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Terry Lynn CASEY *v.* STATE of Arkansas

CA CR 06-120 242 S.W.3d 627

Court of Appeals of Arkansas
Opinion delivered November 8, 2006

Gregory Crain, for appellant.

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

JOSEPHINE LINKER HART, Judge. The circuit court denied the motion of appellant, Terry Lynn Casey, to suppress items seized from the trunk of his car. He then pleaded guilty to two counts of residential burglary and two counts of theft of property, with his plea conditioned upon his right to appeal from the denial of his motion. In accordance with the plea agreement, appellant was sentenced by a jury. In challenging the circuit court's denial of his motion to suppress, appellant first argues that the stop of his car was pretextual. Second, he asserts that his consent to search could not be heard on the videotape of the stop and argues that officers searched his car without

his consent. Third, he argues that law-enforcement officers conducted an improper inventory search of his car. In a separate argument, appellant argues that the circuit court erred in consolidating the charges for trial. We affirm.

Sergeant Brett Turner of the Grant County Sheriff's Department testified that on March 17, 2005, he stopped appellant's car on Highway 270 after following it for a short distance and observing the car cross over the center line and then cross over the white line. Turner further testified that before stopping appellant, he knew that appellant was driving the car, that appellant's driver's license was suspended, and that appellant's car fit the description of a car seen at some residential burglaries. After pulling appellant over, he immediately recognized appellant and asked him for his driver's license. Appellant told Turner that he did not have a license, because it had been suspended for driving while intoxicated.

Turner testified that he smelled alcohol, and he asked appellant if he had been drinking. Appellant stated that he had been drinking the night before and that there were no drugs or alcohol in the car. Turner further testified that he asked if he could look in the car, and appellant agreed. Turner looked inside the car and the car's trunk, and appellant was arrested for driving on a suspended driver's license. Turner testified that a wrecker was called to tow the car, and before the car was towed, an inventory search of the car was conducted. In the trunk of the car, officers found a radio taken in a residential burglary. Turner further testified that their standard procedure is that when someone is driving on a suspended driver's license, he is arrested and transported to jail, and that it is common practice and policy to tow the vehicle if no one is present to take possession of the vehicle.

On appeal, appellant first cites Article 2, Section 15 of the Arkansas Constitution and *State v. Sullivan*, 348 Ark. 647, 74 S.W.3d 215 (2002), and argues that the stop of his car was pretextual. In reviewing a circuit court's denial of a motion to suppress evidence, we conduct a de novo review based on the totality of the circumstances, reviewing findings of historical facts for clear error and giving due weight to inferences drawn by the trial court. *State v. Harmon*, 353 Ark. 568, 113 S.W.3d 75 (2003). In *Harmon*, the Arkansas Supreme Court held that, unlike pretextual arrests, the Arkansas Constitution does not support invalidation of a search because a valid traffic stop was made by a police

officer who suspected other criminal activity. Thus, appellant's argument that the stop was pretextual is based on the erroneous premise that pretextual stops are impermissible. Moreover, there were facts justifying the stop of appellant's car, including appellant's erratic driving and Turner's knowledge that appellant was driving the car without a valid driver's license. Accordingly, we conclude that no error was committed.

Second, appellant asserts that his consent to search his car cannot be heard on the videotape of the stop made by law-enforcement officers and argues that the officers searched his vehicle without his consent. According to the transcription of the videotape, appellant's responses to the request for consent were inaudible. The videotape, however, was introduced into evidence and reviewed by this court, and appellant can be heard readily consenting to the search. Further, Turner testified that he requested and received appellant's consent to search, and the circuit court specifically found that "Deputy Turner clearly asked him on the tape if he could search the vehicle, and the response was clearly an affirmative." Based on the totality of the circumstances and giving due weight to inferences drawn by the circuit court, we cannot conclude that consent was not given.

Third, appellant argues that law-enforcement officers conducted an improper inventory search of his car because the officers were acting in bad faith and "doing a general rummaging for incriminating evidence." We note that police officers may conduct a warrantless inventory search of a vehicle that is being impounded in order to protect an owner's property while it is in the custody of the police, to insure against claims of lost, stolen, or vandalized property, and to guard the police from danger. *Thompson v. State*, 333 Ark. 92, 966 S.W.2d 901 (1998). An inventory search, however, may not be used by the police as a guise for general rummaging for incriminating evidence. *Id.* Thus, the police may impound a vehicle and inventory its contents only if the actions are taken in good faith and in accordance with standard police procedures or policies. *Id.* These standard procedures do not have to be in writing and may be established by an officer's testimony during a suppression hearing. *Id.* Here, appellant's car was stopped on a highway. Turner testified that their standard procedure is that when someone is arrested for driving on a suspended license, that person is transported to jail, and it is

common practice and policy to tow the vehicle if there is no one present to take possession of the vehicle. Given this evidence, we conclude that the inventory search was proper. *See id.*

For his next point on appeal, appellant contends that the circuit court erred in consolidating for trial a burglary and theft charge from March 14, 2005, with a burglary and theft charge from March 16, 2005. At a hearing prior to trial, the State moved to consolidate the cases, and appellant objected, arguing that the consolidation would be prejudicial to him because the jury would hear evidence regarding a series of burglaries rather than separate incidents and that this prejudice would outweigh the efficiency afforded in prosecuting the cases together. The circuit court joined the cases for trial. On the day for trial, appellant renewed his objection to the consolidation, and the court denied the motion. Appellant then entered a conditional guilty plea permitting him to appeal the court's ruling on his motion to suppress. Pursuant to the plea agreement, appellant was sentenced by a jury. The agreement specifically provided that "pursuant to the plea agreement, the Defendant shall receive such sentence as is imposed on each count by a Grant County jury."

In his argument, appellant asserts that the "record is devoid of any evidence that the two burglaries and thefts were part of a single scheme" and that "[j]udicial economy should not be use[d] to get a defendant to plead guilty since he is now facing a combined trial in which a jury may sentence him harder because it knows the circumstances of four crimes as opposed to a single burglary and theft." We hold that the argument is not preserved for appellate review.

Generally, there is no right to appeal a guilty plea, except for a conditional plea of guilty premised on an appeal of the denial of a suppression motion. *Seibs v. State*, 357 Ark. 331, 166 S.W.3d 16 (2004). Thus, to the extent that appellant argues that, prior to his guilty plea, the court improperly consolidated the charges, the argument is not cognizable on appeal. We are mindful that an appellant may also challenge testimony or evidence presented before a jury in a sentencing hearing separate from the plea itself. *Id.* Appellant, however, never argued to the circuit court that error was committed during sentencing. Instead, he made his arguments against consolidation prior to entering his guilty plea, he then entered a guilty plea and sought sentencing by a jury, and he never raised the issue at sentencing. Accordingly, his argument

was not preserved for review. *See id.* (refusing to address on appeal an argument that was decided before sentencing). Consequently, we affirm.

Affirmed.

VAUGHT and BAKER, JJ., agree.

Jeighmichael DAVIS *v.* STATE of Arkansas

CA CR 06-433 242 S.W.3d 630

Court of Appeals of Arkansas
Opinion delivered November 8, 2006

Joseph P. Mazzanti, III, for appellant.

Mike Beebe, Att'y Gen., by: *Farhan Khan*, Ass't Att'y Gen., for appellee.

TERRY CRABTREE, Judge. Appellant Jeighmichael Davis was found guilty by a jury in Bradley County of second-degree battery for which he was sentenced to a term of six years in prison and fined $2,500.[1] Appellant contends on appeal that the evidence is not sufficient to support the jury's finding of guilt and that the trial court erred by refusing an instruction on third-degree battery as a lesser-included offense. We affirm.

Undra Gaines gave testimony about a disturbance that occurred while he was in jail on March 28, 2005. Mr. Gaines testified that the inmates were cleaning their cells when appellant splashed "Mr. Leon with some kind of chemical." Gaines said that appellant then hit Mr. Leon, that appellant took Mr. Leon's keys, and that appellant tried but was not successful in unlocking the back door. Gaines stated that appellant "was steady hitting Mr. Leon after that," and that appellant then tried to unlock another man's cell, and when he could not get the cell open, appellant "ended up hitting him (Leon) again." Gaines testified that appellant threw the keys and ran back into his cell when officers arrived to help, and he said that Mr. Leon had not done anything to cause appellant to hit him.

Van Clark, who works for the Warren Police Department, testified that he and Detective Hollingsworth were in the parking lot when they heard about a disturbance involving an inmate and one of the detention officers. He said that he and Hollingsworth entered the detention area and were met by Detention Officer Leon Schultz. He said that Schultz had severe lacerations to his face and that he was bleeding. Schultz advised that he had been jumped by appellant, whom they found sitting in his unlocked cell.

Leon Schultz testified that he was working at the Warren city jail that day. He had gathered mops, water, and cleaning supplies for the inmates to use to clean their cells. Schultz said that appellant was in cell number four, that appellant had finished cleaning, and that, when he was about to lock appellant inside his

[1] Appellant was also charged with attempted second-degree escape, but the jury returned a verdict of not guilty on that charge.

cell, appellant hit him on the nose, causing his glasses to jam into his eyebrows and cut his face. Schultz said that he tripped over the mop bucket and fell while trying to defend himself, and that appellant jumped on top of him and began beating him in the head. He said that appellant took his keys and tried to get Erick Davis out of his cell but that appellant was not able to get the key to work. Schultz stated that appellant then tried to get out of the back door, and that, when he (Schultz) tried to stop him, appellant knocked him down and beat him again.

Schultz testified that he went to the emergency room afterwards where they cleaned his wounds and that he went to his personal doctor, Dr. Franklin David Chambers, the next day. He was not able to return to work for six weeks. He explained that he scraped his shin when he fell over the mop bucket and that his leg became infected and swelled badly. He said that he had trouble with infections because he was a diabetic and that he "had a real hard time" with the infection on his leg.

Dr. Chambers testified that Schultz had multiple bruises and swelling to the head, and lacerations to his forehead and upper lip. Schultz also had injured his right shoulder. He said that the infection to Schultz's leg required a large amount of treatment and that it was an ongoing effort to control the infection.

Don Hollingsworth, who works for the Warren Police Department, testified that Schultz was a jailer on March 28, 2005. He said that when he saw Schultz in the jail that day that he had blood all over his face. He took photographs of Schultz's injuries that were introduced into evidence.

In his testimony, appellant stated that he had been angry with Schultz because Schultz "had an arrogance about himself" when Schultz told him that he could not use the telephone. He said that he had made up his mind about what he was going to do, and that he hit Schultz because it was what he felt like doing at the time. He said that he pushed Schultz down and dragged him around the corner and continued to hit him again and again. He said, however, that he did not try to escape. Appellant said that he was testifying to show remorse for what he had done, saying that he was coming down off drugs and that he felt badly about what he had done.

When we review a challenge to the sufficiency of the evidence, we will affirm the conviction if there is substantial evidence to support it, when viewed in the light most favorable to

the State. *Cobb v. State*, 340 Ark. 240, 12 S.W.3d 195 (2000). Substantial evidence is that which is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other, without mere speculation or conjecture. *Id.*

A person commits battery in the second degree if he intentionally or knowingly, without legal justification, causes physical injury to a person he knows to be a law enforcement officer, firefighter, or employee of a correctional facility while the law enforcement officer, firefighter, or employee of a correctional facility is acting in the line of duty. Ark. Code Ann. § 5-13-202(a)(4)(A)(i) (Repl. 2006). Second-degree battery is a class D felony. Ark. Code Ann. § 5-12-202(b).

In contesting the sufficiency of the evidence, appellant argues that the State failed in its burden to show that the victim was a law enforcement officer or an employee of a correctional facility. This issue has not been preserved for appeal.

Rule 33.1(a) of the Arkansas Rules of Criminal Procedure provides, "In a jury trial, if a motion for directed verdict is to be made, it shall be made at the close of the evidence offered by the prosecution and at the close of all evidence. A motion for directed verdict shall state the specific grounds therefor." Subsection (c) of this rule provides, in pertinent part, "A motion for directed verdict . . . must specify the respect in which the evidence is deficient. A motion merely stating that the evidence is insufficient does not preserve for appeal issues relating to a specific deficiency such as insufficient proof on the elements of the offense." A general motion that merely asserts that the State has failed to prove its case is inadequate to preserve the issue for appeal. *Grady v. State*, 350 Ark. 160, 85 S.W.3d 531 (2002).

In his motion for directed verdict, appellant's attorney stated, "I make a motion for directed verdict on the grounds that the State has failed to make a prima facie showing that my client committed the offense of battery against the victim." This motion for directed verdict, which was made after the State rested, was renewed at the close of the evidence. Because appellant's directed-verdict motion was general and did not inform the trial court of any specific deficiencies in the State's proof, the argument appellant now makes on appeal was waived.

Appellant's next point is that the trial court erred by refusing to instruct the jury on third-degree battery, as a lesser-included

offense of second-degree battery.[2] The jury instruction on second-degree battery tendered by the State and read to the jury by the trial court advised that "the State must prove beyond a reasonable doubt that Jeighmichael Davis intentionally or knowingly and without legal justification caused physical injury to a person he knew to be an employee of a correctional facility acting in the performance of his lawful duties." Appellant asked the trial court to instruct the jury on third-degree battery, arguing that "there are certainly facts to show that the victim was an employee of a correctional institution but the jury may — in fact, I'm not sure if there was evidence to prove that he was employed by a correctional institution." Appellant proffered an instruction of third-degree battery which read that "the State must prove beyond a reasonable doubt that Jeighmichael Davis, with the purpose of causing physical injury to Leon Schultz, caused physical injury to Leon Schultz." The trial judge refused this instruction, saying "I don't think there is a logical reason to give it."

Appellant argues on appeal that the trial court's ruling was in error because the jury could have found that the victim was not an employee of a correctional facility.[3] We disagree. A trial court's ruling on whether to submit jury instructions will not be reversed absent an abuse of discretion. *Cook v. State*, 77 Ark. App. 20, 73 S.W.3d 1 (2002). It is reversible error to refuse to give an instruction on a lesser-included offense when the instruction is supported by even the slightest evidence. *Cobb v. State, supra.* However, we will affirm a trial court's decision to exclude an instruction on a lesser-included offense if there is no rational basis for giving the instruction. *Ellis v. State*, 345 Ark. 415, 47 S.W.3d 259 (2001). Where there is no evidence tending to disprove one of the elements of the larger offense, the trial court is not required to give an instruction on a lesser-included offense. *Stultz v. State*, 20 Ark. App. 90, 724 S.W.2d 189 (1987). If, after viewing the facts in the light most favorable to appellant, no rational basis for a verdict

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[2] The State argues that third-degree battery is not a lesser-included offense of second-degree battery in this instance. We express no opinion in the matter. The trial court ruled that there was no rational basis for a third-degree battery instruction. We prefer to review this point as it was presented at trial rather than address an issue that was not argued or ruled upon below.

[3] Appellant also argues that the jury could have found that Schultz was not a "law enforcement officer." However, the second-degree battery instruction read by the court did not include the term "law enforcement officer."

acquitting him of the greater offense and convicting him of the lesser one can be found, it is not error for the trial court to refuse to give an instruction on the lesser-included offense. *Id.*; *see also Taylor v. State*, 77 Ark. App. 144, 72 S.W.3d 882 (2002).

In this case, there was no evidence tending to disprove that Schultz was an employee of a correctional facility. To the contrary, there was testimony that referred to Schultz as a "detention officer" and "jailer," and Schultz testified that he worked at the jail in Warren. As there was no evidence that Schultz was not an employee of a correctional facility, the trial court did not abuse its discretion by refusing appellant's proffered instruction. *See Stultz, supra* (holding that, in a burglary case, there was no error in refusing an instruction on breaking or entering where there was no evidence that the building was not an occupiable structure).

Affirmed.

ROBBINS and NEAL, JJ., agree.

Lu Ann Lamb PENLAND and John Penland *v.*
Bryan D. JOHNSTON and Melissa L. Johnston

CA 06-365 242 S.W.3d 635

Court of Appeals of Arkansas
Opinion delivered November 8, 2006

Barbara P. Bonds, for appellants.

J. Slocum Pickell, for appellees.

TERRY CRABTREE, Judge. Appellants Lu Ann and John Penland bring this appeal from an order of the Saline County Circuit Court finding that appellees Melissa and Bryan Johnston had met their burden of proving that they had a prescriptive easement over the Penlands' property and that the Johnstons had proved that they adversely possessed the disputed area. We dismiss the appeal for lack of a final order.[1]

The Johnstons own a 1.57-acre tract that adjoins the northwest corner of the Penlands' land.[2] According to one survey, there is some overlap between the two properties. A county road, Cholla Lane, runs across the northern part of the Penlands' property but ends prior to reaching the Johnstons' property. The Johnstons use a gravel drive from their property across the Penlands' property for approximately seventy feet to reach Cholla Lane. In March 2004, the Penlands asked the Johnstons to sign a document indicating that they consented to the abandonment and closure of Cholla Lane. When the Johnstons refused to sign, the Penlands erected a gate across Cholla Lane.

On April 21, 2004, the Johnstons filed suit against the Penlands and a John Doe, seeking a determination that they had a prescriptive easement over, or adversely possessed, certain property belonging to the Penlands. They also sought damages for trespassing on their property. The Penlands answered, asserting that Cholla Lane was not a county road and denying the remaining allegations of the complaint.

After trial, the court ruled that the Johnstons had sustained their burden of proof, showing they had acquired title by adverse possession and that they had acquired a prescriptive easement across the disputed area. As noted above, this court dismissed the Penlands' first appeal. The Penlands then sought to modify the prior order so as to dismiss the John Doe defendant and to dismiss the Johnstons' remaining claims. An amended and substituted

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[1] We dismissed this case once before for lack of a final order due to the failure to address all of the claims and the presence of a "John Doe" defendant. *Penland v. Johnston*, No. CA05-515 (Ark. App. Dec. 14, 2005).

[2] Melissa Johnston's parents, Jerry and Sharon Hope, also are owners of the property.

order was entered on February 14, 2006, repeating the earlier findings that the Johnstons proved both a prescriptive easement and adverse possession. The court also dismissed the John Doe defendant and dismissed the claims for damages, injunctive relief, and ejectment. This appeal followed.

Under Ark. R. App. P. – Civil 2(a)(1), an appeal may be taken from a final decree entered by the trial court. This portion of Rule 2 has been interpreted to mean that, for an order to be appealable, it must dismiss the parties from the court, discharge them from the action, or conclude their rights to the subject matter in controversy. *Ford Motor Co. v. Harper*, 353 Ark. 328, 107 S.W.3d 168 (2003). The order must be of such a nature as to not only decide the rights of the parties, but also put the court's directive into execution, ending the litigation or a separable part of it. *Id.*

In a long line of cases, the supreme court has held that a trial court's decree must describe the boundary line between disputing land owners with sufficient specificity that it may be identified solely by reference to the decree. *Petrus v. Nature Conservancy*, 330 Ark. 722, 957 S.W.2d 688 (1997); *Riddick v. Streett*, 313 Ark. 706, 858 S.W.2d 62 (1993); *see also Harris v. Robertson*, 306 Ark. 258, 813 S.W.2d 252 (1991); *Rice v. Whiting*, 248 Ark. 592, 452 S.W.2d 842 (1970); *McEntire v. Robinson*, 243 Ark. 701, 421 S.W.2d 877 (1967). In *Petrus*, the supreme court held that, because the decree contemplated a survey to provide a description, it was required to dismiss the appeal for lack of a final order.

There is a second line of cases that hold that dismissal is not always necessary, however. When nothing remains to be done, but a trial court's decree does not describe a prescriptive easement with sufficient specificity so that it can be identified solely by reference to the decree, we may remand for the trial court to amend the decree and provide the easement's legal description. In *Rice v. Whiting*, *supra*, the decree had ordered the boundary lines to be fixed in accordance with a blazed line and monuments set forth in a survey. The supreme court remanded the case to the trial court for the establishment of the boundary lines with such certainty that they could be identified by reference to the decree. In *Johnson v. Jones*, 64 Ark. App. 20, 977 S.W.2d 903 (1998), we remanded in part so that the trial court could amplify and correct the decree by adding a precise legal description of an easement, which had been described in the decree as a line for which no width was given. In *Jennings v. Burford*, 60 Ark. App. 27, 958 S.W.2d 12 (1997), we granted leave to the trial court, under Arkansas Rule of Civil

Procedure 60, to amend the decree by adding a more specific description of the boundary line between the parties' land. In that case, the decree had described the boundary line as a meandering fence reflected by a survey.

We believe that the present case falls within the *Petrus* line of cases because nowhere in the circuit court's decree is the property awarded to the Johnstons identified. Nor does the record appear to contain sufficient evidence to permit the trial court to set forth the specific description of the prescriptive easement or the property appellees have adversely possessed without further proceedings. Ordinarily, one who enters adversely under color of title and actually possesses any part of the tract is deemed to have possession of the entire area described in the document constituting color of title. *Petrus, supra*; *Bailey v. Martin*, 218 Ark. 513, 237 S.W.2d 16 (1951); *St. Louis Union Trust Co. v. Hillis*, 207 Ark. 811, 182 S.W.2d 882 (1944). Obviously, neither the trial court nor the parties intended for this settled rule of property to apply to the circumstances here, because the Johnstons claimed only to the fence line along the south edge of Cholla Lane. One of the surveys introduced in the present case indicates some overlap between the descriptions in the parties' respective deeds. There was no testimony by either surveyor to explain the basis for their survey lines. The permanent record in a boundary-line decision should describe the line with sufficient specificity that it may be identified solely by reference to the order. *See Petrus, supra.* Otherwise, leaving those lines to be established by a future survey may likely result in additional disputes, litigation, and appeals. Again, the case law that requires a circuit court decree to fix and describe the boundary lines in a dispute between landowners discourages piecemeal litigation. *Id.*

Appeal dismissed.

ROBBINS and NEAL, JJ., agree.

Luanne K. Bobo UTTLEY *v.* Christopher Allen BOBO

CA 06-443 242 S.W.3d 638

Court of Appeals of Arkansas
Opinion delivered November 15, 2006

Heather M. May, for appellant.

Joe Morphew, for appellee.

ROBERT J. GLADWIN, Judge. Appellant Luanne K. Bobo Uttley appeals the Clark County Circuit Court's decision to deny her motion to dismiss, which was based upon subject-matter jurisdiction and forum non conveniens. Alternatively, appellant appeals the trial court's child-support award increase as being insufficient and erroneous. We affirm.

I. Facts

The parties were divorced by a decree filed June 27, 2000. That decree of divorce incorporated by reference the provisions of the parties' separation, property settlement and child-custody agreement, which provided that appellant, who retained custody of the two children, planned to move to Oregon and would not leave the United States without first petitioning the trial court. Subsequently, appellee filed a motion to change custody and appellant countered that the trial court no longer had jurisdiction of the case, but rather that the State of Oregon had jurisdiction because appellant and the children had resided in that state for more than six months. By agreed order filed May 1, 2001, the parties agreed to specific visitation for the summer and the costs associated with visitation. Further, the order contained the provision that the trial court retained jurisdiction. By order filed May 17, 2001, the trial court found, after a telephonic conference with

the judge in Oregon, that jurisdiction should remain in the Clark County Chancery Court. On July 31, 2001, the parties entered into an agreed order wherein they agreed that appellant and the children could move to the United Kingdom immediately and that the trial court retained jurisdiction.

On May 2, 2005, appellee filed a motion for change of custody and the appellant filed a motion to dismiss based upon lack of subject-matter jurisdiction, Ark. Code Ann. § 9-19-202 (Repl. 2002), and forum non conveniens, Ark. Code Ann. § 9-19-207 (Repl. 2002). Alternatively, appellant asked that if the trial court did not dismiss the case, that she be afforded relief under Ark. Code Ann. § 9-19-111 (Repl. 2002), which allows witnesses in child-custody matters who live in another state to testify by deposition or by telephone, audiovisual means, or other electronic means. On October 26, 2005, the trial court held that it had jurisdiction and that there was no meritorious reason to allow any witnesses to appear by video conference, telephone or other means, and ordered that all witnesses should appear in person at the trial on October 31, 2005. At trial, the court denied appellee's motion to change custody and increased the child support received by appellant to $173 per week, plus $34.60 per week arrearage from the date of filing the motion.

II. Subject-matter jurisdiction

A trial court has discretion to decide whether it should decline to exercise its jurisdiction under the uniform child-custody jurisdiction act. *Wilson v. Beckett*, 95 Ark. App. 300, 236 S.W.3d. 527 (2006). This court will reverse the trial court's decision only if we find an abuse of discretion. *Id.*

Appellant first claims that the trial court erred in denying her motion to dismiss because the trial court no longer had subject-matter jurisdiction over the case. The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) is codified at Ark. Code Ann. §§ 9-19-101 to -401 (Repl. 2002), and provides in relevant part as follows:

> § 9-19-201. Initial child-custody jurisdiction
>
> (a) Except as otherwise provided in § 9-19-204, a court of this State has jurisdiction to make an initial child-custody determination only if:
>
> (1) this State is the home State of the child on the date of the commencement of the proceeding, or was the home State of the

> child within six (6) months before the commencement of the proceeding and the child is absent from this State but a parent or person acting as a parent continues to live in this State. . . .
>
> § 9-19-202. Exclusive, continuing jurisdiction
>
> (a) Except as otherwise provided in § 9-19-204, a court of this State which has made a child-custody determination consistent with § 9-19-201 or § 9-19-203 has exclusive, continuing jurisdiction over the determination until:
>
> > (1) a court of this State determines that neither the child, nor the child and one (1) parent, nor the child and a person acting as a parent have a significant connection with this State and that substantial evidence is no longer available in this State concerning the child's care, protection, training, and personal relationships. . . .
>
> (b) A court of this State which has made a child-custody determination and does not have exclusive, continuing jurisdiction under this section may modify that determination only if it has jurisdiction to make an initial determination under § 9-19-201.

Appellant argues that the trial court would not have had jurisdiction to make an initial child-custody determination. Therefore, the trial court must have exclusive, continuing jurisdiction. Appellant claims that neither the children nor the children and one parent have a significant connection with this state, and substantial evidence is no longer available in this state concerning the children's care, protection, training, and personal relationships. Thus, the trial court does not have exclusive, continuing jurisdiction under the statute. Appellee claims that the trial court exercised sound discretion in choosing to assume jurisdiction with respect to child custody. We agree.

The order stated that the trial court retained jurisdiction from the time of the original decree of divorce. Moreover, the trial court and a court in Oregon determined that the trial court retained jurisdiction. Further, there are sufficient contacts with the State of Arkansas for this state to maintain jurisdiction. The children's father is here, and the children are here during visitation. Therefore, the trial court had sufficient bases upon which to retain jurisdiction.

III. Inconvenient forum

Appellant argues that Arkansas was, and continues to be, an inconvenient forum for the case. The UCCJEA provides in relevant part as follows:

> § 9-19-207. Inconvenient forum
>
> (a) A court of this State which has jurisdiction under this chapter to make a child-custody determination may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances and that a court of another State is a more appropriate forum. The issue of inconvenient forum may be raised upon motion of a party, the court's own motion, or request of another court.
>
> (b) Before determining whether it is an inconvenient forum, a court of this State shall consider whether it is appropriate for a court of another State to exercise jurisdiction. For this purpose, the court shall allow the parties to submit information and shall consider all relevant factors, including:
>
> (1) whether domestic violence has occurred and is likely to continue in the future and which State could best protect the parties and the child;
>
> (2) the length of time the child has resided outside this State;
>
> (3) the distance between the court in this State and the court in the State that would assume jurisdiction;
>
> (4) the relative financial circumstances of the parties;
>
> (5) any agreement of the parties as to which State should assume jurisdiction;
>
> (6) the nature and location of the evidence required to resolve the pending litigation, including testimony of the child;
>
> (7) the ability of the court of each State to decide the issue expeditiously and the procedures necessary to present the evidence; and
>
> (8) the familiarity of the court of each State with the facts and issues in the pending litigation.
>
> (c) If a court of this State determines that it is an inconvenient forum and that a court of another State is a more appropriate forum,

> it shall stay the proceedings upon condition that a child-custody proceeding be promptly commenced in another designated State and may impose any other condition the court considers just and proper.

Appellant claims that under the eight factors to consider set forth above, the trial court should have found that Arkansas is an inconvenient forum for this case. She states that she and the children have not been residents of Arkansas for over five years and have not been residents of the United States for over four years. Appellee is no longer a resident of Clark County, Arkansas. The children have been in Arkansas only for court-ordered visitation since they moved to the United Kingdom.

Further, appellant claims that if domestic violence were at issue, the courts of the United Kingdom would be in a better position to protect the parties and children. Even though appellant admits that the courts in the United Kingdom and in Arkansas are far apart geographically, she claims that with speedy air travel and communications, the distance is minimized. She claims that she makes about $8,000 annually, while appellee makes over $67,000. Because the trial court denied her motion for alternative relief regarding testimony by telephone or other electronic means, the inconvenience of the forum in Arkansas is compounded for appellant because of her limited income.

She argues that the only agreement regarding jurisdiction was the standard language appearing in virtually all domestic-relations orders in Arkansas. Appellant claims that appellee's argument that she acquiesced to jurisdiction by filing a motion for contempt based upon past-due child support fails to recognize that the UCCJEA concerns matters relating only to child-custody proceedings. Appellant argues that jurisdiction regarding child-support matters rests with the Uniform Interstate Family Support Act (UIFSA), codified at Ark. Code Ann. §§ 9-17-101 to -905 (Repl. 2002), and that an Arkansas court can enforce its own order.

Appellant submits that English courts have the abilities and evidentiary procedures in place to expeditiously decide the issues in this case and that the applicable English Family Law Court could rapidly become familiar with the facts and issues presented in this case. Appellant's solicitor in the United Kingdom said in his witness statement that decisions under English law are made by reference to the best interest or "welfare principle" of the child, which is paramount.

The evidence cited by appellant taken from her solicitor in the United Kingdom was proffered at trial, but it is not alleged that the trial court committed error for refusing to admit the statement into evidence. Failure to raise error constitutes a waiver or abandonment of the trial court's finding and cannot be argued on appeal. *Dalrymple v. Dalrymple*, 74 Ark. App. 372, 47 S.W.3d 920 (2001). Therefore, appellant has nothing upon which to rely in making her argument that an English court would be an appropriate forum to make a child-custody determination under Ark. Code Ann. § 9-19-207.

Appellee contends that because appellant won on the custody issue at trial, the inconvenient forum issue is moot. He cites *Eldridge v. Abramson*, 356 Ark. 358, 149 S.W.3d 882 (2004), for the proposition that appellate courts will not decide academic questions or give advisory opinions. Appellant contends that this is clearly an issue capable of repetition, yet evading review, and is therefore ripe for review and consideration at this time. *Weaver v. City of West Helena*, 367 Ark. 151, 238 S.W.3d 89 (2006). We agree. Because the children are only ages ten and eight, future litigation regarding custody and other issues is foreseeable. Based on appellee's reasoning, if appellant were to be successful in maintaining custody in the future, the decision of the trial court regarding inconvenient forum would never be reviewed. Therefore, the inconvenient-forum issue is capable of repetition, yet evading review, and it is properly before this court.

Upon review, this court finds that the trial court did not abuse its discretion in determining that Arkansas is not an inconvenient forum for the parties. There were several times throughout the history of this litigation when it was acknowledged that Arkansas would maintain jurisdiction. Further, the father remains in Arkansas, and the children continue to travel to Arkansas for visitation. The Arkansas trial court is familiar with this case, as the parties have been before it since the divorce litigation began sometime prior to the divorce decree of June 27, 2000.

IV. Child support

Child-support cases are reviewed de novo on the record. *Paschal v. Paschal*, 82 Ark. App. 455, 117 S.W.3d 650 (2003). As a rule, when the amount of child support is at issue, an appellate court will not reverse a trial court absent an abuse of discretion. *Scroggins v. Scroggins*, 302 Ark. 362, 790 S.W.2d 157 (1990).

Appellant argues that the trial court was clearly erroneous in its findings as to appellee's expendable income for purposes of determining child support. Appellee's 2004 income-tax return reflected his W-2s and 1099. His gross income was $67,209 and net take-home pay was $47,874.89. Further, appellee admitted that his net take-home pay was probably understated because he was having extra money taken out of his gross pay for withholding taxes, as he had filed "married with no exemptions." However, the trial court did not base the child-support amount on this evidence.

Instead, the trial court based the child support on appellee's testimony that his current gross weekly wages were $840, which included his income from Arkansas Children's Hospital (ACH), where he worked twenty-four hours per week at $26 per hour, plus his income from National Park Medical Center (NPMC), where he worked eight hours per week at $27 per hour. The trial court also based the ruling on appellee's testimony that he was unable to work a full schedule during the week due to family obligations, specifically that he provided child care for his ten-month old son while his current wife taught school. Appellee estimated his take home pay was around $1,050 to $1,100 from ACH every two weeks and around $210 to $285 from NPMC every two weeks. This amounted to $675 per week. The trial court accepted this amount and set child support for two children at $173 per week, to be retroactive to the date the action was filed, November 19, 2004, with the arrearage to be paid at the twenty-percent rate of $34.60 per week, by wage withholding.

The determination of child support lies within the sound discretion of the trial court. *Akins v. Mofield*, 355 Ark. 215, 132 S.W.3d 760 (2003). The trial court is required to reference the child-support chart, and the amount specified in the chart is presumed to be reasonable. *Id.* Here, the trial court heard the testimony of appellee regarding his income, reviewed all documentary evidence, and referenced the child-support chart. The trial court was in the best position to determine the credibility of the witness regarding his income and the reasons for his present earnings. Appellant presents nothing to this court showing that the trial court applied some erroneous standard or abused its discretion.

Affirmed.

BIRD and ROAF, JJ., agree.

Tammy CRANSTON *v.* Timothy CARROLL

CA 06-209 242 S.W.3d 643

Court of Appeals of Arkansas
Opinion delivered November 15, 2006

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

Mary Thomason, for appellee.

TERRY CRABTREE, Judge. Appellant Tammy Cranston appeals from an order granting appellee Timothy Carroll's petition for a change of custody. Tammy raises one issue on appeal in which she argues that the trial court applied the wrong burden of proof, and six others contesting the individual findings made by the trial court in reaching its decision. We affirm the trial court's decision.

On April 30, 1999, Tammy gave birth to a daughter, J.T. At the behest of the Child Support Enforcement Unit, it was subsequently established that Tim was the child's biological father. Tim was granted visitation with J.T. by an agreed order entered in March 2003. Tim filed a petition for a change of custody on November 9, 2004, alleging as changed circumstances that Tammy had physically abused the child, that Tammy was abusing drugs, that Tammy did not have stable employment, and that Tammy was not providing a stable home because she had lived in several places over a sixteen-month period. The trial court set a hearing on Tim's petition for November 29, 2004.

Although Tammy was served with notice of the hearing and had hired an attorney, neither she nor her attorney appeared at the scheduled hearing. On the day of the hearing, the trial court entered an order vesting temporary custody in Tim and awarding Tammy visitation every other weekend and a week at Christmas. On June 7, 2005, Tammy filed both an answer to Tim's petition for a change of custody and a motion to set aside the temporary order. In her motion, Tammy asserted that she had experienced problems with her attorney who had assured her that he would obtain a continuance of the November hearing and that, when she was finally able to retrieve her file from the attorney, it contained a motion for a continuance that had been prepared before the hearing, but had not been filed. The court scheduled a hearing for August 22, 2005, on Tim's petition for a change of custody and Tammy's motion to set aside the temporary order. The trial court found that Tammy was not at fault for failing to appear at the previous hearing and proceeded to decide anew Tim's motion for a change in custody.

On this issue, Tim testified that he was employed as a pipe fitter and lived in the Norphlet school district. Another child of his, a son, had been killed crossing the road in front of Tim's house. He said that he was prompted to file the petition for a change of custody after an incident that occurred during an exchange of visitation. Tim testified that he was supposed to return the child to Tammy at 6:00 on Sunday evenings, but that on this occasion Tammy appeared at his house at 5:30 to pick up the child. He said that the child did not want to go with Tammy and that he begged Tammy to let him talk to J.T. and bring her home later. He stated that Tammy would not listen, and instead put her arm around the child's neck and dragged her to the car. Tammy continued to hold the child around the neck in the car, at which time the child bit Tammy on the arm and ran back inside the house. Tim testified that Tammy pulled the child out from behind the couch by her leg and dragged the child, who was screaming and crying, back to the car.

Tim further testified that the child's coat had been left at his house in all the confusion and that he and his wife went to Tammy's home the next day to return the coat. He said that J.T. had a black eye. He testified that the child was not in school on Tuesday or Wednesday but that he visited her at school on Thursday. Tim said that the child's eye was still faintly bruised and that there was bruising on her hip and wrists.

Tim enrolled J.T. in kindergarten in Norphlet when he acquired temporary custody in November. He said that J.T. had missed a lot of school and was often tardy in kindergarten at Smackover where Tammy had her in school, and that she was behind in her skills. He said that she had only four excused absences due to illness in the 104 days that she was in school while in his custody. He said that at kindergarten graduation, J.T. received the "N" award for good citizenship.

Tim said that his wife did not work and that she and J.T. got along well. He denied using illegal drugs and offered to submit to a hair-follicle test to prove that point. Tim testified that for fun he and J.T. caught bugs, lizards, and frogs and that they went camping and fishing. He said that J.T. loves to swim and be outdoors and that they had floated the Caddo River in a canoe. Tim stated that he had never spanked J.T., and that he disciplines her by talking to her, having timeouts, or by taking away privileges. Tim produced a leather strap that was introduced into evidence. Tim said that he came into possession of the strap when Tammy moved out of his

house and that he had seen Tammy use the strap on J.T. He stated that he had obtained an order of protection when he and Tammy separated because Tammy had held a cocked gun to his head.

Tim testified that since he had gotten custody he had never had a baby sitter, saying that "if we can't do it as a family, we don't do it." He said that in his home there was a set routine and that his home was stable, unlike that of Tammy who had lived in different places over the past few years. He said that there were times when he could not find where Tammy lived, and he said that he had picked up J.T. for visitation at Tammy's parents' and sister's houses, as well as a house owned by a man named Tony, who lived across from the Smackover school.

Tim also testified about an incident that occurred at J.T.'s kindergarten graduation. He said that Tammy had insisted on taking the child's original papers even though he offered to make copies for her. He said that Tammy threw back her fist as if she were going to hit him and said that he was a "dead mother fucker."

Tim's wife, Vicki, testified that they had married in July 2004. She had three grown daughters and had been employed as a waitress. She said that she quit her job when J.T. came to live with them. She also recalled the visitation exchange where Tammy had dragged the child out of the house kicking and screaming. She said that she, too, saw the black eye on J.T. the next day.

Vicki had kept a journal regarding visitation since the temporary custody order. She said that Tammy was an hour and a half late picking J.T. up for Christmas visitation, and that they were supposed to get her back at 1:00 p.m. on the appointed day, but that Tammy was not at home. On Tammy's next visitation, J.T. was picked up by a woman named Becky and the following time J.T. was picked up by Tammy's parents. Tammy was not at home when they went to pick her up, and the child was waiting for them in their driveway when they got home. Tammy had not informed them that she had moved. On February 27 and March 13, Tim and Vicki picked J.T. up at the home of Thomas Logois, who lived across the street from the school in Smackover. On March 25, Tammy's sister picked the child up, and they retrieved her from the sister's house. Vicki testified that, when Tammy picked her up on April 9, Tammy got loud and began cursing while demanding clothes and information about the child's school. On May 20, Tammy honked her horn all the way down the street and again in the driveway. She said that there was a big bruise on

J.T.'s leg when she got home on June 5. She and Tammy exchanged heated words on July 1 when Vicki simply asked Tammy where they were supposed to pick the child up.

Vicki testified that at the child's kindergarten graduation Tammy pushed her out of the way as she (Vicki) was putting on the child's cap and gown. She said that Tim asked Tammy if she wanted copies of J.T.'s diploma and papers but that Tammy demanded the originals. She saw Tammy draw her fist back and heard her say toTim, within earshot of J.T., "You're a dead mother fucker." Vicki said that afterward Tammy hit her in the stomach with a camera bag. Vicki said that the blow was painful.

Vicki further testified that they had established a routine for J.T. that consisted of a set time for meals, bathing, school, and going to bed. She said that Tim took her to the bus stop for school every morning. Vicki stated that, when they enrolled J.T. in school at Norphlet, they had to help her with her numbers and letters, but that by the time the school year was over she had caught up with the other children.

Steve Carroll, Tim's brother, testified that Tim was a loving and caring father. He said that Tim provided her with all that she needed and that she seemed to be well-adjusted. He recalled an occasion when Tammy had asked him to come over to her house to uncock a loaded gun that she claimed to have held to Tim's head. He said that the gun was a .357 Magnum revolver and that he removed the round in the chamber and took the bullets with him.

On her part, Tammy testified that she had been living with her parents in Pigeon Hill for six months and that she had just started teaching in El Dorado. She said that she was certified to teach special education and art. She had resigned in December 2002 from teaching in El Dorado after seven years. After that, she worked for the Elaine school district from November 2003 until June 2004. She said that she had lived at 209 East Sixth Street in Smackover beginning in August of 2004 prior to moving in with her parents. Before that, she had lived in West Helena for two months. She said that she had not lived with a man named Thomas Logois in Smackover. She maintained that she had lived in an apartment in the back of his house, and that she cleaned his house and did chores for him. She said that she had no relationship with him other than his being her landlord.

With regard to the November visitation incident, Tammy testified that J.T. had wanted to stay to see Vicki's grandchild and that she jumped behind the couch and started crying and throwing

a fit. She said that she carried, but did not drag, J.T. to the car and that J.T. bit her arm. She said that she did not have a "choke hold" on the child and that J.T. had not run back into the house after biting her. She also said that J.T. felt badly and had apologized for biting her. She said that J.T. did not have a black eye that Monday and that she had not held J.T. out of school. She said that the child was in school on Monday and that everyone there could see that she did not have a black eye. She said that the child had missed school that Tuesday and Wednesday because she had dental appointments concerning her wisdom teeth and that she was in pain and staying with her parents those two days.

Tammy said that J.T. was not behind in kindergarten, saying that it was hard to be behind because it was just the start of schooling. She said J.T.'s teacher in Smackover was a little bit negative, but that the teacher told her that she was improving and was a smart kid. She said that Tim had not informed her of parent/teacher conferences in Norphlet. Concerning J.T.'s graduation, Tammy said that she had merely asked Tim not to remove the tassel so that she could take a picture. She denied hitting Vicki or threatening Tim at the ceremony.

Tammy testified that she had depended on friends and family to survive when she was out of work and that she had cleaned houses and done yard work. She denied that Mr. Logois had supported her. She said that J.T. had her own bedroom at her parents' house and that she was looking at apartments and a couple of houses in which to live. She said that she had not held a gun to Tim's head, but that he was the one who had a gun. Tammy testified that she had previously been married for seven years and that she had been diagnosed with infertility and had several surgeries, and that her infertility had led to the divorce. She said that she had a brief relationship with Tim over one summer, that she and Tim had stopped seeing each other when she found out that she was pregnant, and that Tim had nothing to do with J.T. after her birth. She denied spanking J.T. with a belt and said that she disciplined the child by talking to her.

Susie Ayres, Tammy's cousin and an admitted felon, testified that Tammy was a wonderful mother. She said that Tammy spent time with J.T., that she loves J.T., and that she would hold her for hours. She said that Tammy watched cartoons and colored with J.T.,and that she made sure that she was cared for , properly dressed and well fed. She had never seen J.T. with a black eye and said that Tammy had never laid a hand on the child. Ms. Ayres testified that

she had last seen Tim and Vicki in August of 2004 at the home of Leshia and Blake Hicks. She said that the four were smoking marijuana while J.T. was in the room. She did not believe Tim to be a fit father. She said that he had always been a "drug head and a drunk," and that he had denied the child for years.

Tammy's father, Charles Taylor, testified that Tammy had lived with them since November 2004. He had never seen Tammy strike J.T., and he had not seen the child with a black eye or bruises. He had never seen Tammy use a belt to spank J.T. Mr. Taylor testified that Tammy only stayed with Mr. Logois a few days. He remembered that Tammy's wisdom teeth had cost $550.

Janet Hanson, Tammy's sister, testified that Tammy was a good mother and that she had not seen her whip J.T. She said that Tammy listens to J.T. and that she is patient with her. She had never seen a leather strap. Ms. Hanson testified that she attended J.T.'s graduation and that she did not hear anyone cuss or see anyone being hit. She said that if anyone had called someone a "MF" she would have heard it. She remembered that Tammy had gone to the dentist several times about her wisdom teeth.

Penny Hicks testified that she had known the parties for many years. She described the relationship between Tammy and J.T. as a loving one. She said that Tammy had been depressed since Tim had been granted temporary custody and that Tammy enjoys her visitation with J.T. and hates for it to end. She said that Tammy had wanted a child for years and spent a great deal of money trying to have a child. She had never seen Tammy spank J.T., nor had she seen any bruises on her.

At the conclusion of the hearing, the trial court held the record open for the submission of Tammy's dental records and evidence clarifying the child's attendance records at school. The court also ordered the parties to take a hair-follicle drug test.

The trial court issued a letter opinion outlining its decision to change custody on October 6, 2005. The trial court found that Tammy had lived in multiple residences, including the home of Thomas Logois. The court said that Tammy's explanation about staying in Logois's home made no sense and was not credible, and that it was an example of her placing her personal interests and needs over that of the child. The trial court was of the opinion that it was in the child's best interest to receive a quality education. The court found that Tammy had not made a commitment to that end. The court found that the records showed that the child had missed

the first day of kindergarten, and that between September 20, 2004, and November 12, 2004, the child had been absent from school seven days and that only two of those absences were excused. The child had also been tardy three times during that period. The court further noted that Tammy had missed a parent-teacher conference. The court said that, had Tammy attended the conference, she might have discovered that the child was not performing up to her capabilities. The court found that Tim's commitment to the educational development of the child was far superior than Tammy's. The court noted that, while the child had been having difficulties in school when Tim gained custody, she had since improved and had caught up with the class in reading and in math, that she now completes her school tasks on time and independently, and that she had earned the math award for her kindergarten class. The court observed that the child had four excused absences from school out of 103 days when living with Tim, and that Tim and Vicki had attended parent-teacher conferences. The trial court found that J.T. had enjoyed school since residing with Tim and that there was a greater sense of routine and stability in the child's life than that which had existed when she lived with Tammy.

The trial court also found that Tammy lacked credibility. The court found that Tammy's dental records did not support her testimony about her wisdom teeth. The court found that Tammy was also untruthful in her testimony concerning Mr. Logois. The trial court also expressed concern about Tammy's judgment. The court found that Tammy had forced the child from Tim's home that Sunday in November, and that she had rejected Tim's offer to bring her home later, to the detriment of the child. The trial court also found that Tammy had insisted on receiving the child's original diploma, and that she had directed profanity at Tim and had struck Vicki with a camera bag. The trial court specifically found that it did not believe Tammy's version of events concerning the graduation ceremony.

Finally, the trial court noted that Tammy's drug test had been negative, but that Tim had tested positive for cocaine. The court found, however, that there was no evidence presented showing when Tim had used cocaine, nor was there any evidence as to where the child was when he used cocaine. The court noted the trial testimony of Tim's marijuana usage, but concluded that, thus far, Tim's drug use had not had an adverse impact on the child.

Arkansas Code Annotated section 9-10-113(b) (Supp. 2005) provides that a biological father may petition for custody if he has established paternity in a court of competent jurisdiction. Custody may be awarded to a biological father upon a showing that he is a fit parent to raise the child; he has assumed his responsibilities toward the child by providing care, supervision, protection, and financial support for the child; and it is in the best interest of the child to award custody to the biological father. Ark. Code Ann. § 9-10-113(c). In addition, the father of an illegitimate child must also show a material change in circumstances. *Norwood v. Robinson*, 315 Ark. 255, 866 S.W.2d 398 (1993). If this threshold requirement is met, the trial court must then determine who should have custody with the sole consideration being the best interest of the child. *Bernal v. Shirley*, 96 Ark. App. 148, 239 S.W.3d 11 (2006).

In child-custody cases, we review the evidence de novo, but we do not reverse the findings of the trial court unless it is shown that they are clearly erroneous. *Deluca v. Stapleton*, 79 Ark. App. 138, 84 S.W.3d 892 (2002). 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. *Alphin v. Alphin*, 90 Ark. App. 71, 204 S.W.3d 103 (2005), *aff'd*, *Alphin v. Alphin*, 364 Ark. 332, 219 S.W.3d 160 (2005). There are no cases in which the superior position, ability, and opportunity of the trial judge to observe the parties carry as great a weight as those involving minor children. *Id.*

Tammy's first argument is that the trial court applied the wrong burden of proof in making its decision. Tammy refers to language in our case law stating that a "more rigid standard" is required for custody modifications than for initial custody determinations, *see Vo v. Vo*, 78 Ark. App. 134, 79 S.W.3d 388 (2002), and she argues that Tim had the burden to prove a material change in circumstances by clear and convincing evidence. However, in *Cozzens v. Cozzens*, 93 Ark. App. 415, 220 S.W.3d 257 (2005), we confirmed that the burden of proof in change-of-custody cases was by a preponderance of the evidence. In so holding, we observed that the more rigid standard spoken of in the case law referred to the requirement of showing a change in circumstances, and not a heightened burden of proof. Thus, there is no merit in Tammy's argument.

Tammy also contends that the trial court erroneously found that she was living with another man. She contends that there was no evidence that she was actually living with Mr. Logois. We disagree. Tammy admitted that she was living in this man's home, and her father testified that she had been living there as well. Visitation exchanges occurred at the Lagois residence. The trial court did not believe Tammy's testimony that she was living in a back room and doing housekeeping and yard work for him. Given the deference we have for the trial court's superior ability to assess the credibility of the witnesses, we cannot say that its finding is clearly erroneous.

Tammy also argues that the trial court erred by not accepting her testimony that her wisdom-tooth problems were the cause of the child's missing school the week after the visitation-exchange incident. She contends that there is no proof contradicting her testimony because her dental records are not in the record. There is also no merit in this argument. The trial judge held the record open for the submission of the dental records, and it is clear from the letter opinion that he considered those records in making his findings. That those records were not placed in the record does not inure to Tammy's benefit because it was her burden, as the appellant, to bring up a record sufficient to demonstrate error. *See Dodge v. Lee*, 352 Ark. 235, 100 S.W.3d 707 (2003).

Tammy next argues that the trial court erred in finding that she was not committed to providing the child with a quality education. The record in this case shows that while in Tammy's care the child did not begin school on time and that she had multiple unexcused absences in a short period of time. The child was also tardy on several occasions, and Tammy missed a parent-teacher conference. There was also testimony from Tim and Vicki that the child was behind and having difficulties in school. The trial court's finding is not clearly erroneous.

Tammy further argues that the trial court erred in relying on her changes in residences and employment as a basis for its decision because it was not shown that they had an adverse effect on the child. The evidence showed that appellant had lived in El Dorado, West Helena, one address in Smackover, and then another place in Smackover with Mr. Logois, and then with her parents. She had changed jobs three times since 2002 and was at times unemployed, when she did odd jobs and lived off the largess

of others. Contrary to Tammy's assertions, her moves and changes in employment do portend that she was not providing a stable home for the child. The trial court's findings in this regard are not clearly erroneous.

Tammy further argues that the trial court erroneously found that she had struck Vicki with a camera bag. This finding was based on an assessment of the witnesses's credibility. The trial court believed Vicki's testimony about the incident, and found that Tammy and her sister's testimony was not credible. Again, giving due deference to the trial court, we cannot say that the trial court's finding is clearly against the preponderance of the evidence.

Tammy also takes issue with the trial court's findings with respect to Tim's drug usage. She points out that Tim had accused her of using drugs, that he lied in his testimony when he denied using drugs, and that he was the one who insisted on drug testing. We, too, are troubled by Tim's apparent drug usage, but when all of the evidence is considered, we are not convinced that the trial court's findings are clearly erroneous.

The evidence in this case showed that Tammy often changed residences and employment; that there were periods when she was not employed even though she was well-educated and capable of working; that she was late getting the child into school; that the child was frequently absent from school and tardy while in her care; that the child did poorly in school while in her custody; that she struck Vicki without provocation and threatened Tim at the graduation ceremony in the presence of the child; and that she physically and forcibly dragged the child out of Tim's home during a visitation exchange when she was not even supposed to pick up the child. In light of this evidence, it can hardly be said that there was no material change in circumstances. Consequently, it was for the trial court to then determine which custody placement would be in the child's best interest. The testimony deemed credible by the trial court demonstrates a lack of stability, maturity, and judgment on Tammy's part. Her behavior was shown to be volatile and abusive, and she displayed an attitude of disinterest towards the child's education, all of which were found by the trial court to be detrimental to the child. In contrast, the child had thrived while in Tim's care, and there is no hint in the record that she had suffered any ill effects from being in his custody.

In *Respalie v. Respalie*, 25 Ark. App. 254, 756 S.W.2d 928 (1988), we recognized that a trial court's best-interest determination may not always provide a flawless solution where placement with either parent may not be ideal. In this case, although Tim did test positive for cocaine usage, considering the negatives associated with continuing permanent custody with Tammy, we believe that the trial court in weighing the evidence could find that changing custody was in the child's best interest. We are thus unable to conclude that the trial court's decision is clearly erroneous.

Affirmed.

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

HART and GLOVER, JJ., dissent.

DAVID M. GLOVER, Judge, dissenting. I decline to agree that it was in J.T.'s best interest to place her with her father. In the drug tests, conducted post-trial by court order, Tim tested positive for cocaine, and Tammy tested negative for any drug. The trial court appears to gloss over this fact, stating that thus far, Tim's "drug use has not had an adverse impact on [J.T.]." While our court defers to the trial judge on issues of credibility, in my opinion, the trial court's findings against Tammy in granting Tim's petition for change of custody pale in comparison to Tim's positive drug test. I do not think that it is prudent to take a "wait and see" approach until such drug use does adversely impact J.T. The majority is merely "troubled" by Tim's "apparent" drug use.

At the hearing, Tim twice testified that he did not use drugs, but he then presented a hair sample for drug testing, and the sample tested positive for cocaine. The trial court found that "no evidence has been presented that indicated when [Tim] used cocaine or that would indicate where [J.T.] was at the time that he was under the influence of cocaine." That is a distinction without a difference in my opinion — the drug test positively proved that Tim had lied to the trial court about his drug use, and that he had clearly used cocaine since the time J.T. was placed in his custody by default ten months prior to the final hearing. At the very least, Tim failed to provide the trial court a reasonable explanation for this test result, and I believe that the trial court was remiss in failing to reopen the case and question Tim further, in view of his testimony of abstinence from drugs, before entrusting him with his young

daughter's welfare. At the hearing, Tim denied that he was present at Blake Hicks's house in August 2004 smoking marijuana as recounted by witness Susie Ayres — accordingly, Tim's positive test for cocaine also brings his opposition to Ms. Ayres's testimony into question as well. The trial court recounted in its order that Tim had testified that he had not smoked marijuana since November of 2004, which was the month he obtained temporary custody by default. I find it implausible that Tim did not ingest cocaine during the time the trial court had entrusted him with the temporary custody of his minor daughter pending the final hearing.

In *Ford v. Ford*, 347 Ark. 485, 65 S.W.3d 432 (2002), our supreme court affirmed an award of custody of the minor children to the father. In that case, one of the factors the trial court used in determining the issue of custody was that the mother had tested positive for amphetamines and methamphetamine, while the father's test results were negative.

Overlying my earlier concerns that Tim's post-hearing, positive cocaine test failed to trigger additional inquiries by the trial court, the record also reflects that Tim has not taken an interest in any of his three children until he became intent upon wresting custody of this, his third child, away from her mother. Tim testified that a son, who is now deceased, was living with Tim's parents at the time of that child's accidental death. Tim also testified that he was the biological father of another daughter, whose parentage was speculative because he had never brought a paternity action. Finally, regarding J.T., Tim testified that he did not bother to submit to a paternity test until she was three years old. From his own lips, his suddenly becoming a "responsible custodial parent" is questionable.

This dissenter will not condone giving custody of this child to her father, who not only possessed a poor parental history but also tested positive for the illegal drug cocaine after he testified that he did not use drugs, in opposition to her mother, the child's custodian for all of the child's life, who tested negative for any illegal drug use. I am authorized to state that Judge Hart joins me in this dissent.

Gregory HARRIS *v.* Stacey Harris GRICE

CA 06-160 244 S.W.3d 9

Court of Appeals of Arkansas
Opinion delivered November 29, 2006

Michael Knollmeyer, for appellant.

Benjamin D. Hooten, for appellee.

JOHN MAUZY PITTMAN, Chief Judge. This is an appeal from an order denying appellant's motion for a change in custody of the parties' minor child. On appeal, appellant argues that the trial court's decision to deny his motion for custody was clearly contrary to the preponderance of the evidence and based on an erroneous legal standard. We agree on both points. We reverse and remand for entry of an order granting custody and appropriate child support to appellant and granting appellee standard visitation.

The appellant is the father of K.H., who was born in July 1996. Appellee is the child's mother. The parties divorced in September 1999. By agreement of the parties, they were awarded joint legal custody with physical custody being awarded to appellee subject to liberal visitation by appellant. Subsequent to the parties' divorce, the child was diagnosed with a form of autism known as Asperger's disease. Subsequent concerns over appellee's ability to provide the increased degree of behavioral and educa-

tional assistance necessary for a child suffering from this disorder led to an agreed order in October 2003 expressly allowing appellant to participate in decisions regarding the child's medical care and expressly requiring the parties to ensure that K.H. regularly attend school and to assist him with all homework assigned during the time each had custody of or visitation with the child. One month following the agreed order, appellee filed a motion to relocate out of state with the child. This motion was denied in an order of April 2004 expressly stating that such a move would be contrary to the child's best interest because it would prevent appellant from exercising the extensive visitation afforded him to assist the child in developing his educational and social skills. In June 2005, appellant filed a petition for change of custody alleging, inter alia, that appellee had failed to and was unable to provide K.H. with the degree of behavioral, social, and educational assistance his condition requires. After a series of hearings, the trial court found that appellant had "raised serious matters which this Court finds to be true," but refused to change custody.

The superior position, ability, and opportunity of the trial court to observe the parties carries great weight in cases involving children, *Watts v. Watts*, 17 Ark. App. 253, 707 S.W.2d 177 (1986), and we therefore give special deference to the trial court's assessment of the credibility of the witnesses in child-custody cases. *Hamilton v. Barrett*, 337 Ark. 460, 989 S.W.2d 520 (1999). We review the evidence de novo on appeal, but we will not reverse the findings of the court unless it is shown that they are clearly contrary to the preponderance of the evidence. *Dunham v. Doyle*, 84 Ark. App. 36, 129 S.W.3d 304 (2003). 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. *Id.*

The matters raised by appellant, and found to be true by the trial court, centered around K.H.'s particularized needs resulting from his disorder. Dr. Deane Baldwin, who had treated K.H. for four years at the time of trial, testified that the child suffers from a form of autism called Asperger's disease. This is a severe, pervasive developmental disorder that is manifested by flawed social skills, repetitive behavior, and difficulty in communication. K.H. displays all three symptoms. There is no cure for the condition, but the symptoms can be treated. Treatment is difficult and requires a great deal of ancillary services. Most children with autistic disorders are mentally retarded or suffer from severe learning difficul-

ties. K.H., Dr. Baldwin testified, is normal in some areas of central nervous system functioning, but is deficient to the point of being mildly retarded in others, including the ability to understand the inflections and body language of others. He also stated that K.H.'s difficulties were very frustrating to the child and thus sometimes resulted in negative thoughts, explosive behavior directed at others, or hitting himself, and that the child has difficulty developing motor skills. Finally, Dr. Baldwin stated that change is extremely difficult for children with pervasive developmental disorders, that K.H.'s home life had been chaotic, that his mother had him admitted to Bridgeway immediately before trial, and that he needed stability.

Shannon Resor testified that she had eight years of teaching experience and that she had been K.H.'s third-grade teacher last year. She stated that the child's autism caused him difficulty in motor skills and coordination and resulted in behavioral and academic oddities that made him stand out. For example, K.H. tended to become more upset about what other children said or did than other children would. Although K.H.'s reading skills progressed from second- to third-grade level, he continued to have trouble with memorization, math, and small-motor skills such as handwriting.

Ms. Resor testified that she noticed a difference in K.H.'s behavior during certain weeks of the month, during which time the child would come to school disheveled, late, or without breakfast, and would therefore be agitated when he arrived. On other days, the child would be fine when he arrived, and would appear with his homework completed. The latter days, Ms. Resor subsequently learned, were when K.H. had been with his father pursuant to the prior order giving appellant custody of the child one week per month and on weekends. She testified that K.H. never turned in homework when he had been in appellee's custody the previous day. She testified that she saw appellant frequently at school, that he had attended all parent-teacher conferences, had participated in or organized many school events, and that he would regularly come and have lunch with his son. In contrast, Ms. Resor saw appellee only once, by chance, when appellee was sitting in the principal's office at the beginning of the school year. Appellee attended no parent-teacher conferences, never attended any class parties or functions, never contacted her about K.H.'s progress or schoolwork, and never turned in any of the child's homework.

Ms. Resor said that appellant was a "difference maker." She noticed positive differences when K.H. was with his father. K.H. was happier, calmer, and performed better during those weeks when he stayed with his father. Appellant had, over the summer, procured a third-grade basal reader and read it with K.H. before his class began it in the third grade, resulting in a significant increase in the child's reading ability. Appellant did supplementary work with K.H. on his multiplication tables in addition to normal class work at Ms. Resor's suggestion, turning in the extra assignments after helping the child to master them. When Ms. Resor told appellant that she was having great difficulty assessing K.H.'s abilities because his printing was illegible, appellant procured cursive writing samples and worked intensively with K.H. on cursive writing. After one week of work, K.H. mastered cursive writing. The difference between the examples of the child's handwriting before and after this effort is breathtaking; the former is completely indecipherable, the latter perfectly legible. The sudden change created a stir with K.H.'s occupational therapist at school. Ms. Resor testified that it normally took a child *without* a motor skill disability one year to master cursive writing; with appellant's help, K.H. did it in a matter of days. She also testified that appellant worked intensively to help K.H. learn the skills necessary to make and keep friends, teaching him to kick a ball when his inability to do so became frustrating and embarrassing in physical education class. He also established an internet site for the class with K.H. as the webmaster in order to help him with his social functioning and to overcome the stigma attached to his disability. Appellant took photographs of children at several school functions he attended and posted them on K.H.'s site. Ms. Resor said that the class enjoyed the web site and that it helped to make K.H. popular with his classmates. Finally, she stated that K.H. and appellant are very close, and that the child was happier and calmer and performed better when he was with appellant.

There are numerous other examples of appellant's fruitful work with his son. Appellant read several books on Asperger's and obtained teaching material designed specifically to help children with that disorder, such as a program designed to help such children identify the significance of facial expressions. He also helped K.H. write a rule book called "How to Make Friends" to help the child overcome the flawed social and communication skills symptomatic of his disorder. When K.H. told appellant that people were making fun of him because he could not ride a

bicycle, appellant made that skill a goal for one of the "weekly challenges" he participated in with K.H. and, after four days and hundreds of attempts, the child was able to maintain his balance and now rides as well as an adult. Such challenges are a regular part of the relationship between appellant and the child. Clearly, appellant has a faith in K.H.'s ability to overcome much of his disability, and the child has displayed a willingness and tenacity that justifies that faith. What they have accomplished together is little short of miraculous.

The principles governing the modification of custodial orders are well-settled and require no citation. The primary consideration is the best interest and welfare of the child. All other considerations are secondary. Custody awards are not made or changed to punish or reward or gratify the desires of either parent. 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. Before that order can be changed, there must be proof of material facts which 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. The burden of proving such a change is on the party seeking the modification. *Word v. Remick*, 75 Ark. App. 390, 58 S.W.3d 422 (2001).

In its order, the court stated that appellant had raised important matters that he expressly found to be true, but nevertheless denied the requested change of custody. The judge's reasoning for this anomalous decision was stated in his ruling from the bench, where he said that, although appellant's concerns were very serious and the judge believed them, he had, in latter years, come to believe that "these custody fights were just as bad for the children" and that he wanted "to discourage these custody cases." We hold this to be clear error. The child in this case had already undergone the stress and emotional trauma involved in a custody contest. The requirements of changed circumstances and best interests, together with equity's unique power to fashion remedies, have long been deemed adequate protection against harassing, frivolous, or abusive petitions to change custody. To deny a change in custody that we find to be clearly warranted by changed circumstances and to be manifestly in the child's best interest is to

ignore the polestar consideration in every child custody case, the welfare of the individual child. *Marler v. Binkley*, 29 Ark. App. 73, 776 S.W.2d 839 (1989).

Reversed and remanded with directions to award full custody to appellant and to determine reasonable support payments and standard visitation. The mandate in this case shall issue immediately.

GRIFFEN and GLOVER, JJ., agree.

Sandra P. ERWIN *v.*
RIVERSIDE FURNITURE CORPORATION

CA 06-536 244 S.W.3d 14

Court of Appeals of Arkansas
Opinion delivered November 29, 2006

Stephen M. Sharum, for appellant.

Ledbetter, Cogbill, Arnold & Harrison, LLP, by: *E. Diane Graham* and *Farrah L. Fielder*, for appellee.

JOHN B. ROBBINS, Judge. Appellant Sandra P. Erwin sustained an admittedly compensable injury to her left ankle and

foot while working for appellee Riverside Furniture Corporation on September 10, 2003. The appellee provided certain medical benefits, but a controversy subsequently arose over Ms. Erwin's claim for additional compensation. Specifically, Ms. Erwin alleged that she sustained a low back injury, a left leg injury, and reflex sympathetic dystrophy (RSD), which were all compensable consequences of the work-related accident. Ms. Erwin further asserted entitlement to temporary total disability benefits and additional medical treatment.

After a hearing, the ALJ entered an opinion on March 31, 2005, finding that Ms. Erwin failed to meet her burden of proving the existence of any compensable injury other than the injury to her left foot and ankle. However, the ALJ reserved the issue of additional medical benefits and temporary total disability benefits, stating:

> I find that the claimant is entitled to receive, at the respondent's expense, an evaluation and any necessary testing at the University of Arkansas School for Medical Sciences by the physician currently heading the ankle/foot section of the Department of Orthopaedics. The purpose of this evaluation is to determine whether the claimant's healing period has ended or whether any further medical treatment would be reasonably necessary for the claimant's compensable left ankle/foot injury, together with the nature and extent of any such treatment. A decision on the claimant's entitlement to additional medical services and temporary total disability benefits should be reserved pending the outcome of this evaluation.

Ms. Erwin appealed the decision of the ALJ to the Workers' Compensation Commission and subsequently filed a motion to submit additional evidence, which included a May 17, 2005, medical report by a UAMS physician, Dr. Ruth Thomas. On June 23, 2005, the Commission granted Ms. Erwin's request to submit into evidence the report by Dr. Thomas, but denied her request to submit other medical evidence on the basis that it had not been diligently obtained and would not change the result of the case.

On March 28, 2006, the Commission issued an opinion affirming and adopting the opinion of the ALJ. At the appellee's request, the Commission entered another order on April 19, 2006, which clarified its opinion and stated:

> The Full Commission grants the respondent's motion for clarification. The Full Commission informs the parties that the issues of additional medical treatment and temporary total disability

> compensation remain reserved. We note that the report from Dr. Thomas at UAMS has not yet been included in the record before the Commission. The Full Commission also notes that we have affirmed and adopted the administrative law judge's findings that the claimant did not sustain a compensable injury to her lumbar spine or left leg.
>
> The Full Commission has not adjudicated the claimant's entitlement to temporary total disability compensation or additional medical treatment. We again note that the report from Dr. Thomas at UAMS has not yet been submitted into the record before the Full Commission.

Ms. Erwin now appeals from the March 28, 2006, and April 19, 2006, orders of the Commission, raising three arguments for reversal. First, she argues that the Commission erred in denying in part her motion to submit additional evidence. Next, she contends that the Commission erred in failing to find that she has compensable RSD. Finally, Ms. Erwin asserts that the Commission erred in finding that she failed to prove by a preponderance of the evidence that she is entitled to temporary total disability benefits and additional medical treatment. However, this court cannot reach the merits of this case and must dismiss the appeal for lack of a final order.

It is a well-established rule that in order for this court to review a decision from the Workers' Compensation Commission, the order from which the parties appeal must be final. *Daniel v. Barnett*, 78 Ark. App. 19, 76 S.W.3d 916 (2002); *Humphrey v. Faulkner Nursing Ctr.*, 61 Ark. App. 48, 964 S.W.2d 224 (1998); *Rogers v. Wood Mfg.*, 46 Ark. App. 43, 877 S.W.2d 94 (1994); *Adams v. S. Steel & Wire*, 44 Ark. App. 108, 866 S.W.2d 432 (1993); *St. Paul Ins. Co. v. Desota*, 30 Ark. App. 45, 782 S.W.2d 374 (1990). To be final, an order must dismiss the parties from the court, discharge them from the action, or conclude their rights to the subject matter in controversy. *Rowell v. Curt Bean Lumber Co.*, 73 Ark. App. 237, 40 S.W.3d 344 (2001). Whether an order is final and appealable is a matter going to the jurisdiction of the appellate court and is an issue that the appellate court has a duty to raise on its own motion. *Capitol Life & Accident Ins. Co. v. Phelps*, 72 Ark. App. 464, 37 S.W.3d 692 (2001). The rule that an order must be final to be appealable is a requirement observed to avoid piecemeal litigation. *See Daniel v. Barnett, supra.* When the order appealed from reflects that further proceedings are pending which do not involve merely collateral matters, the order is not final. *Harold Ives*

Trucking Co. v. Pro Transp., Inc., 341 Ark. 735, 19 S.W.3d 600 (2000). When the order appealed from is not final, the appellate court will not decide the merits of the appeal. *Capitol Life & Accident Ins. Co. v. Phelps, supra.*

In the present case, the Commission reserved ruling on one of the key issues in controversy. In this regard, the Commission specifically stated that it had not yet adjudicated Ms. Erwin's entitlement to temporary total disability benefits and additional medical treatment, because it had not yet received into the record the report from Dr. Thomas at UAMS as ordered by the ALJ.[1] Addressing only some of the issues on appeal would encourage piecemeal litigation. Because there is no final order, we are required to dismiss this appeal.

Appeal dismissed.

NEAL and CRABTREE, JJ., agree.

Andrea Dawn HENLEY *v.* Mark B. MEDLOCK

CA 06-418 244 S.W.3d 16

Court of Appeals of Arkansas
Opinion delivered November 29, 2006

[Rehearing denied January 24, 2007.]

[1] We acknowledge that there was a report by Dr. Thomas dated May 17, 2005, that the Commission allowed the claimant to submit into the record. However, this report did not fully address Ms. Erwin's entitlement to temporary total disability benefits and additional medical treatment, and we assume that the Commission was anticipating a subsequent report in compliance with the ALJ's directive. At any rate, the order of the Commission makes it clear that there are pending issues to be resolved, which it has not yet addressed.

The Blagg Law Firm, by: *Ralph Blagg*, for appellant.

Annie Powell, for appellee.

TERRY CRABTREE, Judge. Appellant Andrea Henley appeals the decision of the Sebastian County Circuit Court changing the custody of her two children to their father, appellee Mark Medlock. She argues on appeal that the trial court erred in granting appellee's motion to change custody solely on the stated preferences of the children. We agree and reverse.

In response to appellant's appeal, appellee asserts that this court is without jurisdiction to review, because the notice of appeal failed to properly designate the judgment, decree, or order appealed from as required by Rule 3(e) of the Arkansas Rules of Appellate Procedure. Rule 3(e) provides in pertinent part that the notice of appeal "shall designate the judgment, decree, order or

part thereof appealed from and shall designate the contents of the record on appeal." The final hearing in this case was held on December 6, 2005, and the judge announced his ruling from the bench. The order memorializing the court's ruling was entered December 21, 2005, and appellant filed a notice of appeal on January 19, 2006, within the thirty-day limitation period. Appellant's notice of appeal contained the following:

> Notice is hereby given that Andrea Dawn Henley, Defendant, by and through her attorney, Ralph J. Blagg appeal[s] to the Court of Appeals of Arkansas from the Order entered in favor of Mark B. Medlock, Plaintiff, against her by the Circuit Court of Sebastian County, Arkansas in this cause on December 6, 2005.
>
> Defendant hereby designates the entire record which includes the Order filed of record on December 21, 2005, the pleadings, the transcript, and all exhibits introduced at the hearing for this case.
>
> The transcript has been ordered from the Court Reporter, Ronda Brown, whose address is 5th Floor, 523 Garrison Ave, Fort Smith, Arkansas 72901, recorder of the proceedings and the record has been ordered from the clerk.
>
> Defendant states that financial arrangements have been made to pay for the cost of the transcript with the Court Reporter, Ronda Brown.

It is appellee's assertion that because the notice of appeal references the hearing date of December 6 as the date of the order rather than December 21, the date the order was entered, that the notice of appeal does not identify the order that is appealed with specificity as required by the Arkansas Rules of Appellate Procedure, and therefore, we are without jurisdiction to review. We disagree. Our supreme court has held that the failure to file a timely notice of appeal deprives the appellate court of jurisdiction. *Reynolds v. Spotts*, 286 Ark. 335, 692 S.W.2d 748 (1985). However, because appellant filed a timely notice, we find that the error contained in the notice of appeal is not fatal to the appeal. We addressed a similar issue in *Farm Bureau Mutual Insurance Co. of Arkansas, Inc. v. Sudrick*, 49 Ark. App. 84 n.1, 896 S.W.2d 452 n.1 (1995) where we noted:

> The notice of appeal states that appellant appeals from a judgment "entered on August 4, 1993." Actually no judgment was entered on that date. The only judgment by which appellant was aggrieved

> was the September 23 judgment, and every argument appellant makes on appeal is directed at the September 23 judg- ment. Under these circumstances, we do not think that appellant's failure to designate the September 23 judgment in its notice of appeal is fatal to its appeal of that judgment. *See Jasper v. Johnny's Pizza*, 305 Ark. 318, 807 S.W.2d 664 (1991).

Although appellant's notice of appeal references the hearing date, it also clearly includes the order "filed of record on December 21, 2005." As we did in *Sudrick*, we find that appellant's error is not fatal to the appeal.

In child-custody cases, we review the evidence de novo, but we do not reverse the findings of the trial court unless it is shown that they are clearly contrary to the preponderance of the evidence. *Durham v. Durham*, 82 Ark. App. 562, 120 S.W.3d 129 (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. *Hollinger v. Hollinger*, 65 Ark. App. 110, 986 S.W.2d 105 (1999). The original decree is a final adjudication that one parent or the other was the proper person to have care and custody of the children. *Carver v. May*, 81 Ark. App. 292, 101 S.W.3d 256 (2003). In order to promote stability and continuity in the life of the child, and to discourage repeated litigation of the same issues, modifications in custody require a more stringent standard than that of the original custody determination. *Lloyd v. Butts*, 343 Ark. 620, 37 S.W.3d 603 (2001). For a change of custody, the trial 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 children. *Tipton v. Aaron*, 87 Ark. App. 1, 185 S.W.3d 142 (2004) (citing *Schwarz v. Moody*, 55 Ark. App. 6, 928 S.W.2d 800 (1996)).

The parties were married on September 26, 1994, and they divorced on December 10, 1999. Born of the marriage were two children: "Ro.," a daughter born May 2, 1995, and "Re.," a son born August 6, 1998. The divorce decree recites that the parties agreed for custody to be awarded to appellant subject to reasonable visitation by Mr. Medlock. In 2005, appellant married Joshua Henley. Mr. Henley has four sons from a prior marriage of whom he has custody. The new family, consisting of appellant, Mr.

Henley and the six children, moved to Leslie, Arkansas, into a house owned by Mr. Henley's mother. The house needed extensive repairs, so appellant and Mr. Henley began the process of restoration while living in the home. Appellee remarried and his wife has custody of her sixteen-year-old daughter. Appellee filed a motion to modify on August 17, 2005, seeking custody of Ro. and Re. A temporary hearing was held September 8, 2005, and the final hearing was held December 6, 2005.

Both children testified that they wanted to live with their father. Ro., who was ten-and-a-half at the time of the final hearing, testified that she gets along well with her stepbrothers, her stepfather, and her mother. She confirmed that she is doing well in school in Leslie, and that she has made friends. She said if she lived with her father, she would be able to talk with her stepsister any time and that her dad told her she would be able to take guitar lessons if she lived with him. Although she had been enrolled in tumbling lessons in Leslie, she said that her mother told her she was not going to continue paying for them because going to court was expensive. Ro. testified that she felt that because she wanted to live with her dad, she was being blamed for the financial hardship of going to court. Ro. said that she now has her own bedroom at her mother's house.

Re., who was seven, also testified at the hearing. Although he told the court at the temporary hearing that he wanted to live with his mother, he testified at the final hearing that he wanted to live with his father. When asked why he wanted to live with his father, he said he did not know. He told the court he gets along well with his stepfather, stepbrothers, and mother. Re. said that he likes his school and his teacher and is a straight-A student. Re. testified that he is "not unhappy with anybody." He shares a bedroom with one of his stepbrothers at his mother's house, and he has his own bedroom at his father's house.

At the close of the hearing the court stated in part:

> Well, this is a strange case; strange in the sense that I think the kids are well off either place. I wish you all could stop your squabbling. What I'm asked to do today is decide where these children are going to live. And we had a temporary hearing on the thing, and I determined that there had been no change of circumstance. And the children were too young to — to express a preference. Well, I found a law that says that's wrong; that I can. If I feel that the children are of a sufficient maturity to state a preference, that I can

> certainly consider that as a change of circumstance. They have. Now, they did at the temporary, and they did again today. And they've told me that in here. Not that — that's what they've told both of you, so I'm not — there's not any confidence that I'm breaching here. But they have and have remained steadfast in that. And the children are mature beyond their age. [R.o.], 10 ½, in her conversations, she could pass for 15 without any problem whatsoever. She's a very mature, very bright young lady. [R.e.] is quite proud of being — having all "A's." He didn't tell me that he had a "B" now, but he was quite proud of that. So what I'm going to do is I am going to change custody because of the — of their request. That is the sole reason. They're not mistreated. They're not — not uncared for in any way at their — at their mom's house. The pictures I have seen, the outside looks a little rough, but what I've seen of the inside, looks, you know, looks okay. And I've — I've lived in some about as bad or worse than that, so it's not a problem. That's not — that's not an issue. And it's not an issue that it's Leslie and Fort Smith, although they do think they had a few more opportunities available to them and different programs. Maybe so. But that's an excellent school district, has been, as Mr. Henley has pointed out, for sometime, and I know that. So it's based purely on their — on their request and based on their maturity. . . .
>
> This is one of the things that I'm not too sure the legislature considered when they did what they did. But I'm — and I always consider the best interest of the child, and that's — and I am considering the best interest of the child. If they've got a deep-seeded desire to go live with the other part [sic], then we ought to honor that. . . .
>
> And as I've indicated when I started out, what I'm — what I've done today isn't because anybody has done anything wrong. I think everybody has done the best they can possibly do and have done good with these kids.

Appellee asserts that pursuant to Ark. Code Ann. § 9-13-101(a)(1)(A)(ii) (Supp. 2005), as amended by Act 80 of 2005, the court may base a change of custody solely on the preference of the children, and that cases otherwise holding have now been statutorily overruled. Appellee and the trial court misconstrue the law. Arkansas Code Annotated § 9-13-101(a)(1)(A)(ii) allows that in "determining the *best interest* of the child, the court may consider the preferences of the child if the child is of a sufficient age and

capacity to reason, regardless of chronological age." It is true that the statute permits the court to consider the preferences of the child when making a determination regarding the child's best interest, but the court must first determine the threshold requirement of whether a material change in the circumstances of the parties has occurred since the last order of custody. *Tipton, supra.*

In the case at bar, the trial court specifically announced that at the time of the temporary hearing it did not find a change of circumstances. The court went on to address specific conditions that might be viewed as changed circumstances, such as the condition of appellant's home, the treatment of the children, and opportunities available in Ft. Smith that are not available in Leslie, and found that those factors were not problematic issues in this case. Our standard of review mandates that we defer to the superior position of the trial court to resolve the question of the preponderance of the evidence, because those questions turn largely on the credibility of the witnesses. *Hollinger, supra.* The court found there was no material change in circumstances, and that issue has not been appealed. While this court is not favorably impressed by appellant's unemployment and reliance on public assistance as an alternative to working, absent a finding that there has been a material change in circumstances since the entry of the last custody order, it was not appropriate for the trial court to change custody. Such a holding would not promote continuity and stability in the life of a child, but rather would allow changes in custody any time a child decided to live with the other parent. We are not unmindful that the children in this action have now been living with their father for several months, yet because there was not a finding of a material change in circumstances as of the date of the final hearing in this matter, we are compelled to reverse.

Reversed.

ROBBINS and NEAL, JJ., agree.

Every Donnelle RICHARDSON *v.* STATE of Arkansas

CA 06-527 244 S.W.3d 736

Court of Appeals of Arkansas
Opinion delivered December 6, 2006

[Rehearing denied January 17, 2007.]

William O. "Bill" James, Jr., for appellant.

Mike Beebe, Att'y Gen., by: *Beth Carson*, Ass't Att'y Gen., for appellee.

JOHN MAUZY PITTMAN, Chief Judge. The appellant was charged in the criminal division of Pulaski County Circuit Court with five counts of committing a terroristic act arising out of acts committed when he was seventeen years and eight months of age. Appellant moved to transfer his case to the juvenile division of circuit court and for extended juvenile jurisdiction. After a hearing, the trial court denied those motions. On appeal, appellant asserts that the trial court erred in denying his motions. We affirm.

A prosecuting attorney may, in his discretion, charge a juvenile of fourteen years of age or older in the criminal division of circuit court if the juvenile engages in conduct that, if committed by an adult, would constitute a terroristic act. Ark. Code Ann. § 9-27-318(c)(2)(G) (Supp. 2005). On the motion of the court or any party, the court in which the criminal charges have been filed shall conduct a hearing to determine whether to retain jurisdiction or to transfer the case to another division of circuit court. Ark. Code Ann. § 9-27-318(e) (Supp. 2005). The court shall order the case transferred to another division of circuit court only upon a finding by clear and convincing evidence that the case should, in fact, be transferred. Ark. Code Ann. § 9-27-318(h)(2) (Supp. 2005). Clear and convincing evidence is the 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). We will not reverse a trial court's determination of whether to transfer a case unless that decision is clearly erroneous. *Otis v. State*, 355 Ark. 590, 142 S.W.3d 615 (2004).

In the transfer hearing, the court must consider all of the factors set forth in Ark. Code Ann. § 9-27-318(g), to wit:

> (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 persons 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 which are likely to rehabilitate the juvenile prior to the expiration of the juvenile division of the 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 court.

Although the court must make written findings on all of the ten enumerated factors in deciding whether or not to transfer the case, Ark. Code Ann. § 9-27-318(g), proof need not be introduced against the juvenile on each factor, and the trial court is not required to give equal weight to each of the statutory factors in arriving at its decision. *Otis v. State, supra.*

The evidence adduced at the hearing, testimonial, documentary, and photographic, shows that Interstate 630 traverses a double-line railroad near West 8th and Thayer Streets in Little Rock. The interstate highway crosses the railroad tracks by a viaduct consisting of two separate spans, one bearing the eastbound lanes of traffic, the other bearing the westbound lanes. A gap several feet in width lies between the two spans. The western end of the viaduct terminates in a sloping concrete embankment. By climbing the embankment, one can ascend to street level at the point where the two spans of the viaduct reunite. There is, at this point, a small niche in the median between the eastbound and westbound lanes of traffic protected by concrete barriers several feet high. The crimes with which appellant was charged were

committed by climbing the embankment to that niche and hurling concrete boulders horizontally into the path of traffic moving at highway speed immediately adjacent to the protected niche.

Appellant admitted that, to alleviate his boredom, he climbed the embankment to the niche and deliberately hurled pieces of concrete at passing vehicles. Two vehicles were struck. Photographs of the first vehicle show a windshield that is cracked, but not broken. The windshield also bears a deep crater, approximately the size of a man's hand, adjacent to the roofline near the location of the rearview mirror. The driver did not stop, and he, his wife, and their six-month-old child were not injured. Appellant stated that, after he heard the concrete strike the first vehicle, he continued to hurl pieces of concrete into the path of oncoming traffic and next struck a westbound maroon-colored vehicle. The six-inch long, six pound concrete boulder penetrated the windshield of the maroon vehicle at head-level, directly in front of the steering wheel. The driver, Mrs. Carolyn Mirek, was killed; her teenage daughter survived. Appellant saw the concrete strike Mrs. Mirek's vehicle and fled when he saw the ensuing wreck.

Appellant stated that, although he was accompanied by two friends, his friends did not throw anything and were simply spectators. Photographs of the scene show that large pieces of concrete were plentiful at the base of the embankment near the railroad tracks but that no such objects were present in the protected niche.

There was no evidence that appellant had previously been adjudicated a juvenile offender, but there was testimony that appellant engaged in antisocial behavior, such as killing a neighbor's cat by hanging it in a tree; repeated truancy despite juvenile-court intervention; illegal drug use; destruction of his mother's property in retaliation for punishment; and allegations of assault. In addition, there was evidence that appellant craved attention and habitually broke rules in order to get it. With regard to the possibility of rehabilitation, the record shows that appellant had already received numerous services intended to correct his behavior, including counseling at the Arkansas Child Study Center, and placement in an alternative learning center and the Job Corps. In addition, appellant attended day school at Rivendell for more than four years, where he received counseling for anger management and impulse control. Although Rivendell's program manager, Mario Ross, testified that appellant did well in the structured environment provided by that institution, he conceded that,

although appellant was in the day-school program for a much longer period of time than was usual, he was unable to graduate. Mr. Ross testified that appellant did well academically but that, although it attempted to do so to the best of its ability, Rivendell was unable to correct appellant's misbehavior. Finally, there was testimony by a Pulaski County juvenile probation officer, Monica Allison, that appellant had been offered counseling in the context of his truancy case but that he declined, saying that counseling was a waste of time. She also stated that the counseling available through juvenile court was no different than the private counseling provided by Rivendell and that juvenile jurisdiction over appellant would expire when appellant reached twenty-one years of age. Appellant's age at the time of this writing is approximately nineteen years and two months.

Appellant argues that there was "no evidence to substantiate the serious and violent nature of the charges," or that "appellant committed the alleged offenses in an aggressive, violent, premeditated, or willful manner," or that the appellant committed an offense against persons or property. These arguments are frivolous. No argument has been or can be made to support these bare assertions. The evidence does not, as appellant's counsel suggests, depict a childish incident of rock-throwing that ended in unforeseeable tragedy. To the contrary, the evidence adduced at the hearing is sufficient to support a finding that appellant, when almost eighteen years of age, deliberately carried large pieces of concrete from below the viaduct to a protected niche with the intent to hurl them at oncoming traffic; that appellant struck one vehicle with such a projectile and was aware that he struck it; and that appellant thereafter continued to hurl boulders in the path of oncoming vehicles until Mrs. Mirek was killed. The need to protect society from lethal acts of violence directed against complete strangers for the sole purpose of providing amusement to the perpetrator is manifest. There is undisputably sufficient evidence to satisfy the first three factors enumerated in Ark. Code Ann. § 9-27-318(g).

Sufficient evidence to support the trial court's findings regarding the fourth and eighth factors is found in appellant's admission that he was the only person hurling the pieces of concrete at vehicles, and in the reasonable inference to be drawn from the photographs that appellant carried the concrete boulders up the embankment, indicating planning and premeditation. Al-

though appellant was accompanied by friends, the evidence, including appellant's own testimony, reasonably supports the conclusion that his friends were mere spectators.

With regard to the fifth factor, the evidence of appellant's killing of a neighbor's cat by hanging, destruction of his mother's property in retaliation for discipline, and charges of assault amply supports the trial court's finding that there were some indications of previous antisocial behavior. Likewise, with respect to the seventh factor, the evidence that the extensive services provided to appellant for more than four years were identical to those available to the juvenile court for rehabilitation, and that those services had not been effective in modifying appellant's behavior, support the trial court's finding that it is not likely that appellant would be rehabilitated in the short time remaining before juvenile court jurisdiction expired.

The sole finding by the trial court favoring transfer to juvenile division was made in connection with the sixth factor, which concerns itself with the sophistication and maturity of the juvenile. The trial court found that appellant's level of sophistication was low and that he was immature. However, the supreme court has repeatedly stated that the trial court is not required to give equal weight to each of the statutory factors, and a juvenile's lack of maturity, standing alone, does not mandate transfer to juvenile division. *See Otis v. State, supra.* We hold that the trial court did not err in denying appellant's motion to transfer.

Appellant asserts that the same factors enter into a decision to grant extended juvenile jurisdiction as are considered regarding a motion to transfer pursuant to Ark. Code Ann. § 9-27-318(g),[1] and argues that extended juvenile jurisdiction should have been granted because appellant is likely to be rehabilitated by the programs available through the juvenile division of circuit court. Insomuch as we have held that the trial court properly found that appellant is not likely to benefit from rehabilitation, this argument lacks merit.

Affirmed.

GRIFFEN and GLOVER, JJ., agree.

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[1] The factors to be considered in an extended juvenile jurisdiction designation hearing differ only slightly; they are set out at Ark. Code Ann. § 9-27-503(c) (Repl. 2002).

Jimmy SINGLETON *v.* CITY OF PINE BLUFF

CA 06-398 244 S.W.3d 709

Court of Appeals of Arkansas
Opinion delivered December 6, 2006

The Harper Law Office, by: Kenneth A. Harper, for appellant.

J. Chris Bradley, for appellees.

JOHN MAUZY PITTMAN, Chief Judge. The appellant was employed by the City of Pine Bluff as a police officer. While acting in the course and within the scope of that employment on March 1, 2003, appellant was struck on the right side of the head and shot in the left ankle by a felon. He was provided medical benefits and subsequently filed a claim asserting that he was entitled to disability benefits for his injuries. The Arkansas Workers' Compensation Com-

mission found that he failed to prove that he sustained a compensable anatomical impairment or wage-loss disability and denied his claim. On appeal, appellant argues that this finding was in error. We agree, and we reverse.

In determining the sufficiency of the evidence to support decisions of the Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings and affirm if they are supported by substantial evidence, i.e., evidence that a reasonable person might accept as adequate to support a conclusion. *Carman v. Haworth, Inc.*, 74 Ark. App. 55, 45 S.W.3d 408 (2001). We will not reverse the Commission's decision unless we are convinced that fair-minded persons with the same facts before them could not have reached the conclusions arrived at by the Commission. *Wal-Mart Stores, Inc. v. Sands*, 80 Ark. App. 51, 91 S.W.3d 93 (2002). Where, as here, the Commission has denied a claim because of the claimant's failure to meet his burden of proof, the substantial evidence standard of review requires that we affirm if the Commission's opinion displays a substantial basis for the denial of relief. *Williams v. Arkansas Oak Flooring Co.*, 267 Ark. 810, 590 S.W.2d 328 (Ark. App. 1979).

Here, the Commission's opinion fails to display a substantial basis for the denial of relief. It is undisputed that appellant was shot in the left ankle. It is likewise undisputed that five bullet fragments remain in appellant's ankle because doctors determined that it would be more dangerous to remove them than to allow them to remain in place. There is, therefore, unquestionably objective evidence of physical injury in this case. Nevertheless, the Commission denied relief by employing an analysis that expressly rejected all evidence of physical impairment that was not objective.

Although it is irrefutably true that the legislature has required medical evidence supported by objective findings to establish a compensable injury, it does not follow that such evidence is required to establish each and every element of compensability. *Stephens Truck Lines v. Millican*, 58 Ark. App. 275, 950 S.W.2d 472 (1997). All that is required is that the medical evidence of the injury and impairment be *supported by* objective findings, Ark. Code Ann. §§ 11-9-102(4)(D), 11-9-704(c)(1)(B) (Repl. 2002), i.e., findings that cannot come under the voluntary control of the patient. Ark. Code Ann. § 11-9-102(16)(A)(i). Here, the appel-

lant's allegations of a foot injury affecting his mobility are quite clearly supported by observed bullet fragments embedded in his foot. Nevertheless, although the requirement of support by objective findings had been satisfied, the Commission rejected the medical opinion offered by Dr. Baskin that appellant's ankle injury resulted in eight-percent anatomical impairment simply because it was based in part upon non-objective evidence, i.e., Dr. Baskin's observation that appellant exhibited an antalgic gait. After rejecting Dr. Baskin's observations of a defective gait because they did not meet the statutory standard of objectivity, the Commission concluded that, although appellant still had bullet fragments in his ankle that cause discomfort and occasional swelling, he "miraculously . . . sustained no permanent structural damage to his ankle as a result of his gunshot wound."

As the Commission acknowledges in its opinion, there is no requirement that medical testimony be based solely or expressly on objective findings, only that the record contain supporting objective findings. *Swift-Eckrich, Inc. v. Brock*, 63 Ark. App. 118, 975 S.W.2d 857 (1998). Furthermore, credibility is a matter for the Commission to determine, even where the basis for the credibility finding is "specious at best." *Id.* Nevertheless, we think that a determination of credibility based on rejection of subjective evidence in favor of a "miraculous" result is less than specious and fails to show a substantial basis for denial of relief. Clearly, the Commission arbitrarily and improperly rejected subjective evidence in determining that appellant sustained no anatomical impairment as a result of his ankle injury, and it appears that this error also may have affected the Commission's findings with respect to the other issues in this case. Consequently, we reverse and remand for further proceedings consistent with this opinion. In so doing, we do not hold that the Commission could not, under any circumstances, find that Dr. Baskin's opinion lacked credibility; instead, we hold only that the Commission erred in doing so for the reasons stated in the order from which appellant appealed.

Reversed and remanded.

BIRD and NEAL, JJ., agree.

Anthony Manriquez ENRIQUEZ *v.* STATE of Arkansas

CA CR 05-1219 244 S.W.3d 696

Court of Appeals of Arkansas
Opinion delivered December 6, 2006

J. Marvin Honeycutt, for appellant.

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

JOSEPHINE LINKER HART, Judge. The circuit court denied the motion of appellant, Anthony Manriquez Enriquez, to suppress marijuana seized from the trunk of a car driven by appellant.

He then pleaded guilty to the crime of possession of marijuana with the intent to deliver, with his plea conditioned upon his right to appeal from the denial of his motion. On appeal, appellant argues that the circuit court erred in denying his motion to suppress the marijuana because the deputy lacked reasonable suspicion to detain appellant past the end of the traffic stop and conduct a canine sniff of the car. We reverse and remand.

On appeal, we conduct a de novo review of the circuit court's denial of the motion to suppress evidence based on the totality of the circumstances, examining findings of historical facts for clear error and determining whether those facts give rise to reasonable suspicion, while giving due weight to inferences drawn by the circuit court. *Sims v. State*, 356 Ark. 507, 157 S.W.3d 530 (2004). To conduct a canine sniff of a motorist's vehicle after the legitimate purpose for the initial traffic stop has terminated, the officer must have developed reasonable suspicion to detain before the legitimate purpose ended. *Id.* Reasonable suspicion exists if, under the totality of the circumstances, the police have a specific, particularized, and articulable basis for concluding that the person may be involved in criminal activity. *Id.* In *Sims*, the Arkansas Supreme Court concluded that the legitimate purpose of the traffic stop ended when the officer handed Sims his license, registration, and a traffic warning.

At the suppression hearing, the State presented the testimony of former Crawford County Deputy Sheriff Jeff Smith and a videotape of Smith's traffic stop of appellant that was made by a video recorder in Smith's patrol car. Smith testified that while on duty on April 4, 2004, he saw a white Ford Taurus with a Nevada license plate following too closely to another vehicle. The videotape shows that Smith stopped the Taurus and made contact with appellant, who was the driver and sole occupant of the car. The videotape also shows that Smith asked for appellant's driver's license and vehicle registration. Smith then asked where appellant was going, and appellant said that he was going to New York City to visit his daughter and that he would be there for four or five days.

Smith testified that appellant provided him with a rental agreement for the car, which showed a rental date of March 11, 2004, and a return date of March 18, 2004, and that appellant told him that he had contacted the rental company and talked to a "Robert" and obtained an extension to April 2, 2004. Smith also testified that he obtained appellant's Arizona driver's license and

was told by dispatch that appellant's license was suspended. Smith testified that he told appellant of the suspension and issued him a warning for following too closely. He further testified that he did not issue a warning or citation for the suspended license.

On the videotape, appellant denied knowledge of the suspension, and when questioned by appellant, Smith was unable to identify the date of the suspension. Smith asked dispatch for the reason for the suspension, and dispatch replied, "Just says court action required." Smith then specifically stated to appellant that he would not issue a citation for driving with a suspended license. Smith returned the materials to appellant and asked appellant if he had obtained an extension on the rental agreement. Appellant answered affirmatively, explaining that he had gotten an extension, stating, "That is the reason why I wrote Robert on there. 04/02/04," and that he had rented the car three weeks earlier. Smith made no further inquiry about the car and then asked appellant where in New York City that his daughter lived. Appellant told him that she lived in Manhattan.

The videotape shows that Smith then stated that there were problems on the highway with transportation of narcotics. He asked if appellant had anything illegal in the car. Appellant stated that he did not, and Smith asked if appellant would consent to a search of the vehicle. Appellant refused. Immediately thereafter, Smith removed a dog from his patrol vehicle and worked the dog around the vehicle. He told appellant that he was going to look inside the car. Smith opened the driver's side door and removed the keys. He used the keys to electronically open the trunk, where a blanket covered several large bundles of marijuana.

Smith testified that appellant appeared "nervous to a certain extent and very talkative." Smith also stated that, when someone's license is suspended, "we don't allow them to drive off, we usually contact somebody or tow the vehicle," and that he would not have allowed appellant to drive off with a suspended license but instead would have had the vehicle towed and assisted appellant in getting a ride. He also testified that when he made his initial contact with appellant, he noticed luggage in the back seat and trash and other items in the car, and he noted that the car had a "lived-in look." He further testified that he had no report of the car being stolen.

■ Appellant does not challenge the traffic stop. Rather, he argues that Smith lacked reasonable suspicion to continue to detain appellant and conduct a canine sniff of his car after issuing a

traffic warning. The State makes a number of arguments for affirmance of the circuit court's denial of appellant's motion to suppress. First, the State contends that appellant failed to establish that he had standing to challenge the search of the car. We conclude, however, that appellant, as the driver of the car and the person named in the rental agreement, had standing to challenge the search of the car. *See Littlepage v. State*, 314 Ark. 361, 863 S.W.2d 276 (1993) (holding that a defendant has no standing to question the search of a vehicle owned by another person unless he can show that he gained possession from the owner or from someone who had authority to grant possession). Here, the rental agreement established standing.

The State also argues that because appellant's license was suspended and Smith testified that he would not have allowed appellant to drive the vehicle, the legitimate purpose of the traffic stop had not ended when Smith searched appellant's car. We note that Rule 12.6(b) of the Arkansas Rules of Criminal Procedure provides that "[a] vehicle impounded in consequence of an arrest, or retained in official custody for other good cause, may be searched at such times and to such extent as is reasonably necessary for safekeeping of the vehicle and its contents." Here, however, there was no arrest, and Smith informed appellant that he would not issue a citation. After excluding the possibility of arrest and after returning the materials to appellant, Smith began to question appellant about the possible presence of narcotics in his car. When appellant refused to consent to a search, Smith used his dog to conduct a canine sniff, which is indicative of an evidentiary search. It is apparent that Smith did not impound the car, and his actions as shown on the videotape belie his assertion at trial that he was not going to allow the vehicle to leave. Accordingly, we conclude that, as in *Sims*, the legitimate purpose of the traffic stop ended when Smith issued a warning for following too closely, announced that he was not issuing a citation for driving on a suspended license, and returned the materials to appellant without taking further action.

The State further contends that, even if the legitimate purpose of the stop had ended, Smith had reasonable suspicion to further detain appellant and determine the lawfulness of his conduct. The State notes that Smith testified that there was luggage in the back seat, that the car had a "lived-in" look, that appellant appeared "nervous to a certain extent and very talkative," that

appellant had a suspended driver's license, and that appellant had the car for three weeks and was traveling from Nevada to New York with an expired agreement.

Mere nervousness, however, cannot constitute reasonable grounds for detention. *Sims, supra.* Moreover, we cannot conclude that a car that looks "lived in" constitutes grounds for reasonable suspicion, as there was testimony that appellant had the car for three weeks. *See Meraz-Lopez v. State*, 92 Ark. App. 157, 211 S.W.3d 564 (2005) (holding that the presence of scattered items in the front of the car does not provide reasonable suspicion). As for the suspended driver's license, as noted above, Smith had already completed his investigation of it when he told appellant that he would not issue a citation. The suspended license could not again provide reasonable suspicion to detain appellant, as *Sims* indicates that the resolved grounds for detention cannot continue to serve as a basis for detention. As for appellant's possession of the car for three weeks and traveling to New York City, we cannot say that this, as the State suggests, constitutes unusual travel plans.

The State notes Smith's testimony that the rental agreement was extended to April 2, 2004, and citing *Burks v. State*, 362 Ark. 558, 210 S.W.3d 62 (2005), argues that Smith had a reasonable suspicion that appellant was misappropriating the rental car company's property. In *Burks*, the defendant's car rental agreement specified that the car was not to be driven outside of California and Arizona and was due to be returned the day before the traffic stop occurred. The Arkansas Supreme Court held that reasonable suspicion to detain existed because the facts suggested that the car had been stolen, as it not only was overdue, but also it was being driven far away from the area in which it was meant to be returned.

When testifying that the rental agreement was extended to April 2, 2004, Smith was merely recalling what he was told by appellant. The videotape reveals that Smith returned the materials and asked if appellant had obtained an extension, and appellant replied that he had and that was the reason he wrote "Robert" on the rental agreement. Appellant then says, "04/02/04," but he does not indicate that this was the date the extension expired. Other than asking how long he had the car in his possession, Smith made no further inquiry about the car rental. Furthermore, there was no evidence indicating that the car could be driven only in certain areas, and Smith admitted that he did not have a report of

the car being stolen. Under the totality of the circumstances, we cannot conclude that this evidence provided reasonable suspicion to detain.

Reversed and remanded.

BIRD, NEAL, VAUGHT, and ROAF, JJ., agree.

GRIFFEN, J., concurs.

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

WENDELL L. GRIFFEN, Judge, concurring. I agree that we should reverse and remand in this case because the officer did not have reasonable cause to detain appellant after the traffic stop had concluded. I write separately to highlight that the transcript from the videotape of the stop plainly shows that Officer Jeff Smith requested backup and formed his intent to conduct a canine sniff *before* he was notified that appellant's license was suspended. At that point, the officer knew only that appellant was following another vehicle too closely and reported that he was traveling to New York City to visit his daughter for four or five days. He did not at that point know that appellant's driver's license was suspended or that the rental contract appeared to have expired.

It is telling that the officer called for backup and formed his intent to perform a canine sniff when the only known or suspected illegal activity was that appellant was following another vehicle too closely. Sadly, this case demonstrates that the concept of reasonable suspicion is viewed — at least by the officer in this case — as justification to search a motorist's vehicle when he pleases.

TERRY CRABTREE, Judge, dissenting. The trial court's denial of the motion to suppress is not clearly erroneous because the traffic stop was not completed when the canine sniff was conducted. Therefore, I dissent.

In *Sims v. State,* 356 Ark. 507, 147 S.W.3d 530 (2004), our supreme court recognized that, as part of a valid traffic stop, a police officer may detain a traffic offender while the officer completes certain routine tasks, such as computerized checks of the vehicle's registration and the driver's license and criminal history, and the writing up of a citation or warning. During this process, the officer may ask the motorist routine questions such as his destination, the purpose of the trip, or whether the officer may

search the vehicle, and he may act on whatever information is volunteered. *Id.* The *Sims* court held, however, that a motorist cannot be further detained, once those routine tasks are completed, unless the officer has developed reasonable suspicion for continuing the detention.

In *Sims*, it was clear when the legitimate purpose of the traffic stop was over. The officer declared that the "traffic stop was done" when he returned Sims's papers to him and allowed Sims to walk back to his vehicle. *Id.* at 510, 147 S.W.3d at 532. Based on *Sims*, the majority in this case myopically concludes that the legitimate purposes of the stop came to an abrupt end with the physical transfer of the warning ticket, rental papers, and suspended driver's license. I disagree with their application of the law to the facts of this case.

Here, the officer repeated throughout his testimony that the traffic stop was not over when he ran his dog around the vehicle. The facts and evidence support that assertion. In less than one minute after the officer stopped appellant's vehicle, the officer headed back to his patrol car with appellant's driver's license and the rental papers. Five minutes elapsed before the officer again approached appellant's vehicle. At this point, the officer knew that appellant's driver's license had been suspended, and it appeared that the rental agreement had expired. The officer did not simply return appellant's documents at this juncture and send appellant on his way. Not surprisingly, the officer asked appellant to step out of the vehicle whereupon he, legitimately, inquired about these and other matters.

During the ensuing two-minute discussion, the officer informed appellant that his license was suspended, and pursuant to appellant's request, he called dispatch to inquire as to when the license had been suspended. The officer advised that he was going to give appellant a warning ticket for following too closely, but that he was not ticketing him for driving on a suspended license. Appellant chatted with the officer about what speed he should travel. The officer then inquired about the expiration of the rental agreement, and he learned that appellant had obtained a verbal extension until April 2, two days prior to the stop, and that appellant had been driving the vehicle for three weeks. The officer then discussed appellant's travel plans, and he broached the subject of transporting narcotics. It was during the sixth minute of the stop, or one minute into the two-minute conversation, and before inquiring about the rental agreement, that the officer handed

appellant his license, the warning, and the rental agreement. During the seventh minute of the stop, the officer asked for, but was refused consent to search the vehicle, and he also began the canine sniff of the vehicle.

When properly considered, these facts demonstrate that the legitimate purpose of this brief stop did not end with the mere transmittal of the documents. That act coincided with or occurred during the course of the officer's conversation with appellant about matters that called for explanation concerning subjects that an officer may legitimately probe. This case illustrates that a bright line cannot always be drawn at the handing over of documents, and to draw an artificial line here at the officer's sleight of hand is to place form over substance. Based on the facts of this case, it is my conclusion that the officer did not prolong the detention beyond the time reasonably necessary to complete the traffic stop.

In addition, there was further evidence that the stop was not over with the transfer of the documents. The officer testified that he was intending to impound the vehicle because policy dictated that action when a motorist's driver's license is suspended. The majority makes a credibility determination and finds that the officer's testimony was not truthful. However, our standard of review requires us to defer to the trial court in assessing witness credibility. *Laime v. State*, 347 Ark. 142, 60 S.W.3d 464 (2001). Moreover, that the officer did not yet tell appellant that his vehicle was to be impounded is not damning. I know of no rule requiring an officer to inform a traffic offender about his subjective intentions and planned course of action. It also makes good sense for an officer to withhold conveying distressing information so as to maintain a friendly atmosphere and thus avoid the potential of evoking an undesirable response from a motorist during the initial stage of a traffic stop. Of course, the officer in this instance did not get around to conveying this news to appellant because of the dog's positive alert on the vehicle and the discovery of 234 pounds of marijuana in the trunk. Once this occurred, telling appellant that he had planned to impound the vehicle because of the suspended license became a moot point.

The officer's plan to impound the vehicle because of the suspended license is also cogent evidence that the contraband would be admissible under the inevitable discovery doctrine. Under this doctrine, evidence that might otherwise be suppressed is admissible if the State proves by a preponderance of the evidence that the police would have inevitably discovered the evidence by

lawful means. *Thompson v. State*, 333 Ark. 92, 966 S.W.2d 901 (1998); *Willoughby v. State*, 76 Ark. App. 329, 65 S.W.3d 453 (2002). It is well settled that police officers may conduct a warrantless inventory search of a vehicle that is being impounded in order to protect an owner's property while it is in the custody of the police, to insure against claims of lost, stolen, or vandalized property, and to guard the police from danger. *Thompson v. State, supra.* Rule 12.6 of the Arkansas Rules of Criminal Procedure allows an officer to impound a vehicle and inventory its contents for "any good reason." The supreme court has held that a motorist's suspended license is good reason to impound and inventory a vehicle, even though the motorist is not placed under arrest for driving on a suspended license. *Id.; see also, e.g., Benson v. State*, 342 Ark. 684, 30 S.W.2d 731 (2000); *Casey v. State*, 97 Ark. App. 1, 242 S.W.3d 627 (2006). Because appellant's vehicle was going to be impounded, the contraband would have been inevitably discovered during an inventory permitted under Rule 12.6.

For these reasons, I would affirm the denial of the motion to suppress.

PITTMAN, C.J., and GLOVER, J., join in this opinion.

Bonnie CUTRIGHT *v.* STATE of Arkansas
and Tohono O'odham Nation

CA 06-49 244 S.W.3d 702

Court of Appeals of Arkansas
Opinion delivered December 6, 2006

[Rehearing denied January 17, 2007.]

Jeanette Stephens Heimbaugh, P.A., by: *Jeanette Stephens Heimbaugh*, for appellant.

H.G. Foster, Prosecuting Attorney, 20th Judicial Circuit, by: *C.J. Acklin*, for appellee State of Arkansas.

Tohono O'odham Nation - Office of Attorney General, by: *Samuel F. Daughety*, Ass't Att'y Gen., for appellee Tohono O'odham Nation.

ROBERT J. GLADWIN, Judge. Appellant Bonnie Cutright appeals from the Van Buren County Circuit Court's decision granting custody of Alexia and Andria Sanders to Patrick and Virginia Swartz. On appeal, she argues that the circuit court erred by not following the preferential placement guidelines of the Indian Child Welfare Act of 1978 (hereinafter "ICWA") codified at 25

U.S.C. §§ 1901-1963 (2000). Because the circuit court failed to determine that there was good cause to deviate from the preference of the Tohono O'odham Nation (hereinafter "Nation") that the children in question should be placed with their siblings, we reverse and remand for an award of custody of Alexia and Andria Sanders to appellant.

By way of background, Alexia and Andria Sanders are twin sisters (DOB: 01/22/1997), who, along with four[1] of their full siblings: Bobby (DOB: 11/28/90); Ruben (DOB: 11/23/92); Ricky (DOB: 11/3/93); Roxanne (DOB: 6/26/95) were sent to live with appellant in Arkansas by their mother sometime in August 2002. This action was prompted by Ms. Gaspar's concern that the State of Arizona was going to remove them from her custody while she was in prison. Ms. Gaspar contacted appellant, her third cousin, and requested that she come to Arizona to get the children. While there, Ms. Gaspar gave appellant a signed, written statement conveying the guardianship of all six children to appellant.

The six siblings' natural father is Ruben Sanders, who has undisputedly abandoned the children. He is relevant to this case only because he is an enrolled member of the Nation, which automatically qualifies the children for enrollment in the Nation and triggers the applicability of the ICWA in this custody matter.

In late 2002, approximately two months after appellant had obtained custody of the six Sanders children, Patrick and Virginia Swartz[2] met with Ms. Gaspar in Arizona about possibly adopting Alexia and Andria Sanders. They obtained Ms. Gaspar's signature on a purported relinquishment of her parental rights with respect to the twins and had the document filemarked when they returned to Van Buren County. They then obtained custody of the twins with the assistance of Van Buren County law-enforcement officials.

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[1] Alexia and Andria's mother, Ms. Tina Gaspar, allegedly has at least thirteen children, only two more of whom are full siblings to the children sent to live with appellant: JoJo (DOB: not of record but close in age to her twin sisters and five years old at the time of the final placement hearing) who resides with a great-aunt in Arizona; and Robert (DOB: not of record but the youngest of the siblings at three years of age at the time of the final placement hearing) who resides with Ms. Gaspar's youngest sister in Mississippi. Four of the other half-siblings (who have Juatae Gaspar as a father) had reached the age of majority at the time of this proceeding, and another half-brother, Alex Wood, was adopted by appellant's sister years ago.

[2] Virginia Swartz is a fourth cousin to Ms. Gaspar.

In March 2003, appellant filed a Family in Need of Services Petition (hereinafter "FINS") regarding recent behavior problems with Bobby Sanders, and later added the other children to the petition on April 2, 2003, seeking a determination of custody of all six of the children. The case continued through the course of 2003 and 2004 through May 20, 2005, during which time custody of the twins was left with Mr. and Mrs. Swartz while the other four siblings remained with appellant.

The circuit court was made aware from the outset of the case of the fact that the children are "Indian" children, as defined in the ICWA. Despite letters from the Nation that their preference for the placement of the twins was with appellant and the other siblings, the circuit court granted permanent custody of the twins to Mr. and Mrs. Swartz and the other four children to appellant based upon the best interests of the children and without findings as to the ICWA. This appeal followed.

Generally, 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. *Bernal v. Shirley*, 96 Ark. App. 148, 239 S.W.3d 11 (2006). 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.* Specifically, there are no cases in which the superior position, ability, and opportunity of the trial judge to observe the parties carries a greater weight than those involving the custody of minor children, and our deference to the trial judge in matters of credibility is correspondingly greater in such cases. *Vo v. Vo*, 78 Ark. App. 134, 79 S.W.3d 388 (2002).

While none of the parties question the above-stated standards of review, they are quick to point out the specific requirements of the ICWA related to custodial issues. The leading case in which the Supreme Court dealt with the ICWA is *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989), in which the purpose of the act was discussed:

> The Indian Child Welfare Act of 1978 (ICWA), 92 Stat. 3069, 25 U.S.C. §§ 1901-1963, was the product of rising concern in the

> mid-1970's over the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes. Senate oversight hearings in 1974 yielded numerous examples, statistical data, and expert testimony documenting what one witness called "[t]he wholesale removal of Indian children from their homes, . . . the most tragic aspect of Indian life today." Indian Child Welfare Program, Hearings before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs, 93d Cong., 2d Sess., 3 (statement of William Byler) (hereinafter 1974 Hearings).

Id. at 32. Congressional findings that were incorporated into the ICWA express the following concerns:

> (3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children . . . ;
>
> (4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and
>
> (5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

25 U.S.C. § 1901 (2000). Other provisions of the ICWA set procedural and substantive standards for child-custody proceedings that take place in state court, including section 1915, which relates to the placement of Indian children and provides in its entirety:

> § 1915. Placement of Indian children
>
> (a) Adoptive placements; preferences
>
> In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with

(1) a member of the child's extended family;

(2) other members of the Indian child's tribe; or

(3) other Indian families.

(b) Foster care or preadoptive placements; criteria; preferences

Any child accepted for foster care or preadoptive placement shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with —

(i) a member of the Indian child's extended family;

(ii) a foster home licensed, approved, or specified by the Indian child's tribe;

(iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or

(iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

(c) Tribal resolution for different order of preference; personal preference considered; anonymity in application of preferences

In the case of a placement under subsection (a) or (b) of this section, if the Indian child's tribe shall establish a different order of preference by resolution, the agency or court effecting the placement shall follow such order so long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in subsection (b) of this section. Where appropriate, the preference of the Indian child or parent shall be considered: Provided, That where a consenting parent evidences a desire for anonymity, the court or agency shall give weight to such desire in applying the preferences.

(d) Social and cultural standards applicable

> The standards to be applied in meeting the preference requirements of this section shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties.
>
> (e) Record of placement; availability
>
> A record of each such placement, under State law, of an Indian child shall be maintained by the State in which the placement was made, evidencing the efforts to comply with the order of preference specified in this section. Such record shall be made available at any time upon the request of the Secretary or the Indian child's tribe.

None of the parties dispute that the ICWA applies in this case, but how the placement preferences apply in this situation constitutes the pivotal issue to be resolved. Regarding the placement preferences, it is undisputed that appellant is a third cousin of Ms. Gaspar and Mrs. Swartz is her fourth cousin. The brief submitted by the Nation plainly states that neither the Swartzes nor appellant meet the ICWA's definition of "extended family" under sections 1903 and 1915, and neither party provided any proof or documentation of Indian ancestry despite both claiming to have some Indian blood. Additionally, no other potential Indian placements were identified for the children. Accordingly, the issue with regard to the placement preference must be based on section 1915(c), which states that, "[i]n the case of a placement under subsection (a) or (b) of this section, if the Indian child's tribe shall establish a different order of preference by resolution, the agency or court effecting the placement shall follow such order so long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in subsection (b) of this section."

The Nation, or tribe, initially stated in its letter dated June 22, 2004, that its preference for the placement of the twins was with appellant, "provided there is nothing in the evaluation of the home environment that would put the children at risk if returned to this family." In support of that recommendation, the Nation explained in its brief filed with this court that "[t]he only family the children have in Arkansas are each other, and their placement together is the closest approximation of placement with 'extended family' intended by the Act."

The instant case is clearly not the situation debated with respect to the enactment of the ICWA, where discussion centered

around the grave concern over harm to Indian parents and their children who were involuntarily separated by decisions of local welfare authorities, as well as the impact on the tribes themselves of the massive removal of their children. These children's father, their direct tie to the Nation, had abandoned them and was not involved in this case at all.

None of the parties seeking custody of the children fell within the parameters covered by the ICWA preferences, and based on the record before us, appear to be equally ill-equipped to seriously impart the Nation's heritage and customs to the children. Specifically, Mr. Swartz testified at the final placement hearing that, although he could not pronounce the name of the Nation and was unaware of the primary religion, he and his wife were educating the twins in Indian culture. He testified that they want them to learn the language, that his wife did research on the Internet and contacted a tribal member to obtain some CD's, and has taught them some information about the Nation's language and heritage based on that information. The only other evidence he presented was that his wife had always decorated their home with Southwestern items such as blankets, pottery, Indian pictures hanging on the walls, etc. He admitted that they had not attempted to enroll the twins in the Nation, although they had contacted Valerie Geronimo in Sells, Arizona, an official with the Nation, a couple of months after obtaining custody of the twins and spoke with her brother, Ronald Geronimo. He explained that they referred them to Dana Thomas at the Venito Garcia Library in Sells, Arizona, who advised that they go to the Internet for information. It is undisputed that they did not maintain contact with Ms. Geronimo or other members of the Nation throughout the course of this case based on advice from their attorney at the time.

Appellant does not fare much better. She testified that she takes the children to the library to learn about their heritage and has a primary contact at the Indian Nation named Kathleen Carmen. Appellant testified that Ms. Carmen has provided information to her regarding the Nation, and appellant stated that she also keeps Ms. Carmen updated on the children's progress. Appellant explained that she has been discussing enrollment papers for the children for quite some time but has been informed that it is a lengthy process involving tribal authorities. She did indicate that she knows that the primary religion of the Nation is Catholic but did not indicate that the children are being raised in the faith. She

described taking them through the Nation to go down to Mexico on a trip. To her credit, appellant does appear to be in closer contact with the relatives that have custody of the other two full siblings than the Swartzes.

While both parties in this matter are on equal footing when it comes to the preferences set out in subsections 1915(a) and (b), appellant entered the final placement hearing with the advantages of having four of the twins' full siblings in her custody and remaining in closer contact with the Nation throughout this case. The Nation clearly and repeatedly states that its preference is for all six of the siblings to be together with appellant, "provided there is nothing in the evaluation of the home environment that would put the children at risk if returned to this family." We hold that the Nation's recommendation for placement was sufficient to invoke the preference set out in subsection 1915(c).

The question then becomes whether under section F.3 of the Bureau of Indian Affairs's Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67584 (Nov. 26, 1979), the circuit court had "good cause" to modify the preferences, specifically the requested placement preference of the Nation. Section F.3 states:

> a. For purposes of foster care, preadoptive or adoptive placement, a determination of good cause not to follow the order of preference set out above *shall* be based on one or more of the following considerations:
>
> (i) The request of the biological parents or the child when the child is of sufficient age.
>
> (ii) The extraordinary physical or emotional needs of the child as established by testimony of a qualified expert witness.
>
> (iii) The unavailability of suitable families for placement after a diligent search has been completed for families meeting the preference criteria.
>
> b. The burden of establishing the existence of good cause not to follow the order of preferences established in subsection (b) shall be on the party urging that the preferences not be followed.

(Emphasis added.) According to the guidelines, the burden to prove "good cause" to modify the preferences is on the Swartzes because

they are the ones seeking to avoid the Nation's recommendation for placement of the twins. Relying on subsection (a)(i) is questionable because, although they obtained some type of relinquishment of rights document from the children's mother subsequent to her granting guardianship to appellant, the legitimacy of that entire process was unclear. There was no specific finding made by the circuit court as to Ms. Gaspar's final request, and there is evidence that she chose to place her children with both parties at different times.

As for subsection (a)(ii), it does not appear that anyone argued that the twins had *extraordinary* physical or emotional needs that could be met by the Swartzes but not by appellant. There was testimony from Dawn Harris, a psychologist from Jacksonville, Arkansas, that she definitely believed that there could be damage to the girls if they were removed from the Swartzes, that they would definitely need counseling, and that there could be a long-term lack of trust in people in their lives. This related to the "bonding" issue in the case, which was very contentious when viewed with respect to the ICWA. There was also an issue as to whether Ms. Harris was a "qualified expert witness" with respect to the guidelines due to her admission that she has no experience providing services to Indian children, is unfamiliar with Indian communities, amenities, and culture.[3] Related to subsection (a)(iii), it appears that no other suitable families for placement were found that met the preference criteria; however, it is difficult from the record before us to determine how diligent a search was completed to look for such families.

The Nation appears to base its recommendation solely on keeping the siblings that can be together in the same immediate "family," irrespective of the fact that other full and half-siblings are scattered among several other states. While the children will likely only learn the traditions and information about their heritage that is imparted to them by their guardians for the immediate foreseeable future, they are each other's only viable link to the Nation. It will likely be many years, when they are closer to adulthood, before they might seek out such information and

[3] However, the Washington Supreme Court in *In re Mahaney*, 51 P.3d 776 (Wash. 2002), interpreted the ICWA to allow testimony from expert witnesses with specialized training for children's medical psychological, and special needs, despite such experts' lack of special knowledge of and sensitivity to Indian culture where expert testimony did not inject cultural bias or subjectivity.

traditions on their own, but the Nation values that family unit and appears to advocate that they will be one step closer if that familial bond is maintained.

The circuit court disregarded the ICWA preferences, specifically the recommendation of the Nation, and relied solely on the general "best interest" standard. As the State points out in its brief, a uniform standard has been carved out pertaining to custody proceedings involving children covered under the ICWA. The standard is more involved than the normal "best interest" standard. This standard mandates certain presumptions, placements and findings in placing an Indian child. These standards are applied to the states through federal law and regulations, constitutional requirements, various treaties, preceding case law, as well as other legal and equitable principles. This heightened standard not only seeks to place the covered child in a loving environment, which is a paramount concern in every child-custody situation; but also to protect the child, the child's culture and knowledge thereof, the child's self-image, as well as other considerations designed to maintain the national and tribal heritage within the child and the child's relationship with that heritage.

The decision of the circuit court may not have been reversible within the application of the "best interest test of the child" as the test is normally applied, and taking into account the special deference we give to the superior position of the trial judge in child-custody matters. That said, the "best interest test of the child" is not the only issue in this case. The test is somewhat different when applied to children covered by the ICWA. The State, the Nation, and one of the attorneys ad litem all point out that the ICWA placement preferences should be followed absent good cause as defined by section F.3 of the BIA Guidelines. The theory is that the "best interest test" should be weighed against the standard of maintaining the integrity of the Nation, its culture, its children, and its progression through time not to become extinct. The circuit court even stated on the record that "[w]hat the guidelines of ICWA requires me to do is either keep the children together or find a compelling overriding interest not to." The circuit court then moved to a straight best interest analysis and failed to make findings related to whether there is "good cause" to disregard the Nation's recommendation to place the twins with their siblings in appellant's custody. Accordingly, the findings of the circuit failed to comply with the requirements of the ICWA,

and we hold that they were clearly erroneous. We reverse and remand this matter for an award of custody of Alexia and Andria Sanders to appellant.

Reversed and Remanded.

BIRD and ROAF, JJ., agree.

Max C. EASTIN *v.* STATE of Arkansas

CA CR 05-1324 244 S.W.3d 718

Court of Appeals of Arkansas
Opinion delivered December 6, 2006

Hurst, Morrissey & Hurst, PLLC, by: *Q. Byrum Hurst*, for appellant.

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

JOHN B. ROBBINS, Judge. Appellant Max C. Eastin was convicted in a jury trial of manufacturing methamphetamine, use of paraphernalia to manufacture methamphetamine, possession of methamphetamine, and simultaneous possession of drugs and firearms. Mr. Eastin was sentenced to consecutive terms totaling forty years in prison, and now appeals. Mr. Eastin raises the following four points for reversal: (1) The incriminating evidence should have been suppressed because the search warrant was based on a confidential

informant whose reliability was not established; (2) The trial court erred when it refused to require the State to disclose the identity of the confidential informant; (3) There was insufficient evidence to support appellant's convictions; (4) The trial court erred in admitting a transcript of appellant's statement when the original tape no longer existed. We agree with appellant's first and fourth points, and we reverse and remand.

This case began on October 5, 2004, when Officer Pete Dixon obtained a warrant to search a houseboat on Lake DeGray where Mr. Eastin lived with his girlfriend, Teresa Holder. In support of the search warrant, Officer Dixon swore out the following affidavit:

1. Affiant states that on or about July 22, 2004, this Affiant was contacted by an individual that wished to cooperate with the Group 6 Narcotics Enforcement Unit, in that the individual wished to provide information to further felony drug investigations.

2. That this Affiant met with the aforementioned confidential informant and received numerous items of information, including information on the informant in lieu of prosecution.

3. That, included in the information provided, the informant stated that Teresa Holder was living with her boyfriend, Max Easton on a houseboat docked at Iron Mountain Marina on Lake DeGray and that methamphetamine was being manufactured on the boat.

4. That the informant described the houseboat as being light in color with a maroon stripe, that the boat was named the "Not Yet", that it was docked on C Dock at the marina, and that the boat is owned by Max Easton's father, who lives in Hot Springs, Arkansas.

5. That on or about July 24, 2004, this Affiant confirmed through the marina employees that Max Easton did indeed live on the "Not Yet", which is in fact docked on C Dock at the marina, and that a female, presumed to be Teresa Hoder, is commonly there.

6. That on or about October 5, 2004, this Affiant was contacted by Clark County Investigator Will Steed and advised that he was

investigating the theft of a personal watercraft and personal watercraft trailer, and that Max Easton and Teresa Holder were somewhat involved in the investigation. Investigator Steed stated that the watercraft and trailer were both stolen from Iron Mountain Marina and that the watercraft had been recovered in Hot Springs, Arkansas. During the course of the investigation Investigator Steed learned that the theft suspect is a friend of Max Easton's and commonly at Iron Mountain Marina to visit.

7. That this Affiant agreed to contact the aforementioned informant to see if any other information could be obtained with regards to the watercraft theft. This Affiant contacted the informant by phone and learned that the informant has been to the houseboat within the past seventy-two (72) hours. The informant stated that while in the houseboat a glass jar containing a pill soak was seen in plain view. The informant further stated that Teresa Holder possessed methamphetamine for personal use, and that they were undocking the boat at night and going out onto the lake to manufacture the drug.

8. That this Affiant contacted Investigator Steed and advised of the information. Investigator Steed confirmed through marina employees that the "Not Yet" has been going out onto the lake during nighttime hours lately.

When the search was conducted on October 5, 2004, Ms. Holder was the only person present at the boat, and she was injecting methamphetamine when the police arrived. The search of the boat uncovered various items of paraphernalia that are used to manufacture methamphetamine, as well as the finished product. The police also found a loaded handgun in a drawer in the master bedroom, along with coffee filters containing methamphetamine residue and a receipt bearing Mr. Eastin's name.

A pretrial hearing was held on Mr. Eastin's motion to suppress the evidence and his motion to reveal the identity of the confidential informant. At the hearing, Officer Dixon stated that he had not used the informant before, and that the informant had criminal charges pending and contacted the drug task force wanting to give information in exchange for leniency. Officer Dixon stated that the informant advised him that he had been on the boat within the past seventy-two hours and had observed methamphetamine. The informant further advised that the boat was being undocked at night to cook methamphetamine on the lake, al-

though he did not personally observe it because he could not be on the boat while Mr. Eastin was there. The trial court announced at the hearing that it was denying both of appellant's motions.

At the jury trial, Officer Dixon described the methamphetamine manufacturing process and testified that it was being manufactured on the boat. During Officer Dixon's testimony, the State moved to introduce the transcription of a taped statement taken from Mr. Eastin the day after the search. Appellant objected arguing that the tape was the best evidence, but the prosecutor explained that the tape was destroyed in a fire in his office. Appellant's transcribed statement was admitted by the trial court over objection.

In Mr. Eastin's statement, he acknowledged that he lived on the boat, which was owned by his father, and that Ms. Holder had been living with him. While nobody else lived on the boat, he stated that a woman named Holly would come there to cook methamphetamine. Mr. Eastin admitted that he smokes methamphetamine, and that he provided matches and pills for Holly to use in the manufacturing process. Mr. Eastin also indicated that he would sometimes trade the pills for the finished product. He stated that he personally does not know how to manufacture methamphetamine. Mr. Eastin admitted that the handgun found during the search belonged to him. Ms. Holder also gave a statement to the police, and she too informed them that she and appellant provided matches and Sudafed to help Holly manufacture methamphetamine.

There were two other witnesses at trial. Charles Garner testified that he smoked methamphetamine and was on the boat during a cook. He stated that Mr. Eastin was standing next to Holly at the stove while she cooked, so he assumed Mr. Eastin was helping her. Ms. Holder testified that "Holly cooked and Max and I both assisted her. We would get up and get something if she needed it."

Although listed as his third point on appeal, we must consider appellant's sufficiency arguments before any alleged evidentiary errors in order to protect his right to be free from double jeopardy. *See Cook v. State*, 77 Ark. App. 20, 73 S.W.3d 1 (2002). In conducting our review, we examine all the evidence, including the evidence allegedly admitted erroneously, and review the evidence in the light most favorable to the State. *Willingham v.*

State, 60 Ark. App. 132, 959 S.W.2d 74 (1998). We will affirm a conviction if there is substantial evidence to support the verdict. *Cook v. State*, *supra*.

Mr. Eastin has failed to preserve any of his challenges to the sufficiency of the evidence because his directed verdict motions were general in nature. After the State rested, appellant argued "the State had not made a prima facie case," and at the close of the evidence he argued for a directed verdict "based on lack of proof." Rule 33.1(a) and (c) of the Arkansas Rules of Criminal Procedure provide that a motion for directed verdict in a jury trial shall state the specific grounds therefor, and a defendant's failure to do so constitutes a waiver of any question pertaining to the sufficiency of the evidence. *See Grady v. State*, 350 Ark. 160, 85 S.W.3d 531 (2002). Because Mr. Eastin made no specific motion, all of his sufficiency arguments are waived.

Furthermore, even if appellant's sufficiency challenges had been preserved, none would have merit. Mr. Eastin argues that his convictions were not supported by substantial evidence because there was no evidence that the drugs or paraphernalia in the boat belonged to him, and because the evidence showed that it was someone else doing the manufacturing. He also contends that there was insufficient evidence to corroborate the incriminating testimony of his accomplice, Ms. Holder, as required by Ark. Code Ann. § 16-89-111(e)(1)(A) (Repl. 2005). Mr. Eastin further challenges the simultaneous possession conviction of drugs and firearms conviction on the grounds that there was no evidence of any connection between the handgun and controlled substances.

An accomplice's testimony is sufficiently corroborated if the remaining evidence independently established the crimes and tended to connect the accused with their commission. *Tate v. State*, 357 Ark. 369, 167 S.W.3d 655 (2004). In this case, Ms. Holder indicated that appellant was an accomplice in the manufacturing process by providing matches and pills, and by getting things for Holly during the cook. Other independent evidence clearly showed the crimes were committed given that the search uncovered a methamphetamine lab. And Mr. Eastin was connected to the crimes given that he lived there, admitted to the police that he smoked methamphetamine, and told the police he provided ingredients for the cook. Mr. Eastin offers no convincing argument or authority for the proposition that the State failed in its proof because the firearm was not connected with the drugs. The gun

was found in the same boat as the other contraband, in a drawer with methamphetamine residue, and Mr. Eastin admitted to the police that it belonged to him. Although Mr. Eastin may not have been the principal actor in the manufacturing process, substantial evidence supported each of his convictions.

We next address Mr. Eastin's argument that the contraband should have been suppressed because the search was based on an invalid search warrant with no facts bearing on the informant's reliability. In reviewing a suppression challenge, 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. *Davis v. State*, 351 Ark. 406, 94 S.W.3d 892 (2003). We agree with the appellant that the trial court clearly erred in finding there was probable cause to issue the search warrant.

Arkansas Rule of Criminal Procedure 13.1(b) provides:

> The application for a search warrant shall describe with particularity the persons or places to be searched and the persons or things to be seized, and shall be supported by one (1) or more affidavits or recorded testimony under oath before a judicial officer particularly setting forth the facts and circumstances tending to show that such person or things are in the places, or the things are in possession of the person, to be searched. If an affidavit or testimony is based in whole or in part on hearsay, the affiant or witnesses shall set forth particular facts bearing on the informant's reliability and shall disclose, as far as practicable, the means by which the information was obtained. An affidavit or testimony is sufficient if it describes circumstances establishing reasonable cause to believe that things subject to seizure will be found in a particular place. Failure of the affidavit or testimony to establish the veracity and bases of knowledge of persons providing information to the affiant shall not require that the application be denied, if the affidavit or testimony viewed as a whole, provides a substantial basis for a finding of reasonable cause to believe that things subject to seizure will be found in a particular place.

In this case the reliability of the unknown informant was not established, and other than his allegations there was nothing else to provide any probable cause. The informant volunteered the information to the police in an attempt for leniency for another unspecified charge,

but had never been used as an informant prior to then. The police could not corroborate the informant's statements other than to verify that Mr. Eastin lived on the boat with his girlfriend, and that the boat had been going on the lake at night. The informant did not accurately predict any future events, which could have bolstered his reliability. *See Johnson v. State*, 46 Ark. App. 67, 896 S.W.2d 607 (1994).

The State argues that the informant's statements were incriminating and therefore deemed reliable, citing *McCormick v. State*, 74 Ark. App. 349, 48 S.W.3d 549 (2001). However, the informant's statements were not incriminating because he did not implicate himself in any criminal activity. In fact, it was established at the suppression hearing that the informant did not even personally observe any of the methamphetamine cooks, so that information must have been based on hearsay.

In *Stanton v. State*, 344 Ark. 589, 42 S.W.3d 474 (2001), the supreme court held that no additional support for the reliability of an informant is required when he is a good citizen as opposed to a confidential informant whose identity is to be protected. In *Frette v. City of Springdale*, 331 Ark. 103, 959 S.W.3d 734 (1998), the supreme court said that a citizen-informant's tip ranks high on the probability scale as opposed to a confidential informant from the "criminal milieu." In the case at bar, we have a confidential informant from the criminal milieu whose identity is being protected. We hold that these circumstances do not meet the test for reliability.

The State also argues that this issue is not preserved, but we do not agree. Prior to the suppression hearing appellant argued in his written motion, "[t]he reliability of the confidential informant has not been determined by the affiant and should not provide a basis for the issuance of a search and seizure warrant." During the pretrial hearing the trial court stated, "Defendant's motion to exclude evidence will be denied." The State contends that the specific issue being argued on appeal was not developed or ruled on, and cites *Romes v. State*, 356 Ark. 26, 144 S.W.3d 750 (2004), where the supreme court stated, "[t]his court will not address an argument on appeal where the record is 'barren of proof' as to the allegation made." In the present case there was ample proof presented to the trial court bearing on the informant's reliability, or lack thereof, in the form of the affidavit and Officer Dixon's testimony that he had never used the informant in the

past. The issue was raised and denied on the proof presented, and therefore it is preserved for appeal.[1]

Finally, the State contends that even if this argument is preserved and there was no probable cause to issue the search warrant, we should nonetheless affirm this point based on the good-faith exception announced in *United States v. Leon*, 486 U.S. 897 (1984). We disagree. In *United States v. Leon*, *supra*, the Supreme Court held that an officer's objective, good-faith reliance on a facially valid warrant will avoid application of the exclusionary rule in the event that the magistrate's assessment of probable cause is found to be in error. In the present case, Officer Dixon's testimony at the suppression hearing showed that he had no information beyond what was in the affidavit, and he knew the informant had failed to establish any indicia of reliability. This court has recently stated that the objective standard under *Leon* requires officers to have a reasonable knowledge of our rules. *Hampton v. State*, 90 Ark. App. 174, 204 S.W.3d 572 (2005). It was the State's burden to establish applicability of the good-faith exception, *Hoay v. State*, 348 Ark. 80, 71 S.W.3d 573 (2002), and we hold that the State failed to meet its burden.

Mr. Eastin's next argument is that the trial court erred in failing to disclose the identity of the confidential informant. He contends that he needed the informant's testimony at both the suppression hearing and at trial to show that all of the informant's information related to criminal acts by Ms. Holder and not the appellant.

Pursuant to Ark. R. Crim. P. 17.5(b), disclosure is not required where the informant's identity is a prosecution secret and failure to disclose will not infringe upon the constitutional rights of the defendant. A defendant has the burden to show that the informant's testimony is essential to his defense. *Hill v. State*, 314 Ark. 275, 862 S.W.2d 836 (1993).

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[1] We recognize that after the trial court denied appellant's motion to disclose the identity of the informant, appellant's counsel asserted that he could not proceed on his motion to exclude evidence "because obviously without the identity of the confidential informant it would be impossible to attack his credibility." However, we do not view this as an abandonment of his motion to exclude the contraband but rather an assertion that there would be no additional witnesses to call at the hearing. Neither the trial court nor the State deemed the argument abandoned either, given that the trial court subsequently denied the motion and the State gave extensive argument as to why the motion should be denied on its merits.

The trial court did not abuse its discretion in failing to compel disclosure of the informant because it was not needed for appellant's defense at either of the hearings. At the suppression hearing, the affidavit outlining the informant's knowledge was before the trial court and any further testimony by the informant was unnecessary. At the trial, the State did not rely on the informant's hearsay statements in proving the elements of its case. Instead, it relied on the items seized during the search, the testimony of the police and other witnesses, and appellant's inculpatory statement. Thus, the appellant had no need to cross-examine the informant about his knowledge.

Appellant's remaining argument is that the trial court erred in admitting a transcription of his statement to the police when the original tape no longer existed. We agree that the trial court abused its discretion in this regard based on our supreme court's holding in *Hamm v. State*, 296 Ark. 385, 757 S.W.2d 932 (1988). In that case, the appellant's statement was taped, but the tape was erased when it was reused. At trial, the appellant moved to suppress the statement because the State introduced a transcription of the tape without first disclosing the recorded statement pursuant to Ark. R. Crim. P. 17.1(a)(ii). The trial court allowed the transcription in evidence, but the supreme court reversed, holding that the appellant was prejudiced in that the recording was the best evidence, and without it the appellant had no way to determine whether the transcription was accurate. The supreme court went on to say that, on retrial, the trial court could allow oral testimony about the confession into evidence. Although the State asserts in the instant case that the tape was destroyed by accident and not through any bad faith, this fact is immaterial. Under the reasoning of *Hamm v. State, supra*, the transcription was inadmissible. This result is not intended to punish the State for any bad faith, but rather to protect the rights of the accused.

The State alternatively argues that even if the transcription was erroneously admitted the error was harmless when considering the overwhelming evidence of appellant's guilt. However, we cannot engage in any harmless-error analysis in light of the trial court's erroneous admission of the evidence obtained as a result of the illegal search.

Reversed and remanded.

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

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

ROBERT J. GLADWIN, Judge, dissenting. This court should not address appellant's motion to suppress because he abandoned it at the preliminary hearing and thus it is not preserved for review. Therefore, I would affirm.

On February 1, 2005, appellant filed a motion to exclude evidence. In that motion the only material allegation was that the reliability of the confidential informant had not been determined by the affiant and should not provide a basis for the issuance of the search warrant. He also filed a motion to reveal the identity of the confidential informant. The first issue addressed by the trial court during the preliminary hearing was the identity of the confidential informant. The trial court found that the appellant's motion to provide the identity of the confidential informant should be denied. After a short colloquy, the following exchange took place:

> COURT: All right the record is so noted, and we'll proceed to the motion to exclude evidence.
>
> MR. JOHNSON: Well your honor we can't proceed at this point because obviously without the identity of the confidential informant, it would be impossible to attack his credibility.
>
> COURT: All right the defendant's motion to exclude evidence will be denied.

Following this exchange, the prosecutor asked the court to go on the record to explain her reasons in response to the motion. After the prosecutor's short statement, appellant's counsel stated, "I thought the court had already ruled." The prosecutor thanked the court for humoring her and the discussion moved to the question of a continuance.

This court will not address an argument on appeal where the record is "barren of proof" as to the allegations made. *Munnerlyn v. State*, 292 Ark. 467, 470, 730 S.W.2d 895, 897 (1987). It is the appellant's burden to present a case before the trial court that fully and completely develops all the issues. *See Raymond v. State*, 354 Ark. 157, 118 S.W.3d 567 (2003); *Walker v. State*, 314 Ark. 628, 864 S.W.2d 230 (1993). Moreover, it is the appellant's burden to obtain a clear ruling on an issue from the trial court. *Misskelley v.*

State, 323 Ark. 449, 915 S.W.2d 702 (1996), *cert. denied*, 519 U.S. 898 (1996); *Bowen v. State*, 322 Ark. 483, 911 S.W.2d 555 (1995), *cert. denied*, 517 U.S. 1226 (1996).

In the present case appellant clearly abandoned his argument. When the trial court proceeded from the motion to provide the identity of the confidential informant to the motion to suppress, appellant's counsel stated that he could not proceed and made no other statement. The prosecutor's statement is mere surplusage as the court denied the motion based upon appellant's failure to proceed on his motion. It is clear that the court thought appellant had abandoned his motion by his immediate denial.

I agree with the majority that the trial court erred in admitting the transcription of appellant's statement to the police when the original tape no longer existed. *See Hamm v. State*, 296 Ark. 385, 757 S.W.2d 932 (1988). However, the error was harmless considering the overwhelming evidence of appellant's guilt. *See Lewis v. State*, 74 Ark. App. 61, 48 S.W.3d 535 (2001). Therefore I would affirm appellant's conviction.

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

KAREN R. BAKER, Judge, dissenting. Although I agree with Judge Gladwin that the case should be affirmed, I dissent separately for two reasons. First, appellant could not abandon an argument that he never made. The written motion merely stated that the reliability of the confidential informant had not been determined by the affiant and should not provide a basis for the issuance of a search and seizure warrant. The written motion failed to cite any case law or factors to analyze the facts of the case, and, in fact, failed to cite any facts regarding the affidavit or the circumstances giving rise to its creation. When the trial court announced it was ready to hear appellant's motion to suppress, appellant responded that he could not proceed. The appellant had the burden of proving the invalidity of the search and the supporting documents. *Pritchard v. State*, 258 Ark. 151, 523 S.W.2d 194 (1975). He made no argument for the trial court to consider. Therefore, the trial court did not err in denying the motion.

Second, the affidavit was sufficient on its face to support the issuance of the warrant. The affidavit sworn by Officer Dixon allowed the trial court to determine that the informant was sufficiently reliable, including the officer's independent corroboration of the houseboat's location, specific description, and the

appellant's method of operation. *See Weatherford v. State*, 93 Ark. App. 30, 216 S.W.3d 150 (2005).

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

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

Id. at 118, 959 S.W.2d at 741 (quoting *Bybee*, *supra*). The *Frette* court termed this explanation of the satisfaction of the factors a useful analytical framework and applied them to determine that an informants tip carried with it sufficient indicia of reliability to justify an investigatory stop. *Frette*, 331 Ark. at 118, 959 S.W.2d at 741. Because the informant in *Frette* was identifiable and thus subject to prosecution for making a false report, he was found to have greater reliability and satisfy the first factor. The informant's personal observation of the criminal activity gave him a reliable basis of knowledge and satisfied the second factor. The third factor was satisfied when the informant's information was corroborated by a law enforcement officer. *Id.* at 121, 959 S.W.2d at 743.

Under the totality of the circumstances in the instant case, and applying the factors to determine sufficient indicia of reliability of an informant, the trial court committed no error in denying the appellant's motion to suppress. Contrary to the majority's

analysis, there were sufficient facts to support the reliability of the informant. Following the reasoning used in both *Weatherford* and *Frette*, the reliability of the informant was established by the fact that he was identifiable and therefore subject to prosecution for making a false report regarding appellant's illegal activity. Additionally, the informant provided the information regarding appellant in lieu of prosecution for the informant's own illegal activity. If the information provided proved to be false, the informant was not only subject to prosecution for providing a false report, but also subject to losing any leniency regarding prosecution for his own previous acts. Furthermore, the information was based on personal knowledge and observation of the informant, observation which was verified again by Officer Dixon upon confirming the location of the houseboat and confirming through employees of the dock that appellant and his girlfriend did live on the boat and had been taking the boat out at night.

The majority dismisses the police officer's confirmation of the informant's statements that the houseboat was located at a particular place, that appellant and his girlfriend lived on the boat, and that the boat had been going out on the lake at night. Perhaps if the officers had waited to board the boat until the next time that appellant was moving the houseboat out onto the lake at night, the majority would have found sufficient corroboration. However, while accurately predicting future events may bolster reliability, accurate prediction is not required to establish reliability. Neither is it necessary under these facts. The trial court in this case had before it an officer's confirmation of not only the location and description of the vehicle/houseboat, but also the previous activity of moving the boat onto the lake at night as described by the informant. While none of this confirmed activity is illegal, nothing in our statutory or case law requires corroboration of the illegal activity itself. It only requires that the trial court determine that there are sufficient facts to establish the reliability of the informant which this trial court did.

Another disturbing aspect of the majority's analysis is its reliance on evidence at the suppression hearing that the informant did not personally observe any of the "methamphetamine cooks" so that the information must have been based on hearsay. The affidavit itself states that methamphetamine was being manufactured on the boat and that while on the houseboat, the informant had observed in plain view a glass jar containing a pill soak. A pill

soak is a preparatory step in the manufacture[1] of methamphetamine. *See Saul v. State*, 365 Ark. 77, 225 S.W.3d 373 (2006). This step in the manufacturing process is so critical that it has led to increased regulation and record keeping of the pills purchased by citizens of this State under no suspicion of illegal activity. *See* Combat Methamphetamine Epidemic Act of 2005, Pub. L. No. 109-177, 120 Stat. 256 (codified in scattered sections of 21 U.S.C. and 42 U.S.C.); Act of Feb. 22, 2005, No. 256, 2005 Ark. Acts 875. It is difficult to see how the observation of set forth in the affidavit could not support the issuance of a warrant. His observation certainly satisfies the second prong of the test discussed in *Frette*.

Applying the factors used to determine sufficient indicia of reliability of an informant, the trial court did not err in its denial of the appellant's motion to suppress.

Tina BAILEY *v.* Mark BAILEY

CA 06-660 244 S.W.3d 712

Court of Appeals of Arkansas
Opinion delivered December 6, 2006

[Rehearing denied January 24, 2007.]

[1] "Manufacture" means the production, preparation, propagation, compounding, conversion, or processing of a controlled substance, either directly or indirectly by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis. Ark. Code Ann. § 5-64-101(m) (Repl. 1997).

Hilburn, Calhoon, Harper, Pruniski & Calhoun, LTD., by: *Sam Hilburn* and *Traci LaCerra*, for appellant.

Osment Law Firm, P.A., by: *Pamela S. Osment*, for appellee.

SAM BIRD, Judge. Tina Bailey brings this appeal from a decree of the Faulkner County Circuit Court filed on March 15, 2006, which granted her a divorce from Mark Bailey and ordered the parties to share joint custody of their two minor children. Appellant contends that the trial court abused its discretion by awarding joint custody, by failing to award sufficient alimony to her, and by dividing the marital debt equally. We reverse and remand on all points.

Joint Custody

Joint custody or equally divided custody of minor children is disfavored in Arkansas; however, Ark. Code Ann. § 9-13-101(b)(1)(A)(ii) as amended in 2003 specifically permits the court to consider such an award. *Dansby v. Dansby*, 87 Ark. App. 156, 189 S.W.3d 473 (2004). Equally divided custody of minor children may be ordered where the circumstances clearly warrant it; if it is shown that the interest of the child is better fostered by divided custody, we have held that this is a proper order for a court to make. *Hansen v. Hansen*, 11 Ark. App. 104, 666 S.W.2d 726 (1984). A crucial factor bearing on the propriety of joint custody is the parties' mutual ability to cooperate in reaching shared decisions in matters affecting the child's welfare. *Dansby*, *supra*.

Our law is well settled that the primary consideration in child custody is the child's best interest at the time of the final hearing as demonstrated by the record. *Hobbs v. Hobbs*, 75 Ark. App. 186, 55 S.W.3d 331 (2001). The time for parties to demonstrate the mutual ability to cooperate in reaching shared decisions in matters affecting a child's welfare so as to justify an award of joint custody is before and at the hearing that is the basis of the joint-custody award, not some later time in an unknown future based on unproven facts. *Id.*

Here, stating that its decision was not easy, the court ruled from the bench that both parents were fit to have custody but that it would grant the joint custody requested by appellee. The court observed, "I think they can work together now that the financial strains aren't there as much." Appellant contends that the parties are not able to communicate or to reach shared decisions regarding what is best for the minor children.

Appellant testified that she had agreed to temporary joint custody of "one week on and one week off" because appellee wanted it desperately and she did not want to keep him from the children, but she stated that the joint custody had not worked. She agreed that the boys were doing well in school although the younger son's behavior had gotten worse in the last year. She said that the boys had a good relationship with appellee, that she did not mind his seeing them whenever he wanted to, but that she did not want the boys moved physically from one house to another.

Appellant asserts that appellee has undermined her role as a parent by a pattern of manipulation, as exemplified in the following instances to which she testified. Appellee purchased a dirt bike for one son despite appellant's voicing to appellee her preference that it not be bought and despite her safety concerns. Appellee did not discuss two trips with her prior to planning them, each of which included days that were scheduled to be hers with the boys: she found out from the boys about a ski trip to Canada, and appellee announced upon returning from the six-day ski trip that he was taking the boys duck hunting the next weekend. Appellant appeared at the younger boy's classroom for his school Christmas party, as had been previously planned, only to find out from his teacher that he had been checked out by appellee: appellant kept calling appellee until she found out that the two of them were in Little Rock, shopping for Christmas. Appellant also testified that the parties did not agree on the boys' discipline: she said that her method began with talking to them and administering punishment according to the seriousness of what had been done, while appellee "gets to the boiling point, . . . just blows up at them," and once hit the younger son in the head with the barrel of a paint-ball gun for failing to clean up his room.

Appellant also argues that appellee is of the mind-set that he is the authoritative figure, with appellant to be submissive and subjective to him, and that joint custody enables him to control his ex-wife. Appellee testified regarding a list he had written in preparation for counseling issues. The list and his testimony reflect his belief that, in the biblical sense, the wife should be submissive and subjective to her husband's wishes and authority. Appellee stated that God created man to be the leader of the house and to establish the environment so that a woman would want to be submissive, that a husband and wife were equals in terms of making decisions about their children, and that appellant would no longer have to be submissive after divorce because she no longer would be

his wife. He testified that he disagreed that he and appellant could not get along as husband as wife, and he said that they were divorcing because she wanted the divorce. He said that they had been able to communicate in terms of their temporary agreement of each having the boys for a week, but that appellant failed to extend parental courtesy to him in not telling him about the younger son going to his heart doctor for a checkup and in not consulting him about the older going to First Baptist youth group on Wednesday nights.

Asking the trial court to award joint custody, appellee stated that the temporary custody had gotten into a decently normal routine with flexibility about visitation; he stated that he was extremely concerned that appellant might choose to relocate geographically if he did not share custody with her. He said that, shortly before the hearing, he had gone to the house when appellant contacted him about the younger son's stubbornness in not wanting to go to a basketball practice; appellee finally took him and worked with him at practice. He said that on other occasions, "I just [had] to reign in as the father because I'm the father figure. That's the way the good Lord made the father is to be the ultimate authority in the house. . . . So there are times when I've had to intervene at her request, and I don't mind doing that."

The appellate court does not disturb a circuit court's findings unless they are clearly against a preponderance of the evidence, giving due regard to the opportunity of the court to judge the credibility of the witnesses. *Hansen, supra.* In cases involving child custody a heavier burden is cast upon the circuit court to utilize to the fullest extent all of its powers of perception in evaluating the witnesses, their testimony and the children's best interest. *Id.* This court has no such opportunity and we know of no case in which the superior position, ability and opportunity of a circuit court to observe the parties carries as great a weight as one involving minor children. *Id.*

We do not depart from these well established tenets. However, considering the attitudes of the parents toward each other and toward their respective roles before and at the date of the hearing, the fact that a basis of appellee's request for joint custody was his concern that appellant might choose to relocate if she had sole custody, and the parties' differing opinions as to disciplining the children, we conclude in the present case that the trial court's finding that the parties could work together was clearly erroneous. Thus, the court's finding that the children's best interest would be

fostered by ordering joint custody is also clearly erroneous. The award of joint custody is reversed and remanded.

The Award of Alimony

The trial court ordered appellee to pay appellant alimony in the amount of $250 per week for six months from the date of the divorce decree. As her second point on appeal, appellant contends that the trial court abused its discretion by failing to award sufficient alimony to her.

The decision whether to award alimony is a matter that lies within the trial judge's sound discretion, and on appeal, this court will not reverse a trial judge's decision to award alimony absent an abuse of that discretion. *Cole v. Cole*, 89 Ark. App. 134, 201 S.W.3d 21 (2005). The primary factors that a court should consider in determining whether to award alimony are the financial need of one spouse and the other spouse's ability to pay. *Id.* A court may also consider other factors, including the parties' financial circumstances; the amount and nature of the parties' income, both current and anticipated; the extent and nature of the parties' resources and assets; the parties' earning ability and capacity. *Id.* Section III(e) of Administrative Order No. 10 of the Arkansas Supreme Court also gives guidance on spousal support: "The [family support] chart assumes that the custodian of dependent children is employed and is not a dependent. . . . For final hearings, the court should consider all relevant factors, including the chart, in determining the amount of any spousal support to be paid." *In re Admin. Order No. 10*, 347 Ark. App'x 1064, 1069 (2002) (per curiam).

The parties here were married for twenty-four years and had two sons, aged nine and fourteen at the time of the divorce. Appellee worked throughout the marriage and earned an average take-home pay of $7000 a month from his primary employment; he also received income from being on the Quorum Court and from refereeing high school, college, and arena league football games. Appellant worked at Acxiom from 1990 until the birth of their first child in 1992, when she quit to care for him. She went back to work part-time there from 1993 or 1994 until 2001, and worked full time for a year in 2002 after appellee was laid off from the company. Except for holiday employment in 2005 at JC Penney and Belk, she did not work again before the divorce hearing in February 2006. Appellant testified that she had interviewed with JC Penney, Belk, Oxford Learning, J.K. Kirkland &

Associates, and another employment service; a list introduced at the hearing shows that she sent resumes or had interviews for over thirty jobs. She was not employed, however, at the time of the hearing.

Here, the court ruled that sale proceeds from the marital house were to apply to satisfaction of the mortgage, an equity loan, and remaining debt. Appellant was awarded half of the parties' retirement accounts: Merrill Lynch had an approximate balance of $125,000; Edward Jones was approximately $11,000; Fidelity Investments was approximately $92,000; and there was an IRA of $1,500. Appellant and appellee each were to retain possession of their own life insurance policies and to pay the premiums.

It is clear to us that appellant has no assets at this time, other than those awarded by the court, upon which to rely for support. She worked part time for approximately half of the fourteen years from the birth of the parties' first child until the time of divorce; she worked full time for one year in 2002 and, as of 2006, did not work again except for one holiday season. Should she withdraw these retirement and life insurance funds, she undoubtedly will suffer tax disadvantages and incur substantial penalties, thus lessening her assets even more. She has no other assets or resources. Her current needs far outweigh appellee's ability to provide alimony for six months that amounts to less than one month's income for him. We hold that the trial court abused its discretion in making an insufficient award of alimony, and we remand for action in keeping with our decision.

Division of Marital Debt

The trial court ordered that each party pay one-half of marital debts amounting to $78,916.33. The written order reads in pertinent part:

> The following are marital debts and the responsibility for paying these debts shall be divided equally with each party paying one-half (½) the debts:

HSBC	$ 4,204.00
Merrill Lynch	$ 10,295.18
Chase	$ 10,524.38
Chase	$ 3,000.00

Bank One	$ 11,558.49
MBNA	$ 12,381.00
American Express	$ 4,900.00
Colony Shop	$ 600.00
Conway Regional	$ 225.00
Bank of America	$ 300.88
Check Alert	$ 399.00
First Security Bank	$ 528.81
Bailey Paint Loan	$ 13,000.00
Mary Cook Loan	$ 5,000.00

> Until these Debts are paid in full the [appellee] shall assume responsibility for paying the credit cards that are in his name except the Chase card with a balance of $3,000.00, the MBNA, Colony Shop, Check Alert and First Security cards/debts which the [appellant] shall assume responsibility for paying.

The evidence showed that the parties drove nice cars, traveled, and after 1992 had been able to afford appellant's working only part time or not at all in order to stay home except for one year. Part of the parties' debt was accumulated from a part-time business that appellant once pursued as a hobby, part was attributable to charges that she made when appellee was laid off, and further debt was acquired during the pendency of the divorce. Large-ticket items purchased by appellee included a $12,000 Polaris; the Honda dirt bike for a son; the $2,300 ski trip with the boys; guns; and a Toyota from credit-card equity.

An allocation of the parties' debt is an essential item to be resolved in a divorce dispute, and it must be considered in the context of the distribution of all of the parties' property. *Williams v. Williams*, 82 Ark. App. 294, 108 S.W.3d 629 (2003). A judge's decision to allocate debt to a particular party or in a particular manner is a question of fact and will not be reversed on appeal unless clearly erroneous. *Id.* It is not error to determine that debts should be allocated between the parties in a divorce case on the basis of their relative ability to pay. *Id.* Furthermore, the effect of an allocation of debt on a spouse's lifestyle is a valid consideration; the supreme court has affirmed unequal debt allocations where a husband was able to pay the debts from income without materially changing his style of life but the wife could not pay the debts from

her income without disposing of assets to pay part of the debt. *Id.* (citing *Richardson v. Richardson*, 280 Ark. 498, 503, 659 S.W.2d 510, 513 (1983)).

In light of the award of marital property, the trial court abused its discretion in ordering appellant to pay half of these marital debts. *See Williams, supra*; *In re Admin. Order No. 10, supra.* It is not economically feasible for appellant to deplete the property awarded to her as half of the marital property in order to pay half of the debt, and appellee has far more ability to earn substantial income than she does at this time. Were this award to remain in effect, appellant would be reduced to poverty.

The division of marital debt is reversed and remanded. Although this court has the power to decide equity cases de novo on the record, we may decline to do so if we conclude that justice would be better served by a remand to the trial court. *Reaves v. Reaves*, 63 Ark. App. 187, 975 S.W.2d 882 (1998). We think it appropriate to remand this case to the trial court for further consideration of the disposition of marital property and the division of debt in accordance with the equities of this case.

The award of joint custody is reversed, and the case is remanded for determination of custody and related issues. The division of debt, to be considered along with the award of alimony, is also reversed and remanded.

Reversed and remanded.

HART and GRIFFEN, JJ., agree.

Carl D. KING *v.* PEOPLEWORKS, Zurich American Insurance Company, Teletouch Communications, Inc., & Federal Insurance Company

CA 06-366 244 S.W.3d 729

Court of Appeals of Arkansas
Opinion delivered December 6, 2006

Baxter, Jensen, Young & Houston, by: *Terence C. Jensen*, for appellant Carl D. King.

Rieves, Rubens & Mayton, by: *Michael R. Mayton* and *Michael C. Stiles*, for appellees/cross-appellees Peopleworks and Zurich American Insurance Company.

Huckabay, Munson, Rowlett, & Moore, P.A., by: *Jarrod Parrish* and *Carol Lockard Worley*, for appellees/cross-appellants Teletouch Communications and Federal Insurance Company.

SAM BIRD, Judge. This case arises from an opinion of the Workers' Compensation Commission issued on December 19, 2005. The Commission found that Carl D. King sustained a compensable aggravation to his back while working for Teletouch Communications, Inc. on February 7, 2001; that Teletouch was liable for reasonably necessary medical treatment provided in connection with the aggravation; that King was entitled to temporary total disability compensation from September 7, 2001 until November 10, 2001; and that Teletouch was liable for the compensability of the temporary total disability. King appeals the Commission's decision and Teletouch cross-appeals, each raising one point. A third party in this case is appellee and cross-appellee Peopleworks, King's former employer who had accepted compensability of a back injury that King sustained on December 15, 1999.

King contends that the Commission erred in finding that he was not entitled to temporary total disability benefits after November 10, 2001, the date on which he began drawing unemployment benefits. Teletouch contends that substantial evidence does not support the Commission's finding that on February 7, 2001 King suffered an aggravation rather than a recurrence of a compensable injury sustained on December 15, 1999. Peopleworks contends that substantial evidence supports the Commission's findings that King was not entitled to temporary disability benefits after November 10, 2001 and that he sustained an aggravation to his 1999 injury on February 7, 2001. Alternatively, Peopleworks contends that King's latest back problems were traceable to a chronic back condition from the late 1980s. We reverse and remand on direct appeal; we affirm on cross appeal.

The following stipulations and undisputed facts, presented at a hearing before the administrative law judge on October 7, 2004, are pertinent to the issues now before us. In October 1990 King underwent a laminectomy at L5-S1 after sustaining a back injury while working for an employer who is not involved in the present case. In 1997 King began working for Peopleworks, and in December 1999 he sustained the back injury that Peopleworks accepted as compensable. Peopleworks paid for some medical benefits and for a laminotomy at L4-5 performed by Dr. Wilbur Giles on June 30, 2000. King missed no work due to his back

injury until the time of his surgery; he was off work after surgery and received temporary total disability benefits until reaching the end of his healing period no later than August 21, 2000, and returning to light-duty work on August 22, 2000. King's employment continued after Teletouch purchased Peopleworks in September 2000. Dr. Giles released King to full duty on October 22, 2000, and he worked until Teletouch terminated him on September 7, 2001.

King requested additional treatment after the incident of February 7, 2001, turning first to Peopleworks and then to Teletouch. Each employer controverted and denied the claim, leading to the litigation that has resulted in the present appeal.

Temporary Total Disability

King contends on appeal that the Commission erred in determining that he was not entitled to temporary total disability benefits after November 10, 2001, when he began receiving unemployment benefits. He argues that the law and evidence do not support a finding that he was precluded from receiving temporary total disability benefits after the thirty-nine weeks that he received unemployment benefits. He asserts that the Commission's opinion should be reversed in part, allowing him to draw temporary total disability benefits after his receipt of unemployment compensation benefits ended. We agree that the Commission erred. For the reasons explained herein, we reverse and remand for a determination of whether King was entitled to additional temporary total disability benefits after he began receiving unemployment benefits.

The Commission determined that King entered a healing period for an aggravation as the result of an independent incident occurring on February 7, 2001, but was not totally incapacitated to earn wages at that time because he continued to work. In determining the time period for which King was entitled to temporary total disability compensation, the Commissioned reasoned:

> [Teletouch] terminated the claimant's employment on or about September 7, 2001.... The record demonstrates that the claimant began receiving unemployment compensation on or about November 10, 2001. A claimant's receipt of unemployment benefits makes him ineligible to receive temporary total disability compensation. *See*, Ark. Code Ann. § 11-9-506; *Allen Canning Company v. Woodruff*, CA 04-1364 (Ark. App. 9-7-2005).

The Commission found that King was entitled to temporary total disability compensation from September 7, 2001 until November 10, 2001 and that Teletouch was liable for this compensation.

Temporary total disability is that period within the healing period in which the employee suffers a total incapacity to earn wages. *Ark. State Highway Dep't v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). The healing period is "that period for healing of an injury resulting from an accident." Ark. Code Ann. § 11-9-102(12) (Supp. 2005). Whether the healing period has ended is a factual determination to be made by the Commission. *Ketcher Roofing Co. v. Johnson*, 50 Ark. App. 63, 901 S.W.2d 25 (1995). Arkansas Code Annotated section 11-9-506 (Repl. 2002) further specifies:

> *Limitations on compensation — Recipients of unemployment benefits*
>
> (a) Any other provisions of this chapter to the contrary notwithstanding, no compensation in any amount for temporary total, temporary partial, or permanent total disability shall be payable to an injured employee with respect to any week for which the injured employee receives unemployment insurance benefits . . . .
>
> (b) Provided, however, if a claim for temporary total disability is controverted and later determined to be compensable, temporary total disability shall be payable to an injured employee with respect to any week for which the injured employee receives unemployment benefits but only to the extent that the temporary total disability otherwise payable exceeds the unemployment benefits.

Teletouch asserts that King failed to establish that he remained in his healing period and totally incapable of earning wages after his unemployment ran out. Teletouch points to King's testimony that he was physically capable of doing the work when he was terminated, that he was not planning on quitting due to his back problems, and that he indicated on his application for unemployment benefits that he was ready, willing, and able to go to work. Teletouch asserts that King's notation of "back problems" on the unemployment application, although establishing that he wanted to avoid jobs that required heavy lifting, does not establish that he remained in a healing period and does not indicate that he was totally incapacitated.

Similarly, Peopleworks asserts that King failed to establish that he was totally and completely incapacitated to earn wages and that he was within his healing period. Peopleworks essentially

repeats the arguments of Teletouch regarding King's testimony that he was capable of working at the time of his termination. Additionally, Peopleworks argues that King never re-entered a healing period after his release to full-duty, especially in connection with his 1999 compensable injury, before the incident of February 7, 2001.

In *Allen Canning Co. v. Woodruff*, 92 Ark. App. 237, 212 S.W.3d 25 (2005), this court found substantial evidence to support the Commission's finding that the claimant failed to prove that he was totally incapacitated from earning wages after July 18, 2003. We wrote:

> In arriving at this conclusion, the Commission relied upon several factors that were set forth in its opinion-the physical therapist's August 8, 2003 discharge report that stated that as of July 18, 2003, the last day appellee was seen, "significant improvement was noted"; the fact that appellee filed for and began receiving unemployment compensation benefits shortly after July 18, 2003; appellee's own testimony at the hearing that he believed that he could return to some type of work at Allen Canning and that he had made several job inquiries; and the fact that there was no medical evidence indicating that appellee was totally incapacitated from working after July 18. Obviously, if appellee was applying for jobs, he was holding himself out as able to work. All of these findings support the Commission's decision that appellee was not totally incapacitated from earning wages after July 18, 2003, and therefore was no longer entitled to temporary-total disability benefits.
>
> Furthermore, as pointed out by appellant, appellee's receipt of unemployment compensation benefits makes him ineligible to receive temporary-total disability benefits. Arkansas Code Annotated section 11-9-506(a) (Repl. 2002) provides in pertinent part that "no compensation in any amount for temporary total disability shall be payable to an injured employee with respect to any week for which the injured employee receives unemployment benefits under the Arkansas Employment Security Law." The Commission's determination that appellee's temporary-total disability benefits terminated as of July 18 is also affirmed.

92 Ark. App. at 246-47, 212 S.W.3d at 31.

We agree with King that *Allen Canning Co., supra*, does not stand for the proposition that a claimant's receipt of unemployment benefits acts as a complete bar to temporary total disability

benefits when the receipt of unemployment benefits ends. The *Allen* court's reference to Ark. Code Ann. § 11-9-506 followed our holding that substantial evidence supported the Commission's finding that appellee failed to prove that he was totally incapacitated from earning wages after he began receiving unemployment benefits.

In the present case, King testified that people helped him with his work at Teletouch after the February 7, 2001 incident, and he stated that the reason he was given for his termination on September 7, 2001 was that he was untrainable and had missed so much time from work. The Commission, however, did not determine whether King was or was not totally incapable of earning wages. Furthermore, although the Commission found that King entered a healing period on February 7, 2001, it did not address whether the healing period had ended.

Subsection (b) of Ark. Code Ann. § 11-9-506 provides that when a claim for temporary total disability is controverted and later determined to be compensable, temporary total disability shall be payable to an injured employee with respect to any week for which the employee receives unemployment benefits to the extent that the temporary total disability otherwise payable exceeds the unemployment benefits. King's claim falls within this subsection because it was controverted in its entirety but was later determined to be compensable for the time period September 7 through November 10, 2001.

Under the terms of the statute, and if King remained within his healing period and was totally incapacitated from earning wages, he was entitled to receive temporary total disability benefits to the extent that they exceeded his unemployment compensation from September 7 through November 10, 2001. Furthermore, he was entitled to receive full benefits after his receipt of unemployment compensation ended if he remained in his healing period and suffered a total incapacity to earn wages. Therefore, as a matter of law, the Commission erred in determining that King was not entitled to temporary total disability compensation once he began receiving unemployment benefits.

We reverse the Commission's finding that King's entitlement to temporary total disability benefits stopped on November 10, 2001, merely because he began receiving unemployment benefits on that date. The case is remanded to the Commission for a factual determination regarding whether King remained within

his healing period and suffered a total incapacity to earn wages after his receipt of unemployment compensation began. Should the Commission find that King indeed remained within his healing period and was totally incapacitated from earning wages after November 10, 2001, the Commission must also determine the amount of benefits to be awarded him under Ark. Code Ann. § 11-9-506(b).

Aggravation of Pre-Existing Back Condition

Teletouch contends on cross appeal that substantial evidence does not support the Commission's finding that King sustained an aggravation rather than a recurrence of his compensable 1999 injury. We do not agree.

A recurrence exists when the second complication is a natural and probable consequence of the prior injury; it is not a new injury but merely another period of incapacitation resulting from a previous injury. *Weldon v. Pierce Bros. Constr.*, 54 Ark. App. 344, 925 S.W.2d 179 (1996); *Atkins Nursing Home v. Gary*, 54 Ark. App. 125, 923 S.W.2d 897 (1996). An aggravation is a new injury resulting from an independent incident and, being a new injury with an independent cause, must meet the requirements for a compensable injury. *Crudup v. Regal Ware, Inc.*, 341 Ark. 804, 20 S.W.3d 900 (2000). "Compensable injury" is defined, in part, at Ark. Code Ann. § 11-9-102(4)(A)(i) (Supp. 2005):

> An accidental injury causing internal or external physical harm to the body . . . arising out of and in the course of his employment and which requires medical services or results in disability or death. An injury is "accidental" only if it is caused by a specific incident and is identifiable by time and place of occurrence.

Furthermore, a compensable injury must be established by medical evidence, supported by objective findings. Ark. Code Ann. § 11-9-102(4)(D). Objective findings are those findings which cannot come under the voluntary control of the patient. *Id.* § 11-9-102(16)(A)(i).

Regarding the incident of February 7, 2001, the Commission noted King's testimony that he was in the process of checking a transmitter for Teletouch, that he squatted down and opened his laptop, that he had a severe pain in his back and right side when he started to get up, and that it knocked him back down to the ground. Further examining the evidence, the Commission wrote:

> The Full Commission finds that this incident [of February 7, 2001] was an aggravation/accidental injury. We note the physical therapist's finding on March 5, 2001, "Patient presents with a decreased lumbar lordosis." *Dorland's Illustrated Medical Dictionary*, 28th Ed., defines "lordosis" in part as an "abnormally increased curvature" of the spine. The claimant credibly testified that his back was "crooked" following the February 7, 2001 specific incident.

The Commission's opinion cited *Estridge v. Waste Management*, 343 Ark. 276, 281, 33 S.W.2d 167, 171 (2000), where our supreme court held, "Appellant's treating physician found straightening of the curve in the spine, which is a sign that is normally associated with muscle spasm in the straightened area. This finding *is* objective evidence of injury with no evidence to the contrary." Also noting the holding of *Continental Express, Inc. v. Freeman*, 339 Ark. 142, 4 S.W.3d 124 (1999), that muscle spasms reported by a physician or physical therapist can constitute objective medical findings, the Commission determined that "in the present matter . . . a physical therapist's notation of 'decreased lumbar lordosis' is an objective medical finding establishing a new injury."

Teletouch contends on appeal that the Commission erroneously based its ruling "upon the presence of a decrease in the lordotic curve and not any comparison of the diagnostic studies performed before and after appellant's surgery in June of 2000." Rather than disputing the presence of lordosis and muscle spasm subsequent to the February 2001 incident, Teletouch argues that the evidence is not dispositive because King had spasms before the date of the incident.

Teletouch points out that the decision in *Estridge, supra*, did not involve a determination of whether the claimant suffered a recurrence or aggravation. It asserts that the present issue is whether King sustained a distinct and new injury, rather than whether there was objective evidence of injury, and that the Commission erroneously found lordosis to be evidence of a new injury separate and apart from King's previous back problems. It argues that King experienced an increased need for medical treatment due to a recurrence of the condition for which he had continued to receive treatment until a month before the incident on February 7, 2001. It notes that King had scoliosis, that medical records such as physician's notes of January 2, 2001, reported King's "chronic low back pain," and that King testified that his back problems continued and remained in the same location as

before the incident of February 2001. It points to medical evidence that King suffered from problems in both sides of his body after surgery in June 2000, and it asserts that fair-minded people could not conclude that appellant suffered a bulging disc in his back and decreased lumbar lordosis as a result of "standing up from the kneeling position." Teletouch concludes that King's decreased lordosis is directly attributable to muscle spasms he suffered prior to and during the course of treatment he previously received at cross-appellee Peopleworks' expense.

Peopleworks responds that substantial evidence proves that King sustained either a new injury or an aggravation to a pre-existing injury on February 7, 2001; it contends alternatively that all of King's present back problems are traceable to his long-standing chronic back condition that arose in the late 1980's. Peopleworks argues that Teletouch's argument relies considerably on King's subjective complaints of pain and that his testimony was contradicted by reliable and consistent objective medical evidence. Peopleworks suggests that the physicality of King's job, particularly after Teletouch bought out the business in September 2000, "began to wear and tear at King's body."

Finding that King sustained a compensable aggravation resulting from an independent incident occurring on February 7, 2001, the Commission wrote:

> The independent incident caused physical harm to the claimant's body, the independent incident arose out of and in the course of the claimant's employment with [Teletouch], and the incident required medical services. The independent incident was identifiable by time and place of occurrence, and the incident was established by medical evidence supported by objective findings.

In reviewing decisions of the Commission, this court views the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings and affirms the decision if it is supported by substantial evidence. *Clairday v. Lilly Co.*, 95 Ark. App. 94, 234 S.W.3d 347 (2006). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.* It is the Commission's function to weigh the medical evidence and assess the credibility and weight to be afforded to any testimony. *Id.*

The question on appeal is not whether the evidence would have supported findings contrary to the ones made by the Commission; there may be substantial evidence to support the Com-

mission's decision even though we might have reached a different conclusion if we had sat as the trier of fact or heard the case de novo. *Dorris v. Townsends of Ark., Inc.*, 93 Ark. App. 208, 218 S.W.3d 351 (2005). Here, we do not agree with Teletouch that the Commission erroneously interpreted *Estridge, supra*, nor do we agree that the Commission ignored evidence indicating that King's injuries were merely a continuation of his previous back problems.

We do not agree with Teletouch that reasonable minds could not conclude that King's bulging disc and decreased lumbar lordosis resulted from the incident. While not challenging the presence of decreased lumbar lordosis and spasms subsequent to February 7, 2001, Teletouch asserts that the decreased lordosis was attributable to previous muscle spasms rather than to the incident of February 7, 2001. This was a factual determination for the Commission to decide after weighing and interpreting the evidence and deciding matters of credibility.

The Commission's review of the evidence included medical records before and after the incident of February 7, 2001; King's testimony, found by the Commission to be credible, that after squatting down and opening his laptop on February 7, 2001, he started to get up and was knocked to the ground by severe pain in his back and right side; his testimony that his back was "crooked" following the severe pain experienced in the incident; and the physical therapist's observation of the decreased lumbar lordosis on March 5, 2001. We hold that this evidence constitutes substantial evidence to support the Commission's conclusion that King suffered a new injury on February 7, 2001, and a compensable aggravation resulting from the independent incident.

Reversed and remanded on direct appeal; affirmed on cross appeal.

GLADWIN and ROAF, JJ., agree.

ECONOMY INN & SUITES and CCMSI *v.*
Nimisha JIVAN

CA 06-158 253 S.W.3d 4

Court of Appeals of Arkansas
Substituted opinion delivered March 14, 2007*

Michael E. Ryburn, for appellants.

Harrelson, Moore & Giles, LLP, by: *Greg Giles*, for appellee.

SAM BIRD, Judge. In a previous opinion, *Economy Inn & Suites v. Jivan*, delivered Dec. 6, 2006, we affirmed the decision of the Workers' Compensation Commission finding that Nimisha Jivan was performing employment services at the time of the accident that caused her death and awarding benefits to her statutory beneficiaries.[1] Appellants filed a petition for rehearing. After careful reconsideration of this case, we grant appellants' petition and issue this substituted opinion reversing the decision of the Workers' Compensation Commission.

* REPORTER'S NOTE: The original opinion was handed down December 6, 2006.

[1] *See* Ark. Code Ann. § 11-9-527 (Repl. 2002).

Nimisha Jivan and her husband worked for appellant Economy Inn & Suites in Hope: Nimisha was the assistant manager, and her husband was the manager. On February 17, 2003, Nimisha died as a result of smoke inhalation when a fire broke out at the hotel. Nimisha's husband and two children claimed that the accident happened while Nimisha was performing employment services and that they were entitled to death benefits pursuant to Ark. Code Ann. § 11-9-527. Her employer and its insurance carrier, CCMSI, denied benefits, claiming that Nimisha was not performing employment services at the time of the accident.

All the evidence before the Commission in this case was submitted by the parties through stipulations. The parties stipulated to the following facts:

> [Nimisha Jivan] was employed as the assistant manager for the respondent-employer, and in that capacity she and her husband, the hotel manager, were provided with a room in the hotel in which to live on the premises to carry out their responsibilities as employees of the hotel; that on February 17, 2003, a fire occurred at the hotel, causing [Nimisha's] death; that [Nimisha] is survived by her widower, Jack Jivan, and two minor children . . . . [T]hat on February 17, 2003, [Nimisha] was off duty and was in the bathroom of the hotel room provided by the respondent, changing her clothes to go to a gym to exercise when a fire occurred at the hotel; that she was not able to escape the fire and died as a result of smoke inhalation-; that although [Nimisha] was off duty at the time her death occurred, she and her husband were always considered to be on call to address any hotel related issues, which is at least one of the reasons she and her husband were provided a room in the hotel there on the premises.

The administrative law judge found that Nimisha was engaged in employment services at the time of her fatal injury and that her injury arose out of and in the course of her employment, and he awarded benefits to her husband and two children. The Commission adopted the decision of the law judge, including all findings of fact and conclusions of law. Appellants filed this appeal.

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. *Sapp v. Phelps Trucking, Inc.*, 64 Ark. App. 221, 984 S.W.2d 817 (1998). This court must affirm the decision of the

Commission if it is supported by substantial evidence. *Id.* Substantial evidence is that evidence which a reasonable mind might accept as adequate to support a conclusion of the Commission. *Gen. Elec. Railcar Repair Servs. v. Hardin*, 62 Ark. App. 120, 969 S.W.2d 667 (1998). The issue on appeal is not whether the appellate court might have reached a different result or whether the evidence would have supported a contrary finding; if reasonable minds could reach the Commission's conclusion, the appellate court must affirm its decision. *Minnesota Mining & Mfg. v. Baker*, 337 Ark. 94, 989 S.W.2d 151 (1999).

The pivotal issue in this case is whether Nimisha was performing employment services at the time of her death. A compensable injury is defined in Ark. Code Ann. § 11-9-102(4)(A)(i) (Repl. 2002) as "[a]n accidental injury . . . arising out of and in the course of employment. . . ." A compensable injury does not include an "[i]njury which was inflicted upon the employee at a time when employment services were not being performed." Ark. Code Ann. § 11-9-102(4)(B)(iii) (Repl. 2002).

While the statute does not define the terms "in the course of employment" and "employment services," the supreme court has held that 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 Transp.*, 347 Ark. 851, 857, 69 S.W.3d 1, 4 (2002) (quoting *White v. Georgia-Pacific Corp.*, 339 Ark. 474, 478, 6 S.W.3d 98, 100 (1999)). We use the same test to determine whether an employee is performing "employment services" as we do when determining whether an employee is acting within "the course of employment." *Id.* The test is whether the injury occurred within the time and space boundaries of the employment, when the employee was carrying out the employer's purpose or advancing the employer's interest directly or indirectly. *Id.*

Here, based solely upon findings that "[Economy Inn's] purpose and interest was advanced by [Nimisha's] frequent and regular presence on the premises" and that Nimisha was "on call" twenty-four hours a day, the Commission concluded that her estate had proven by a preponderance of the evidence that she was engaged in employment services at the time of her fatal injury. We disagree with the Commission.

We have held that an injury is not compensable where an employee is performing an activity that is merely for the purpose of

attending to his personal needs. In *Cook v. ABF Freight Systems, Inc.*, 88 Ark. App. 86, 194 S.W.3d 794 (2004), we held that a truck driver, who was "off the clock" but "on-call" in a motel room provided by his employer and was injured while turning on a light switch in the bathroom, was not performing employment services where there was no evidence that his entry into the bathroom was for any reason other than to attend to his own personal needs. In *Kinnebrew v. Little John's Truck, Inc.*, 66 Ark. App. 90, 989 S.W.2d 541 (1999), we affirmed the Commission's decision that a shower was not inherently necessary for the performance of the job a trucker was hired to do. In *Kinnebrew*, a truck driver who showered at a truck stop while he was off-duty but on the road and awaiting further instructions from his dispatcher slipped and fell in the shower stall. We held that he was not performing employment services because showering was not "inherently necessary" for the performance of the job that he was hired to do. *Id.* at 92, 989 S.W.2d at 543.

In this case, Nimisha was in the bathroom changing clothes to go exercise, an activity involving attention solely to her personal needs. The fact that she was on call in her living quarters does not necessitate a finding that every activity in which she engaged was inherently necessary to her job. Nimisha was certainly entitled to enjoy life in her home at the hotel beyond her responsibilities as the hotel's assistant manager. The parties' stipulation contained no evidence that she was required to remain on the premises at all times, or even most of the time, for the benefit of her employer. We cannot see how changing clothes to go exercise at a gym constituted an activity that carried out her employer's purpose or advanced its interest any more than any other personal activity in which an employee such as Nimisha might have engaged while in her room at the hotel. Under the dissent's reasoning, employers would be required to extend workers' compensation coverage to every personal activity in which an employee such as Nimisha might have engaged while in her room at the hotel, including cooking, eating, washing dishes, watching television, dancing, sleeping, or falling out of bed. We disagree and hold that fair-minded persons with the same facts before them could not have reached the conclusion that Nimisha was performing employment services at the time of her death, and we reverse the Commission's decision awarding benefits.

Reversed and remanded for the entry of an order consistent with this opinion.

PITTMAN, C.J., and HART, GLADWIN, MARSHALL, and MILLER, JJ., agree.

GLOVER, VAUGHT, and BAKER, JJ., dissent.

KAREN R. BAKER, Judge, dissenting. I dissent because the majority completely ignores the applicable precedent relied upon by the Commission in awarding benefits and abandons our standard of review of administrative decisions. The Commission found that performing the activity *on the premises* while *on call* was the critical focus of the analysis. In reaching its decision, the Commission relied upon our opinion in *Privett v. Excel Specialty Products*, 76 Ark. App. 527, 69 S.W.3d 445 (2002). In *Privett*, we explained that the concept of employment services encompasses the performance of incidental activities that are inherently necessary for the performance of the primary activity. This court reasoned that the fact that a worker is not directly compensated for the activity engaged in when an accident occurs is not controlling as to whether the worker was performing employment services. *Id.* We further recognized that an employee preparing his truck for a cross-country drive by equipping it with items necessary for the efficient performance of his job was performing an incidental activity that was inherently necessary for the performance of his primary employment activity regardless of the fact that the employee was performing the tasks on his day off. *Ray v. Wayne Smith Trucking*, 68 Ark. App. 115, 4 S.W.3d 506 (1999) (cited in *Privett*, 76 Ark. App. at 532, 69 S.W.3d at 449).

In reaching its decision, the Commission relied upon our reasoning in *Privett* and applied its reasoning to the stipulations submitted by the parties. The entire case was submitted on stipulated facts that included the following:

> 3. Nimisha Jivan was employed as the assistant manager for the respondent employer on February 17, 2003 and in this capacity she and her husband, who was the hotel manager, were provided with a room in the hotel to live on the premises to carry out their responsibilities as employees of the hotel.
>
> 4. On February 17, 2003 Mrs. Jivan was off duty and was in the bathroom of the hotel room provided by the respondent changing her clothes to go to a gym to exercise when a fire occurred

at the hotel and Mrs. Jivan was not able to escape the fire and died as a result of smoke inhalation.

5. Although Mrs. Jivan was off duty at the time her death occurred, theparties agreed and stipulate that she and her husband were always considered to be on-call to address any hotel related issues, which is at least one of the reasons she and her husband were provided a room in the hotel there on the premises.

From these stipulations, the ALJ and Commission distinguished Ms. Jivan's situation from the truck driver in *Cook v. ABF Freight Systems, Inc.*, 88 Ark. App. 86, 194 S.W.3d 794 (2004), relied upon by the majority. They reasoned:

> The instant claimant, in contrast [to the claimant in *Cook*], was on the employer's premises at the time of her injury and was expected to reside on the premises for the employer's convenience. The respondent-employer clearly derived a significant benefit from the claimant's regular and continual presence on the premises of the hotel.
>
> The concept of employment services encompasses the performance of incidental activities that are inherently necessary for the performance of the primary activity. *Privett v. Excel Specialty Prod.*, 76 Ark. App. 527, 69 S.W.3d 445 (2002). Given the claimant's responsibilities to her employer, her residing on the premises and spending as much time as possible on the premises was inherently necessary for the performance of her primary activity, managing the hotel. An employee is performing employment services when her injury is sustained within the time and space boundaries of the employment, when the employee was carrying out the employer's purpose or advancing the employer's interest directly or indirectly. *Pifer v Single Source Transportation*, 347 Ark 851, 69 S.W.3d 1 (2002). It is plain from the record that the employer's purpose and interest was advanced by the claimant's frequent and regular presence on the premises. She was within the space boundaries of her employment, and given that she was "on-call" 24 hours per day, she was within the time boundaries as well."

The Commission found that "[t]he stipulations agreed to by the parties are reasonable and are hereby accepted as fact." We cannot merely ignore the parties' stipulations. A stipulation is "an agreement between the attorneys respecting the conduct of the

legal proceedings." *Dinwiddie v. Syler,* 230 Ark. 405, 323 S.W.2d 548 (1959). That agreement is the equivalent of undisputed proof and leaves nothing for the fact finder to decide as to the stipulated matter. *Brown v. Keaton,* 232 Ark. 12, 334 S.W.2d 676 (1960). We held in *Arkansas Louisiana Gas Co. v. Grooms,* 10 Ark. App. 92, 661 S.W.2d 433 (1983), that when the parties stipulate to certain facts, neither the ALJ nor the Commission may ignore that stipulation and decide the matter on an issue that, because of the stipulation, had not been fully developed by the parties or upon that they had not introduced proof. The only exception is when the ALJ or Commission gives notice of their intent to do so and affords an opportunity to offer proof on that issue. *Id.* Here, the ALJ accepted these stipulations as facts, and the Commission in turn explicitly accepted and adopted the ALJ's findings of fact in its decision.

This court, on a recent appeal based upon a stipulation, was compelled to reverse the decision of the Commission when it ignored the stipulation it had accepted. *See Powers v. City of Fayetteville,* 97 Ark. App. 251, 248 S.W.3d 516 (2007). The case references our earlier holding that reversed the Commission's denial of benefits. In that earlier case, the Commission rejected audiological testing to establish objectively a compensable injury when a stipulation independently established the hearing loss. We remanded for a determination of fact concerning a causal relationship between the hearing loss and the employment.

Similarly, we cannot ignore the stipulations that the parties submitted and the Commission accepted. The critical issue in this case, as in any Workers' Compensation claim, is whether the employee was performing "employment services" at the time of her injury. *Pifer v. Single Source Transp.,* 347 Ark. 851, 69 S.W.3d 1 (2002); *Collins v. Excel Specialty Prods.,* 347 Ark. 811, 816, 69 S.W.3d 14, 18 (2002); *White v. Georgia-Pacific Corp.,* 339 Ark. 474, 6 S.W.3d 98 (1999); *Olsten Kimberly Quality Care v. Pettey,* 328 Ark. 381, 944 S.W.2d 524 (1997). 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." *Pifer, supra; White, supra; Olsten Kimberly, supra.* The test is whether the injury occurred "within the time and space boundaries of the employment, when the employee [was] carrying out the employer's purpose or advancing the employer's interest directly or indirectly." *White v. Georgia-Pacific Corp.,* 339 Ark. at 478, 6 S.W.3d at 100. *See also Wal-Mart Stores, Inc. v. King,* 93 Ark. App. 101, 216 S.W.3d 648 (2005); *Ark. Meth.*

Hosp. v. Hampton, 90 Ark. App. 288, 205 S.W.3d 848 (2005). The critical issue is whether the interests of the employer were being directly or indirectly advanced by the employee at the time of the injury. *Collins, supra*; *see also Matlock v. Ark. Blue Cross Blue Shield*, 74 Ark. App. 322, 49 S.W.3d 126 (2001).

The Commission appropriately directed its analysis to this critical issue of whether the employer's interests were being directly or indirectly advanced at the time Ms. Jivan sustained the injury that caused her death. The Commission found that Ms. Jivan was on the employer's premises at the time of her injury and was expected to reside on the premises for the employer's convenience. It further found that the employer's purpose and interest were advanced by Ms. Jivan's frequent and regular presence on the premises. The Commission therefore concluded that Ms. Jivan was within the space boundaries of her employment. Given that Ms. Jivan was on call twenty-four hours a day, it also found that she was within the time boundaries of her employment as well. In reaching its decision, the Commission properly distinguished the facts of this case from that of *Cook, supra*, in which the employee was injured in a private motel neither owned nor affiliated with the employer, there was no indication that the employee was required to stay at this hotel, or that his staying in that hotel advanced his employer's interest, but rather, the room was provided solely for the employee's convenience.

Despite the Commission's reliance on our precedent in *Privett*, the majority makes no mention of the case to explain why the Commission's reliance upon it was in error. The closest the majority comes to addressing the basis upon which the Commission rendered its decision is in the statement: "The fact that she was on call in her living quarters does not necessitate a finding that every activity in which she engaged was inherently necessary to her job." Nothing in our review procedures permits this court to reverse the Commission's decision because the established fact "does not necessitate a finding." We are to examine the facts and determine whether fair-minded persons with the same facts before them could not have reached the conclusion. Furthermore, the Commission's finding was not so broad as to find that every activity Ms. Jivan may have engaged in upon the premises was inherently necessary to her job. The Commission's decision was properly limited to the facts before it.

The majority's reversal of the Commission's decision ignores the fact that the parties stipulated that Ms. Jivan's primary

employment activity was the management of the hotel and that despite the fact that she was off duty at the time of her death, she was nevertheless on call and on the premises in the space provided to her to perform her primary employment activity. The majority improperly invalidates the Commission's finding that given Ms. Jivan's responsibilities to her employer, her residing on the premises and spending as much time as possible on the premises was inherently necessary for the performance of her primary activity, managing the hotel. An employee is performing employment services when her injury is sustained within the time and space boundaries of the employment, when the employee was carrying out the employer's purpose or advancing the employer's interest directly or indirectly. *Pifer, supra.* The Commission's analysis is well-reasoned and supports its decision.

In this case, the majority's inability to see how the employee's changing clothes advances her employer's interest completely ignores the focus of the Commission's finding. The Commission focused on the fact that Ms. Jivan was engaged in a personal activity on the employer's premises because the employer derived a benefit from her continued presence on the premises. The majority fixates on the details of the activity engaged in by Ms. Jivan while on the employer's premises, rather than on the fact that she was on the premises, on call, and that her presence and on-call status advanced the employer's interest. This misplaced focus negates the parties' stipulations. It ignores the stipulation that Ms. Jivan and her husband were provided with a room in the hotel to live on the premises to carry out their responsibilities as employees of the hotel. It renders void the parties' express stipulation that although she was off duty at the time her death occurred, she and her husband were always considered to be on-call to address any hotel related issues. It obliterates the stipulation that at least one of the reasons she and her husband were provided a room in the hotel on the premises was for her to be available to provide management services. The Commission found that the employer derived a significant benefit from Ms. Jivan's regular and continual presence on the premises of the hotel. Given the parties' stipulations, the Commission's conclusion is well taken.[1]

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[1] The majority opines that "[u]nder the dissent's reasoning, employers would be required to extend workers' compensation coverage to every personal activity in which an employee such as [Ms. Jivan] might have engaged." The Commission merely rendered its decision based on the parties' stipulations and applicable law. The review of this court must

Accordingly, I dissent.

GLOVER and VAUGHT, JJ., join.

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always be whether the evidence supports the Commission's decision, not whether we agree with the disposition of the case. The majority impermissibly imposes a different result because it disagrees with the Commission. It then justifies its disagreement by listing isolated activities and suggesting that affirmance of the Commission's decision would require as a matter of law that every personal activity engaged in by an employee on the premises would be deemed as advancing an employer's interest. Affirming the Commission's decision would not overrule our extensive case law demanding a fact intensive analysis of the statutory criteria.

Jeff Rosenzweig, for appellant.

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

JOHN MAUZY PITTMAN, Chief Judge. The appellant was charged with kidnapping, terroristic threatening, and aggravated assault. After a jury trial, he was convicted of these offenses and sentenced to consecutive terms of imprisonment totaling thirty-two years. On appeal, he argues that the evidence was insufficient to support the finding of guilt on the kidnapping charge and that the trial court erred in excluding certain testimony on the grounds of relevance. We affirm.

A person commits the offense of kidnapping if, without consent, he restrains another person so as to interfere substantially with his liberty with the purpose of terrorizing him. Ark. Code Ann. § 5-11-102(a)(6) (Repl. 2006). Where the sufficiency of the evidence is challenged on appeal of a criminal conviction, we review the sufficiency of the evidence prior to the consideration of trial errors. *Harris v. State*, 284 Ark. 247, 681 S.W.2d 334 (1984). In determining the sufficiency of the evidence to support a criminal conviction, we view the evidence in the light most favorable to the State, considering only the evidence that supports the verdict, and we affirm if there is substantial evidence to support the verdict. *Wells v. State*, 93 Ark. App. 106, 217 S.W.3d 145 (2005). Substantial evidence is evidence that is forceful enough to compel reasonable minds to reach a conclusion one way or the other without having to resort to speculation or conjecture. *Benson v. State*, 357 Ark. 43, 160 S.W.3d 341 (2004).

Viewed in light of that standard, the evidence reflects that the victim, Linda Holcombe, was an officer of the Merchants and Planters Bank in Newark, Arkansas. The bank had foreclosed on real property belonging to appellant's son, resulting in substantial controversy and litigation. On the day that his son's property was to be auctioned, appellant appeared at the bank soon after it opened. The victim asked if she could help appellant and invited him to her office. Once inside her office, appellant shut the door, pushed a chair against the door and, still standing, told the victim that she "lied." He then took a revolver out of his pocket, pointed it at the victim, and told her that she was "going with him to Newport . . . to straighten this out." The victim was afraid to move

her hands from her desk to set off the alarm. After five or ten minutes, she recovered her composure sufficiently to attempt to calm appellant, as she had been trained to do in the event of such a situation. She told appellant that she needed to get the file relating to the transaction so that they could talk about it, whereupon appellant moved the chair away from the door and allowed her to exit her office. The victim went to another room to dial 911. Shortly thereafter appellant pursued the victim and attempted to force his way into the room that she had entered. The drive-through teller, Charlene Morrison, intervened and, after engaging appellant in a lengthy conversation, calmed him down sufficiently to induce him to put down the revolver and surrender to the score of police officers who had gathered outside the bank.

Appellant argues that his conviction of kidnapping should not stand because the State failed to show that he employed any greater restraint on the victim than that normally incident to the crimes of aggravated assault and terroristic threatening, of which he was also convicted. We do not agree. In Arkansas, it is only when the restraint exceeds that normally incidental to the associated crime that the defendant should also be subject to prosecution for kidnapping. *See Moore v. State*, 355 Ark. 657, 144 S.W.3d 260 (2004). Any additional restraint will support a conviction for kidnapping. *Id.* Factors considered in determining whether a separate kidnapping conviction is supportable include whether the movement or confinement (1) prevented the victim from summoning assistance; (2) lessened the defendant's risk of detection; or (3) created a significant danger or increased the victim's risk of harm. *Id.* Here, the offense of terroristic threatening required no more than the communication of a threat — by word or deed — with the purpose of terrorizing the victim, *see Lowry v. State*, 364 Ark. 6, 216 S.W.3d 101 (2005), and the offense of aggravated assault was accomplished when appellant displayed the firearm and pointed it at the victim. *See* Ark. Code Ann. § 5-13-204(a)(2) (Repl. 2006); *Harris v. State*, 72 Ark. App. 227, 35 S.W.3d 819 (2000). Given the testimony that appellant kept the doorway blocked for several minutes after performing these acts and that the victim was prevented from summoning assistance during this time, we hold that the evidence is sufficient to sustain the kidnapping conviction.

Appellant next argues that the trial court erred in sustaining the State's objection that the terms of the civil dispute

were irrelevant to the questions presented in the criminal trial, and therefore refusing to permit him to question the victim concerning the property that had been collateral for the loan made to appellant's son. Trial courts have broad discretion in deciding evidentiary issues, and their decisions are not reversed absent an abuse of discretion. *Smith v. State*, 351 Ark. 468, 95 S.W.3d 801 (2003). We find no error in this case. Even if the victim had lied to appellant regarding the terms of the loan, that would be no defense to the crimes of which he was convicted. Furthermore, although the question posed by appellant may, depending upon the answer given, have had some marginal relevance with respect to the victim's credibility, the need for a determination of her credibility was considerably lessened when appellant took the stand and admitted that he entered the bank on the day in question, that he accompanied the victim to her office, that he closed the door to her office, and that he displayed a revolver to the victim "to let her know [he] was serious."

Affirmed.

GLADWIN and ROBBINS, JJ., agree.

Brent HUMPHRIES *v.*
NATIONWIDE MUTUAL INSURANCE COMPANY

CA 06-304 245 S.W.3d 156

Court of Appeals of Arkansas
Opinion delivered December 13, 2006

[Rehearing denied January 24, 2007.]

Taylor Law Firm, by: *Timothy J. Myers*, for appellant.

Joe Benson, for appellee.

JOSEPHINE LINKER HART, Judge. Appellant, Brent Humphries, appeals from the circuit court's order granting

summary judgment in favor of appellee, Nationwide Mutual Insurance Company, wherein the court found that a policy providing for underinsured motorist coverage was not ambiguous and that appellant's vehicle did not meet the policy definition of an underinsured vehicle. In his three points on appeal, appellant alternatively argues that the policy provided underinsured motorist coverage under the circumstances of this case; the policy language is ambiguous; or the policy violates Arkansas law and is consequently unenforceable. We affirm.

According to appellant's pleadings and exhibits, on February 6, 2003, appellant was a passenger in a truck owned by appellant's mother and driven by Delbert Priesmeyer, Jr. Appellant was an insured driver of the truck, and the truck was an insured vehicle under a policy issued by appellee to appellant's mother. Priesmeyer lost control of the truck, and the truck left the highway, went into a ditch, spun, and struck a sign. Priesmeyer died at the scene, and appellant suffered multiple injuries. Appellant settled his claim against Priesmeyer's insurer and sought judgment against appellee for the underinsured motorist coverage policy limits of the policy issued by appellee.

The parties filed motions for summary judgment, and the circuit court ultimately awarded summary judgment to appellee. In its order, the circuit court found that the "policy is not ambiguous as to whether damages must result from an accident arising out of the ownership, maintenance, or use of the underinsured motor vehicle" and that appellant's "vehicle does not meet the policy definition of an underinsured vehicle." Appellant appeals from the court's ruling.

A circuit court grants summary judgment when a party is entitled to judgment as a matter of law. *Lewis v. Mid-Century Ins. Co.*, 362 Ark. 591, 210 S.W.3d 113 (2005). If the language of an insurance policy is unambiguous, we give effect to the policy's plain language without resorting to the rules of construction, but if the language is ambiguous, we construe the policy liberally in favor of the insured and strictly against the insurer. *Id.* Policy language is ambiguous if there is doubt or uncertainty as to its meaning and it is fairly susceptible to more than one reasonable interpretation. *Id.*

In his argument on appeal, appellant acknowledges that, under the definition section of the underinsured motorist coverage policy, the policy provides that "[w]e will not consider as an . . . underinsured motor vehicle . . . any motor vehicle insured under

the liability coverage of this policy." But he notes that, under the liability coverage of the policy, the coverage excluded "[b]odily injury to any insured or any member of an insured's family residing in the insured's household." He argues that because he was denied liability coverage under this provision, the truck was not a "motor vehicle insured under the liability coverage" of the policy so as to preclude recovery under the underinsured coverage provisions. In his second point on appeal, applying the same analysis, he alternatively argues that the policy is ambiguous.

We disagree with appellant's argument. We find persuasive the Arkansas Supreme Court's decision in *Pardon v. Southern Farm Bureau Casualty Insurance Co.*, 315 Ark. 537, 868 S.W.2d 468 (1994). There, under the uninsured motorist provision of the insured's policy, the insurer was liable to pay for bodily injury damages to which the insured was entitled to collect from an owner or driver of an uninsured automobile. The policy defined an uninsured automobile as one not insured by a liability policy at the time of the accident. Also, the insured was excluded from liability coverage since he was owner of the truck. The insured's estate argued that because he was excluded by the terms of his liability policy, the estate was entitled to recover under the uninsured motorist provision of his policy. The Arkansas Supreme Court concluded that because the insured's truck was insured by a liability policy, his uninsured motorist coverage, by its very terms, was inapplicable.

As in *Pardon*, even though appellant's liability coverage excluded bodily injury to him, the policy unambiguously defined an underinsured motor vehicle so as not to include any motor vehicle insured under the liability coverage of this policy. Therefore, we conclude as a matter of law that the terms of the policy are unambiguous and appellant is not entitled to coverage.

Appellant also asserts that the policy is ambiguous because it placed in the definition section of the policy the language that it would not consider as an underinsured motor vehicle any motor vehicle insured under the liability coverage of this policy. He asserts that the language should have been in the exclusions section of the policy, and consequently, the policy is ambiguous, as the language is "hidden." We disagree. We see nothing ambiguous about defining a term, and in doing so, limiting its scope.

In further asserting that the policy is ambiguous, appellant notes that the policy provides for payment of "compensatory damages . . . because of bodily injury suffered by you or a relative and which are due by law to you or a relative from the owner or driver of . . . an underinsured motor vehicle." He asserts that because Priesmeyer was the owner of an underinsured vehicle, he is entitled to coverage, and that this creates an ambiguity.

In *Lewis*, the Arkansas Supreme Court held that there was underinsured motorist coverage, even though the underinsured vehicle was not involved in the accident, noting further that there was no policy language stating that the accident must arise out of the ownership, maintenance, or use of the underinsured motor vehicle. The policy in this case, however, contains the language missing from the policy in *Lewis*. Specifically, the policy provides that the "[d]amages must result from an accident arising out of the: 1. ownership; 2. maintenance; or 3. use; of the ... underinsured motor vehicle." This language indicates that the bodily injury must arise from the involvement of the underinsured's vehicle in the accident. Appellant's damages did not result from an accident arising out of Priesmeyer's ownership of the underinsured vehicle. Thus, we conclude that there is no ambiguity.

Appellant also asserts that the insurance policy violates Ark. Code Ann. § 23-89-209 (Repl. 2004), which concerns underinsured motorist coverage. He argues that the statute contemplates "underinsured motorist coverage to apply when the torfeasor's liability insurance carrier, the underinsured motorist in this case, has paid their policy limits," and that by focusing its coverage on the vehicle and not the motorist and tortfeasor, appellee's definition is contrary to the statute and therefore unenforceable. We disagree.

Our statute specifically provides that the underinsured motorist "coverage shall enable the insured . . . to recover from the insurer the amount of damages for bodily injuries to or death of an insured which the insured is legally entitled to recover from the owner or operator of another motor vehicle whenever the liability insurance limits of the other owner or operator are less than the amount of the damages incurred by the insured." Ark. Code Ann. § 23-89-209(a)(3). Given the statute's emphasis on recovery from the owner or operator "of another motor vehicle," we cannot conclude that the policy in this case violates the statute by

excluding from its definition of underinsured motor vehicle "any motor vehicle insured under the liability coverage of this policy." Moreover, the Arkansas Supreme Court has specifically held that the Arkansas statutes do not require that an auto policy provide underinsured coverage where no underinsured vehicle is involved in the accident. *Lewis, supra.*

Affirmed.

BIRD and GRIFFEN, JJ., agree.

John A. SMITH & Wanda L. Smith *v.* Karen A. EISEN

CA 05-1405 245 S.W.3d 160

Court of Appeals of Arkansas
Opinion delivered December 13, 2006

Odom & Elliott, P.A., by: *J. Timothy Smith*, for appellants.

Robert R. Cloar, for appellee.

ROBERT J. GLADWIN, Judge. This case is a dispute between a pawn-shop owner and his customer. It involves the question of whether a deed to a house was a true conveyance of the property, with an accompanying agreement between the purchasers (the pawn-shop owner and his wife) and the seller (the customer) that entitled the customer to repurchase the property for twice the amount

of the "sale," or whether it was an equitable mortgage securing a usurious loan. The trial court found that the transaction was a usurious loan secured by an equitable mortgage. We agree and affirm the trial court's finding to that effect. We reverse the denial of attorney's fees to the customer, appellee Karen Eisen, and remand for further proceedings.

Appellee purchased a house in Fort Smith on April 25, 1995, for $75,580.64. In 1996, she had financial difficulties and asked appellant John Smith if he would loan her $15,000 against her house. The parties disagree about the nature of the transaction that followed. According to appellee, John (and his wife, appellant Wanda Smith) agreed to take a deed to the house; put the deed in his safe without filing it; and, upon appellee's satisfaction of the debt, return the deed to her. According to appellants, however, appellee sold her property to them for $15,000 and, in a separate contract, they agreed to reconvey it to her if she paid $250 monthly for ten years, for a total amount of $30,000. On December 4, 1996, appellee signed a warranty deed of her property to appellants and, that same day, all three parties signed the following document on stationery bearing the pawn shop's letterhead:

> I John A. Smith and wife Wanda L. Smith do hereby sell to Karen A. Eisen our property and house located at 3010 So. 34th street, Fort Smith, Ar.
>
> Legal description; [sic] Lot 7 in Block 6 Revised Plat of Lakewood Addition
>
> Under these following agreement [sic].
>
> Karen A. Eisen will pay payments of $250.00 a month begining [sic] January 1st, 1997 and ending with payment of December 1st, 2006. (10 years) Karen A. Eisen will also maintain a [sic] Insurance Policy on the dwelling for at least 75,000.00 dollars, and she will also pay the yearly real estate taxes. She is allowed to make her payment between the 1st and 10th of each month. She may not get more than 2 months behind. She must pay the insurance payments on time and pay the real estate taxes when they are due before penalty time, October 10 of each year. Failure to abide by these obligations automatically makes this contract between seller and buyer terminated.
>
> If Karen A. Eisen pays off loan in advance she must pay all remaining payments due. Also she must pay off loan in full before she can sell house or obtain another Mortgage.

The receipt signed by appellee, for $15,000, "for house and lot located a[t] 3010 So. 34th St. Fort Smith, Arkansas 72903 Lot 7 in Block 6 Lakewood Addition Fort Smith Ark 72903," was dated September 4, 1996. According to appellee, she actually received the $15,000 at the same time that she gave the deed to the property and signed the contract (December 4, 1996). Appellants contend that she received the money on September 4, 1996, and stress that the time that elapsed between those dates supports their argument that these were two separate transactions. Appellants filed the deed on December 4, 1996.

Although appellee did purchase insurance on the property as agreed initially, she did not buy insurance after 1998. Appellee testified that she was unable to obtain a homeowner's policy on a residence that was not in her name; that, when she informed appellant of this fact, he told her not to worry about it, because he had insurance on his other properties; and that he stated that would take care of it. In September 2003, when appellee was late making her payments, appellant told her that the agreement was terminated and that, if she wanted to stay in the house, she would have to pay monthly rent of $400. Appellants contend that they also terminated the agreement because appellee failed to continue homeowner's insurance on the property. Appellee refused to agree to appellants' new terms, and appellants refused to accept further payments of $250 per month.

On November 14, 2003, appellee filed a complaint against appellants, claiming that appellants had loaned her money on December 4, 1996, secured by a deed to her property. She alleged that appellants had "recently" refused her payments and claimed that they owned the property. She asked for revocation of the deed and restoration of title in her name with an accounting of the funds she had paid, all future interest voided, and attorney's fees and costs on the grounds of fraud, conversion, and unjust enrichment. She also asked for damages for the money she had paid in interest plus attorney's fees and costs under Arkansas's usury laws and the Arkansas Deceptive Trade Practices Act.

Appellants filed a motion to dismiss on March 24, 2004, arguing that the statute of limitations for each claim in the complaint had run. They also argued that, under Ark. R. Civ. P. 8(a) and Ark. R. Civ. P. 12(b)(6), appellee had failed to properly plead her causes of action. They filed a counterclaim that same date, alleging that appellee's failure to maintain insurance on the property and her missed payments amounted to a breach of the

agreement; they asked for damages, including rental payments on the property in the amount of $400 per month, beginning October 1, 2003; reimbursement of the premiums for the insurance policy that appellants secured for the property; property taxes they had paid; costs; and attorney's fees. In the alternative, they sought an order permitting them to evict appellee from the premises. The circuit court denied the motion to dismiss on April 20, 2004. Appellants filed their answer on May 4, 2004, denying that the parties had ever entered into a loan agreement and raising the defenses of statute of limitations, statute of frauds, the parol-evidence rule, unclean hands, laches, waiver, and first breach.

On December 6, 2004, appellants moved for summary judgment on the bases of the statute of limitations and appellee's purported failure to establish the elements of her causes of action. In her response to the motion for summary judgment and brief, appellee conceded that the statute of limitations had run on the usurious interest paid more than five years prior to the lawsuit and stated that she had calculated her damages accordingly, requesting judgment for $15,231.26, with all future interest voided and the monthly payments reduced to the amount of principal due. The circuit court denied the motion for summary judgment on January 4, 2005.

On May 18, 2005, appellee filed an amended complaint alleging that she was entitled to a finding that the contract was an equitable mortgage and that she was entitled to revocation of the deed and restoration of record title in her name, along with an accounting, on the grounds of fraud, conversion, and unjust enrichment. She also stated that she was entitled to damages under the usury laws of Arkansas within five years preceding the lawsuit, with all future interest voided, plus attorney's fees and costs under article 19, section 13 of the Arkansas Constitution, which states that the interest rate shall not exceed five percent above the federal discount rate at the time of the contract. According to appellee, the federal discount rate on December 4, 1996, was five percent; therefore, any interest rate above ten percent at that time was usurious. She requested that she recover twice the interest paid within that five-year period and that future interest be voided. Appellee stated that double the amount of interest paid within five years prior to the lawsuit's filing was $15,231.26. She further alleged that she was entitled to damages for the money she had paid in interest within five years preceding the lawsuit, plus attorney's

fees and costs, under the Deceptive Trade Practices Act. In their response, appellants raised the same affirmative defenses as before.

At trial, appellee, appellant John Smith, and a former customer of appellants, Donald Toran, testified. Appellant Wanda Smith did not testify. The trial court entered its order on September 9, 2005. In the order, it found that appellee had approached appellant John Smith about a loan of $15,000 and that he had "agreed to make her a loan conditioned upon [appellee] deeding her residence to him. [Appellant] John Smith told [appellee] that he would not file the deed but would put it in his safe and upon payment of the indebtedness he would return the deed to [appellee]." The trial court stated:

> The law is settled that it is presumed that a deed, here a Warranty Deed, is what it appears to be, and anyone claiming that the deed is in fact a mortgage has to prove by clear, unequivocal and convincing evidence that there was an indebtedness and that . . . the deed was security for the debt. [Appellee] argues that the deed was in fact an equitable mortgage. The [appellants] contend "the transaction was an outright sale and nothing else."
>
> There are a number of factors that the Court should consider in deciding whether it was an absolute deed or an equitable mortgage. Those include the statements and agreements of the parties, the disparity between the value received by [appellee] and the value of the real estate at the time of conveyance, the fact that the [appellee] retained possession of the residence and the bargaining power and sophistication of the [appellee] and [appellant] John Smith. From the facts presented, the Court finds that the transaction was in reality an equitable mortgage. Accordingly, the Court finds that the Deed is void and title to the residence shall be transferred to [appellee].
>
> The next question is whether the loan constitutes a usurious loan. As heretofore stated, the real purpose of the transaction was to make a loan to [appellee] in the amount of $15,000.00. In fact, the agreement (Plaintiff's exhibit 5) refers to it being a loan. Since it was a loan, under its terms of paying back $30,000.00 over ten (10) years, the interest rate calculates to be in excess of that allowed by law. The rate is usurious. [Article] 19, Section 13 of the Arkansas Constitution provides that all loans that are usurious "*shall* be void as to the unpaid interest" and that the borrower is entitled to "twice the amount of interest paid." The Arkansas Supreme Court has held

> that this is mandatory. The interest paid for the five (5) years preceding the filing of this lawsuit is $8,252.77, doubled to be $16,505.54.
>
> The [appellants] in this matter have a balance due them on the loan in the principal sum of $7,727.69. Deducting that sum from $16,505.54 leaves a balance due [appellee] of $8,777.85. [Appellants] have paid real estate taxes of $818.20 for 2002 and $818.50 for 2003, which should be deducted from $8,777.85 for a balance of $7,141.15. [Appellants] offered evidence of the payment of insurance on the property of $360.00 [Defendants' exhibit 7] which should be deducted from the $7,141.15 for a balance owed [appellee] of $6,781.15. [Appellants] are hereby ordered to pay said sum to the [appellee] within forty-five (45) days of the entry of this Order.
>
> [Appellants'] counterclaim is dismissed. Each side shall bear their own costs and attorney fees.

Appellee filed a motion to reconsider on September 23, 2005. In her motion, she asked that part of the court's September 9, 2005, order — that the parties bear their own attorney's fees and costs — be held in abeyance until she had an opportunity to submit a motion for fees and expenses to the court. In her accompanying brief, appellee stated that she had expected to wait and file her motion for attorney's fees after the judgment; that this motion to reconsider was "not a motion for fees"; and that she would not have filed this motion but for the court's premature ruling on fees. She stated:

> The fee issue in the instant case are [sic] being sought not only under the contract statute (16-22-308) but also under the statute specifically for Plaintiffs who prevail in usury cases. (A.C.A. 4-57-108).
>
> The merits of the attorney fees and costs award is not to be decided here. This motion is just asking for the opportunity to submit the issue to the court as that interest rate for the judgment be specified.

On October 5, 2005, appellants asked that the motion be denied because a claim for attorney's fees must be made by motion no later than fourteen days after the entry of judgment. They also filed their notice of appeal on October 5, 2005. On October 11, 2005, the trial

court denied appellee's motion to reconsider. Appellee filed a notice of cross-appeal on October 19, 2005.

Standard of Review

In bench trials the standard of review on appeal is whether the trial court's findings were clearly erroneous or clearly against the preponderance of the evidence. *Anderson v. Stewart*, 366 Ark. 203, 234 S.W.3d 295 (2006). We give due deference to the superior position of the trial court to determine the credibility of the witnesses and the weight to be accorded their testimony. *Id.* Further, it is within the province of the trier of fact to resolve conflicting testimony. *Id.*

Arguments

On appeal, appellants argue that the trial court erred in denying their motion to dismiss; in denying their motion for directed verdict; in imposing an equitable mortgage; in holding that the transaction was a usurious loan; and in awarding damages to appellee. For her cross-appeal, appellee contends that the trial court erred in refusing to award her attorney's fees.

The Motion to Dismiss

Appellants first contend that the trial court erred in denying their motion to dismiss appellee's complaint dated November 14, 2003, on the ground that it failed to state facts upon which relief could be granted. They allege that appellee's complaint stated only conclusions without facts and that she did not state the elements of her causes of action. They argue at length that the complaint did not contain the elements for fraud, conversion, unjust enrichment, usury, or a violation of the Deceptive Trade Practices Act. However, the trial court did not base its decision on fraud, conversion, unjust enrichment, or the Deceptive Trade Practices Act; it simply held that the transaction was in fact a loan secured by an equitable mortgage and that the loan bore a usurious interest rate. Therefore, we will address only the claims concerning appellants' refusal to abide by the parties' agreement and usury. *See Morgan v. Chandler*, 367 Ark. 430, 241 S.W.3d 221 (2006).

In determining whether to dismiss a complaint under Ark. R. Civ. P. 12(b)(6), it is improper for the trial court to look beyond the complaint. *Thomas v. Pierce*, 87 Ark. App. 26, 184 S.W.3d 489 (2004). In order to properly dismiss the complaint, the trial court must find that the complaining party either (1) failed to

state general facts upon which relief could have been granted or (2) failed to include specific facts pertaining to one or more of the elements of one of her claims after accepting all facts contained in the complaint as true and in the light most favorable to the nonmoving party. *Id.* Pleadings are sufficient if they advise a party of his obligations and allege a breach of them. *Id.*

In reviewing the circuit court's decision on a motion to dismiss under Ark. R. Civ. P. 12(b)(6), we treat the facts alleged in the complaint as true and view them in the light most favorable to the party who filed the complaint. *Key v. Coryell*, 86 Ark. App. 334, 185 S.W.3d 98 (2004). In testing the sufficiency of the complaint on a motion to dismiss, all reasonable inferences must be resolved in favor of the complaint and the pleadings are to be liberally construed. *Id.* However, Arkansas law requires fact pleading, and a complaint must state facts, not mere conclusions, in order to entitle the pleader to relief. *Id.* According to Ark. R. Civ. P. 8(a)(1), a pleading that sets forth a claim for relief shall contain a statement in ordinary and concise language of facts showing that the pleader is entitled to relief. Rules 12(b)(6) and 8(a)(1) must be read together in testing the sufficiency of a complaint. *Id.* We look to the underlying facts supporting an alleged cause of action to determine whether the matter has been sufficiently pled. *Id.*

In order to state a cause of action for breach of contract, the complaint need only assert the existence of an enforceable contract between the plaintiff and defendant, the obligation of the defendant thereunder, a violation by the defendant, and damages resulting to the plaintiff from the breach. *Rabalaias v. Barnett*, 284 Ark. 527, 683 S.W.2d 919 (1985). Appellee's claim for breach of contract was more than sufficient to survive the motion to dismiss. She asserted that appellants had loaned her money on December 4, 1996, secured by a deed to her property, and that they had "recently" refused her payments and claimed that they owned the property. She attached a copy of the December 4, 1996, repurchase agreement to her complaint. Arkansas Rule of Civil Procedure 10(c) provides that a copy of any written instrument that is an exhibit to a pleading is a part thereof for all purposes.

Even though the usury claim, of itself, was not sufficiently pled, we will not reverse on this issue, because the breach-of-contract claim was sufficiently pled, and appellee later filed an amended complaint that adequately set forth her usury claim. Thus, appellants suffered no prejudice. We will not reverse

unless error and prejudice have been shown. *Martin v. Scharbor*, 95 Ark. App. 52, 233 S.W.3d 689 (2006).

The Statute of Limitations

Appellants also contend that appellee failed to state a claim within the applicable statute of limitations. The statute of limitations that applies here is the one for breach of a written contract, Ark. Code Ann. § 16-56-111 (Repl. 2005); it applies to the claim that appellants failed to abide by their agreement and to the usury claim, which was based on a written contract. A statute of limitations does not begin to run until the plaintiff has a complete and present cause of action. *Oaklawn Bank v. Alford*, 40 Ark. App. 200, 845 S.W.2d 22 (1993). The period of limitations for contracts runs from the point at which the cause of action accrues. *Id.* For breach of contract, the true test in determining when a cause of action arises or accrues is to establish the time when the plaintiff could have first maintained the action to a successful conclusion. *Id.* A cause of action for breach of contract accrues the moment the right to commence an action comes into existence, and occurs when one party has, by words or conduct, indicated to the other that the agreement is being repudiated or breached. *Id.* In ordinary contract actions, the statute of limitations begins to run upon the occurrence of the last element essential to the cause of action. *Id.*; *accord Dupree v. Twin City Bank*, 300 Ark. 188, 777 S.W.2d 856 (1989).

■ Although appellee gave appellants the deed and signed the contract to repurchase on December 4, 1996, appellants did not breach the contract until September 2003. In her November 14, 2003, complaint, appellee noted that the contract was dated December 4, 1996, and stated: "Plaintiff has made many payments on the loan but recently the Defendants refused further payments and claimed the payments were merely rent that they own the property." Appellee attached a copy of the contract to her complaint. Even though appellee stated that appellants had "recently" refused her payments and asserted their ownership of the property, it was not clear, on the face of the complaint, that the statute of limitations had run. Appellee's complaint, therefore, was sufficient to avoid the application of the five-year statute of limitations as to the contract issue and, because the payments were to be made monthly, as to all usurious payments of interest within five years of the filing of the complaint on November 14, 2003.

The Motion for Directed Verdict

Appellants contend in their third point that the trial court erred in denying their motion for directed verdict at trial. As with the previous two points, we need only consider whether appellee presented sufficient evidence to survive the motion for directed verdict as to her claim that appellants had failed to perform their obligations under a transaction that was, in fact, an equitable mortgage securing a loan and her claim that the loan bore a usurious interest rate. According to appellants, the evidence simply demonstrated that the parties entered into two separate transactions on September 4, 1996, and on December 4, 1996, concerning one piece of property. We disagree.

A motion for a directed verdict is a challenge to the sufficiency of the evidence. *Calvary Christian Sch., Inc. v. Huffstutler*, 367 Ark. 117, 238 S.W.3d 58 (2006). A trial court's duty is to review a motion for directed verdict or dismissal at the conclusion of a plaintiff's case by deciding whether, if it were a jury trial, the evidence would be sufficient to present to the jury. *Woodall v. Chuck Dory Auto Sales, Inc.*, 347 Ark. 260, 61 S.W.3d 835 (2001). In making that determination, the trial court does not exercise fact-finding powers that involve determining questions of credibility. *Id.* If the evidence is such that fair-minded persons might reach different conclusions, then a jury question is presented. *Id.* As discussed below, the evidence more than sufficiently supports the trial court's decision on the breach-of-contract and usury issues. Therefore, it did not err in denying the motion for directed verdict.

Equitable Mortgage

Appellants next argue that the trial court erred in finding that the transaction constituted an equitable mortgage. They contend that this case simply involved an outright conveyance of a deed in exchange for $15,000 and a separate agreement to reconvey the property for $30,000. They assert that appellee failed to prove by clear, unequivocal, and convincing evidence that the deed was intended to act as security for an obligation, pointing out that the receipt for $15,000 made no mention of a mortgage and was dated on September 4, 1996, three months before appellee gave the deed to appellants.

In attempting to discern the real character of a transaction, the trial court should consider all of the written and oral evidence

and focus on the intent of the parties in the light of all attendant circumstances. *Bright v. Gass*, 38 Ark. App. 71, 831 S.W.2d 149 (1992). In carrying out the true intent of the parties, the trial court properly looks beyond the mere form in which the transaction was clothed and considers all the facts and circumstances of the transaction, the conduct of the parties, and their relations to one another and to the subject matter. *Id.* Conclusions concerning the true intent of the parties primarily involve issues of fact, and the trial court's decision on such cases will not be reversed unless they are clearly erroneous. *Id.*

The presumption arises that a deed is what it purports to be and, to establish its character as a mortgage, the evidence must be clear, unequivocal, and convincing. *Wensel v. Flatte*, 27 Ark. App. 5, 764 S.W.2d 627 (1989). If there is a debt existing and the conveyance was intended by the parties to secure its payment, equity will regard and treat an absolute deed as a mortgage. *Id.* The party claiming that the deed was a mortgage has the burden of showing that the deed was in fact a mortgage, that there was an indebtedness, and that the deed was intended to secure the debt. *Id.* Because the equity upon which the court acts arises from the real character of the transaction, any evidence, written or oral, tending to show the real nature of the transaction is admissible. *Id.*; *accord Ehrlich v. Castleberry*, 227 Ark. 426, 299 S.W.2d 38 (1957); *Newport v. Chandler*, 206 Ark. 974, 178 S.W.2d 240 (1944); *Monaghan v. Davis*, 16 Ark. App. 258, 700 S.W.2d 375 (1985).

■ Appellee testified that she bought the house for $75,580.64 in 1995; that she needed money for an "ice box, hot water tank, two new toilets, $6,000 for two dental implants and [she] had to paint the house"; that she asked John Smith if he would loan her $15,000 against her house; that he told her that she had to sign a deed to get the loan but that he would keep the deed in his safe until she paid off the loan, when he would return it; that she signed the deed, not believing that she had sold her house; that, although she fell behind in her payments occasionally, she got caught up; and that John Smith accepted her payments until September 2003. She was emphatic that she had not sold her home to appellants. Appellant John Smith disputed appellee's account of the events. As the finder of fact, it was within the trial court's province to believe or disbelieve the testimony of any witness, including Mr. Smith. *Found. Telecomms., Inc. v. Moe Studio, Inc.*, 341 Ark. 231, 16 S.W.3d 531 (2000). We affirm on this issue.

Usury

Without conceding that this transaction was a loan, appellants further argue that appellee failed to prove that the interest rate on the loan was usurious as contemplated by article 19, section 13 of the Arkansas Constitution. That section states that the maximum lawful rate of interest on any contract shall not exceed five percent over the federal reserve discount rate at the time of the contract's formation and that all contracts with an interest rate in excess of that rate shall be void as to the unpaid interest; a person who has paid interest in excess of the maximum lawful rate may recover, within the time prescribed by law, twice the amount of interest paid. They assert that neither the September 4, 1996 receipt nor the December 4, 1996 contract reflects an interest rate or a sale price. Essentially, appellants' argument on this point is a re-argument that the transaction was not a loan secured by an equitable mortgage. They do not attack the accuracy of the calculations on the exhibits introduced by appellee, which showed that the annual percentage rate of the loan was 15.864%, which was more than five percent over the federal discount rate when the contract was entered into.

Usury occurs when a lender charges more than the legally permissible maximum rate of interest, defined by Article 19, section 13 of the Arkansas Constitution, as amended by Amendment 60. *Evans v. Harry Robinson Pontiac-Buick, Inc.*, 336 Ark. 155, 983 S.W.2d 946 (1999). For an agreement to be usurious, it must be so at the time it was entered into. *Id.* The party asserting usury has the burden of proof, and the proof must be sustained by clear and convincing evidence. *Id.* The intention to charge a usurious rate of interest will never be presumed, imputed, or inferred where the opposite result can be fairly and reasonably reached. *Id.*

Courts in Arkansas are obligated to look beyond the four corners of the document in question to determine, considering all of the attendant facts and circumstances, if the contract is usurious in effect. *Carter v. Four Seasons Funding Corp.*, 351 Ark. 637, 97 S.W.3d 387 (2003). In *McElroy v. Grisham*, 306 Ark. 4, 810 S.W.2d 933 (1991), the supreme court addressed an argument like appellants':

> In denying that the transactions amounted to a usurious loan, the appellees first contend that the documents were not usurious on their face. While it is true that, taken alone, the original warranty deed and option contract appear to be documents concerning only

> the sale of land, and no mention of a loan or obligation on the part of Mr. McElroy to repay the appellees is recited, these transactions call to mind an oft quoted maxim: "The law shells the covering and extracts the kernel. Names amount to nothing when they fail to designate the facts." *Sparks v. Robinson*, 66 Ark. 460, 51 S.W. 460 (1899). In *Sparks*, we upheld the trial court's conclusion that an absolute bill of sale of a sewing machine, coupled with an absolute right of redemption, amounted to nothing more than a mortgage with a usurious rate of interest.
>
> Here, the chancellor found that the purported sale and option to repurchase were nothing more than a cloaking device to hide the true transaction — a loan in the amount of $80,000 to be repaid in two years, with interest totalling $40,000. Such a transaction has been historically recognized as one of several simple devices to evade Arkansas usury laws. *See* G. Collins and V. Ham, *The Usury Law of Arkansas: A Study in Evasion*, 8 Ark. L. Rev. 399 (1954).

306 Ark. at 8-9, 810 S.W.2d at 935-36.

The supreme court's language in *Commercial Credit Plan, Inc. v. Chandler*, 218 Ark. 966, 972, 239 S.W.2d 1009, 1012 (1951), also bears repeating here:

> We have held that collateral contracts entered into contemporaneously with a contract for the lending and borrowing of money, where the collateral agreement is in itself lawful and made in good faith, will not invalidate the contract for the loan of money as usurious, although its effect might be to exact more from the borrower than the sum which would accrue to the lender from a legal rate of interest. *Hogan v. Thompson*, 186 Ark. 497, 54 S.W.2d 303. But it is equally well settled that where, as here, the primary purpose is to lend money through multiple transactions devised to cloak the real intent to collect excessive interest, courts will analyze the scheme and ascribe to it the contemplated purpose, disregarding as preconceived emergency defenses such language as that found in appellant's note limiting recovery to the actual amount loaned.

The test for usury is not whether the lender intended to violate the usury laws but whether the lender knowingly entered into a usurious contract intending to profit by the methods employed. *McElroy v. Grisham, supra.* Further, it is unnecessary that both parties intend that an unlawful rate of interest be charged; if

the lender alone charges or receives more than is lawful the contract is usurious. *Id.* As the supreme court explained in *McElroy v. Grisham*, all attendant circumstances must be taken into consideration in deciding whether a transaction is usurious: the "seller's" obvious financial troubles; her expressed intent to keep the property; her remaining in possession of the property; the substantial disparity between what she paid for the property and the "purchase" price; and the immediate renegotiation of a contract for resale all point to the conclusion that none of the parties intended for the property to come into the hands of appellants any more than was necessary to secure the loan and for appellants to make a profit from such loan. Also relevant were appellee's ninth-grade education, her medical disabilities, and her lack of sophistication in business matters in comparison to appellants'. When the intent to commit usury is not apparent on the face of the challenged document, the question of whether a lender possessed the requisite intent is for the finder of fact to decide. *Hickman v. Courtney*, 361 Ark. 5, 203 S.W.3d 632 (2005). We hold that the trial court did not err in finding that this loan was usurious.

Damages

In appellants' next point, they contend that, if we find that the trial court did not err regarding the usurious nature of the loan, the court's finding of fact as to the amount of damages was clearly erroneous. They concede that the trial court correctly deducted the amount they paid in property taxes, and they do not dispute the actual computation of the usurious interest. Instead, they argue that appellee breached the contract when she failed to carry insurance on the property and to make timely payments, of which they became aware in September 2003; therefore, they argue, the contract should be terminated and appellee should be held responsible for monthly rent of $400 from October 1, 2003, through the present. They also ask us to hold that appellee should be evicted from the property. They contend that the trial court erred in failing to recognize that appellee had breached the contract before she brought this lawsuit. We reject this contention because it is nothing more than a re-argument of their position that this transaction was not an equitable mortgage securing a usurious loan.

Appellee's Cross-Appeal

For her cross-appeal, appellee argues that the trial court erred in refusing to award her attorney's fees under Ark. Code Ann. § 4-57-108 (Repl. 2001), the Deceptive Trade Practices Act, or under Ark. Code Ann. § 16-22-308 (Repl. 1999). She points out that the trial court denied fees to her in its original order, before she had the opportunity to file a post-judgment motion for fees. In her motion to reconsider filed on September 23, 2005, fourteen days after judgment, she asked for the opportunity to file such a motion. Appellee concedes that, under Ark. R. Civ. P. 54(e), she was required to file her post-trial motion for attorney's fees within fourteen days of the judgment but points out that she had already been denied her fees in the judgment. We agree with appellee that her request for attorney's fees was timely.

Because the trial court did not base its decision on the Deceptive Trade Practices Act, an award of fees under that act would not be appropriate. However, Ark. Code Ann. § 4-57-108 provides that there shall be an award of attorney's fees in usury cases involving consumer loans and credit sales, which, under article 19, section 13 of the Arkansas Constitution, include credit extended to a natural person in which the money, property, or service that is the subject of the transaction is primarily for personal, family, or household purposes. Because the wording of this statute was mandatory, an award of attorney's fees was required. We therefore reverse on this point and remand for the trial court to take evidence on the issue of attorney's fees and to enter an appropriate award to appellee.

Affirmed on direct appeal; reversed and remanded on cross-appeal.

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

Billy OSBORNE *v.* BEKAERT CORPORATION,
Death & Permanent Total Disability Trust Fund,
& Liberty Mutual Group

CA 06-537 245 S.W.3d 185

Court of Appeals of Arkansas
Opinion delivered December 13, 2006

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

Ledbetter, Cogbill, Arnold & Harrison, LLP, by: *James A. Arnold*, for appellee Bekaert Corporation.

Judy W. Rudd, for appellee Death & Permanent Total Disability Trust Fund.

JOHN B. ROBBINS, Judge. In this appeal, appellant Billy Osborne appeals the findings by the Commission that (1) Arkansas Code Annotated section 11-9-522(f) (Repl. 2002) is constitutional, and (2) the employer had not controverted his status as permanently totally disabled. We hold that the statute is unconstitutional. We hold that the Commission's finding on controversion is supported by substantial evidence. Thus, we reverse in part, and we affirm in part.

This case was considered on undisputed facts. Osborne was injured in a work-related accident on May 22, 2001, that caused him to lose his left leg in an above-the-knee amputation. Osborne was sixty-one-years old at the time. After receiving extensive medical care, his healing period ended exactly a year later on May 22, 2002. He was given a forty-five percent whole-body impairment rating. Benefits were consistently paid. The insurance carrier had an attorney enter an appearance in a July 1, 2002 letter, in which counsel asked that appellant be deposed prior to a determination of whether he was permanently totally disabled ("PTD"). Appellant was deposed on August 21, 2002. The employer thereafter agreed that appellant was PTD, specifically stating so in a letter dated March 2, 2004. The employer suggested that the Death and Permanent Total Disability Trust Fund ("Fund") be

made a party because the employer's liability would be capped at $75,000, for which the employer should receive a credit. The Fund thereafter asserted that its liability was limited by the terms of Ark. Code Ann. § 11-9-522(f)(1), which included a 260-week limitation on permanent total disability benefits for persons injured after age sixty. Appellant asserted that this statute was unconstitutional.

A pre-hearing conference was held in August 2004, in which appellant maintained that he was PTD or alternatively entitled to wage-loss disability benefits over and above his impairment rating. Appellant also stated his challenge to the statute at issue as an arbitrary limitation on older workers who are hurt on the job. Appellant added that he was not being paid the proper rate on his weekly compensation, which should be $410 and not $405. Appellee employer responded that it agreed appellant was PTD, and the only dispute was whether appellant was entitled to $405 or $410 per week. Appellee Fund agreed that appellant was PTD, but asserted that the statute at issue limited its liability, and further that the employer was not entitled to a credit for paying the permanent impairment rating.

A letter from the Administrative Law Judge ("ALJ") to the attorneys for appellant, the employer, and the Fund, dated October 11, 2004, stated that she understood that the parties had stipulated to appellant being PTD, that his weekly rate should be $410, and that the primary issue was the constitutionality of Ark. Code Ann. § 11-9-522(f). She asked all three attorneys to submit simultaneous briefs on the constitutionality issue for her consideration, in lieu of a hearing. Two additional issues were in fact litigated by agreement of the parties, which were whether the employer was entitled to a credit for the first $75,000 paid to the employee (a dispute between the employer and the Fund), and whether appellant's attorney was entitled to an attorney fee based upon controversion of the claim with regard to PTD status (a dispute between the employer and appellant).

In an opinion filed on April 6, 2005, the ALJ found that appellant had not rebutted the presumption of constitutionality, that the employer was entitled to the credit it sought, and that the employer had controverted appellant's entitlement to PTD because it did not stipulate to PTD until a year and a half after deposing appellant. All three parties appealed the administrative decision.

On de novo review, the Commission affirmed the finding that the employer was entitled to a $75,000 credit for benefits paid, which finding is not challenged on appeal. The Commission found that the employer had not controverted appellant's entitlement to PTD benefits. The Commission noted the stipulation prior to the submission of briefs that the employer accepted the claim for PTD after the opportunity to depose the claimant. When the claim was brought forward again for a hearing, which was later cancelled and submitted on briefs alone, the issue was not whether appellant was PTD. Because litigation was not necessary to determine appellant's status in this regard, the Commission reversed the finding that the employer controverted this portion of the claim.

The Commission was also asked to make a finding as to whether the statute, Ark. Code Ann. § 11-9-522(f) (Repl. 2002), was unconstitutional. This statute provides:

> (f)(1) Permanent total disability benefits shall be paid during the period of permanent total disability until the employee reaches the age of sixty-five (65); provided, with respect to permanent total disabilities resulting from injuries which occur after age sixty (60), regardless of the age of the employee, permanent total disability benefits are payable for a period of two hundred sixty (260) weeks.
>
> (2) The purpose and intent of this subsection is to prohibit workers' compensation from becoming a retirement supplement.

The Commission agreed with the ALJ that appellant had not demonstrated that the statute was unconstitutional. It noted that the party seeking to have a statute declared unconstitutional bears the burden of demonstrating unconstitutionality. It also remarked that an earlier version of this statute concerning permanent partial disability benefits was declared unconstitutional in *Golden v. Westark Community College*, 333 Ark. 41, 969 S.W.2d 154 (1998). Subsection (f)(1), but not (f)(2), was rewritten by the legislature in 1999. Prior to the re-writing, the statute read:

> (1) Any permanent partial disability benefits payable to an injured worker age sixty-five (65) or older shall be reduced in an amount equal to, dollar-for-dollar, the amount of benefits the injured worker received or is eligible to receive from a publicly or privately funded retirement or pension plan but not reduced by the employee's contributions to a privately funded retirement or pension plan.

> (2) The purpose and intent of this subsection is to prohibit workers' compensation from becoming a retirement supplement.

Ark. Code Ann. § 11-9-522(f) (Repl. 1996).[1] The Commission recognized that our supreme court determined that this prior version violated the Equal Protection Clause of the United State Constitution. However, the Commission found that there was no similar Equal Protection issue involved in the present appeal.

We are now faced with the issues on appeal, which are: (1) whether the present form of Ark. Code Ann. § 11-9-522(f) is unconstitutional, and (2) whether there is substantial evidence to support the Commission's finding that the employer did not controvert appellant's entitlement to PTD benefits.

When the constitutionality of a statute is challenged, the Attorney General of this state must be notified and is entitled to be heard. Ark. Code Ann. § 16-111-106(b) (Repl. 2006). The purpose behind the notification to the Attorney General is to assure a "fully adversary and complete adjudication" of the constitutional issue. *Ark. Dep't of Human Servs. v. Heath*, 307 Ark. 147, 149, 817 S.W.2d 885, 886 (1991). This was not done in the present appeal, and the employer makes note of this fact. The employer also notes that it is not the proper adversarial party because its liability is unaffected with regard to this point.

We could decline to address the merits of this issue. It is generally reversible error when the Attorney General fails to receive notice of a constitutional attack on a statute. *Olmstead v. Logan*, 298 Ark. 421, 768 S.W.2d 26 (1989); *City of Little Rock v. Cash*, 277 Ark. 494, 644 S.W.2d 29 (1982), *cert. denied*, 462 U.S. 1111 (1983). This general rule has not been applied in some exceptional circumstances, which our supreme court has observed exist where all the issues have been briefed and argued by litigants who are clearly adversarial. *See Reagan v. City of Piggott*, 305 Ark. 77, 805 S.W.2d 636 (1991). In this instance, the issue has been fully developed by appellant, the employer, and the Fund in their briefs to the ALJ, the Commission, and our court. Thus, we choose to address the merits.

We begin by stating our recognition that statutes are presumed to be constitutional, and the burden of proving otherwise is

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[1] An identical statute applying a dollar-for-dollar offset for permanent total disability benefits, Ark. Code Ann. § 11-9-519(g) (Repl. 1996), was repealed by Act 251 of 1997.

on the party challenging the legislative enactment. *See Golden, supra. See also ACW, Inc. v. Weiss*, 329 Ark. 302, 947 S.W.2d 770 (1997). All doubts are resolved in favor of a statute's constitutionality. *Foster v. Jefferson County Bd. of Election Comm'rs*, 328 Ark. 223, 944 S.W.2d 93 (1997).

Appellant argues that this statute creates an unfair cut-off of benefits, generally setting the line for ceasing PTD benefits at or near age sixty-five. We must analyze this Equal Protection Clause issue of age-based discrimination concerning disability benefits under a rational-basis standard. *See Golden, supra.* The stated purpose of Ark. Code Ann. § 11-9-522(f)(2) is "to prohibit workers' compensation from becoming a retirement supplement." Arkansas Code Annotated section 11-9-101 provides that one of the primary purposes of the workers' compensation laws is "to emphasize that the workers' compensation system in this state must be returned to a state of economic viability." These purposes are simply a restatement of the goals of avoiding duplicate payments and of curtailing the cost of workers' compensation insurance, which have been determined to be legitimate governmental concerns, so held in *Golden.*

We also must recognize that workers' compensation benefits are provided in exchange of forbearance from suing an employer in tort for an injury. *See Golden, supra.* Workers' compensation benefits are meant to ease the burden of lost earnings due to injury. *Id.* Workers' compensation benefits are not a retirement supplement. *Id.* The Fund concedes that this was the holding of our supreme court, though the Fund argues that this declaration is not well-reasoned. We are powerless to overturn a decision by our supreme court. *See Box v. State*, 348 Ark. 116, 71 S.W.2d 552 (2002).

In declaring the earlier version of the statute unconstitutional, our supreme court held that:

> [W]e cannot accept the premise posited by our General Assembly in the offset statute that workers' compensation benefits received by one who is age 65 or older fall into the category of a "retirement supplement." Ark. Code Ann. § 11-9-522(f). All parties agree that Bill Golden could legitimately accept social security retirement benefits after attaining age 65 and, at the same time, supplement his retirement benefits with income from work at his Westark job without any offset. Yet, illogically, Westark and PECD maintain that if Golden could no longer work due to a work-related injury,

> any benefits flowing from the workers' compensation program, which are meant to ease the loss in earnings, suddenly become verboten. Not only is the reasoning illogical, but the net effect of the statute is to work a disincentive on those age 65 or older to seek gainful employment to supplement social security benefits. We fail to see the rationale behind this inconsistency in treatment. The effect, of course, is to weed these older workers out of the work force.
>
> Plus, the starting points for workers' compensation and social security are so completely different. As the [*Industrial Claim Appeals Office v. Romero*, 912 P.2d 62 (Colo. 1996)] decision makes abundantly clear, a work-related injury resulting in a disability such as a leg amputation with severe limitation on earning capacity calls into play drastically different policy considerations than social security which is meant to ease the financial burden during later years, whether the recipient age 65 or older is working or not. Suffice it to say that we find no logical premise for the legislative conclusion that social security retirement benefits and workers' compensation benefits are duplicative and should offset one another.
>
> In sum, it is not the mere age-based classification that is troublesome to this court, though there is clearly disparate treatment by the General Assembly for those age 62 through 64 and those age 65 and older, but the fact that we perceive no rational basis for offsetting these two benefits irrespective of the age. To be sure, economic viability of the workers' compensation program and eradication of duplicate benefits are worthy and lofty goals, but we fail to see how workers' compensation benefits paid for loss of the ability to earn the same wages and a retirement benefit under social security are duplicative in any respect. The economic objective behind § 11-9-522(f) to save money may be reasonable but the means for achieving that particular end are not and, hence, the statute fails to withstand constitutional scrutiny. . . . . We reverse the decision of the Commission and the Court of Appeals on the constitutional point and hold that § 11-9-522(f) violates the Equal Protection Clause of the United States Constitution because the justification for the age-based classification for groups receiving both workers' compensation benefits and social security retirement benefits is not rationally related to a legitimate government purpose. Accordingly, § 11-9-522(f) is void on its face and of no effect.

Golden, 333 Ark. at 51-52, 969 S.W.2d at 154-60.

In response, the legislature rewrote this section to its present form. The re-enactment deleted the dollar-for-dollar set off, yet the goal remains the same, and there are time limitations specifically with regard to those age sixty and older, geared to halt PTD at or around age sixty-five, with PTD otherwise ceasing at age sixty-five if one is not injured after the age of sixty. This does no more to provide a rational basis than that found defective in the earlier version of the statute. It creates a ceasing point for PTD benefits so that older workers who are eligible for social security or retirement benefits are foreclosed from receiving PTD for a legitimate work-related injury. For reasons mirroring those stated by our supreme court in *Golden*, we hold that there is no rational basis for this distinction. The stated goal of avoiding retirement-benefit duplication has been squarely rejected by our supreme court. In addition, this method of preserving the economic viability of the workers' compensation system is not reasonable, which has also been decided by our supreme court. Therefore, we hold that Ark. Code Ann. § 11-9-522(f) is unconstitutional.

Appellant's other point on appeal concerns the finding that the employer did not controvert appellant's entitlement to PTD benefits, thereby eradicating the employer's liability for an attorney fee on that issue. The Commission found that the employer was entitled to investigate the claim, and it thereafter agreed and in fact stipulated that appellant was PTD, prior to a need for a hearing on the issue.

On appeal of a workers' compensation case, we view the evidence in the light most favorable to the Commission's decision and affirm that decision if it is supported by substantial evidence. *Plante v. Tyson Foods, Inc.*, 319 Ark. 126, 890 S.W.2d 253 (1994). Substantial evidence exists if reasonable minds could have reached the same conclusion. *Id.* The question whether a claim is controverted is one of fact. *Pickens-Bond Constr. Co. v. Case*, 266 Ark. 323, 584 S.W.2d 21 (1979). The question before us is whether there is any substantial evidence to support the Commission's findings in respect to controversion. *Id.*

Making an employer liable for attorney's fees serves legitimate social purposes such as discouraging oppressive delay in recognition of liability, deterring arbitrary or capricious denial of claims, and insuring the ability of necessitous claimants to obtain adequate and competent legal representation. *Aluminum Co. of Am. v. Henning*, 260 Ark. 699, 543 S.W.2d 480 (1976). Put another

way, the fundamental purpose of attorney's fees statutes such as Ark. Code Ann. § 11-9-715 is to place the burden of litigation expenses upon the party that made it necessary. *Cleek v. Great S. Metals*, 335 Ark. 342, 981 S.W.2d 529 (1998). However, the mere failure of the employer to pay certain benefits does not, in and of itself, amount to controversion, especially when the carrier accepts the injury as compensable and is attempting to determine the extent of the disability. *Revere Copper & Brass, Inc. v. Talley*, 7 Ark. App. 234, 647 S.W.2d 477 (1983).

The Commission had substantial evidence before it to conclude that the employer had not controverted appellant's status for purposes of awarding an attorney fee. Appellant was compensated for this severe injury from the date it occurred. When appellant formally requested a hearing on several matters in early 2004, the employer responded with a letter accepting that appellant was PTD, so stating on March 2, 2004, and in a pre-hearing questionnaire. The hearing was ultimately cancelled, and the weekly rate of compensation was not at issue. There was never a gap in payments owed to appellant. Considering the foregoing, we hold that substantial evidence supports the Commission's finding on this issue.

Reversed as to the constitutionality issue; affirmed as to the controversion issue.

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

FAMILY DOLLAR STORES, INC. &
St. Paul Travelers Insurance *v.* Barbara S. EDWARDS

CA 06-583 245 S.W.3d 181

Court of Appeals of Arkansas
Opinion delivered December 13, 2006

Mark Alan Peoples, PLC, for appellants.

John Barttelt, for appellee.

SAM BIRD, Judge. Appellants Family Dollar Stores, Inc., and St. Paul Travelers Insurance appeal from a decision of the Workers' Compensation Commission awarding benefits to appellee Barbara S. Edwards, who suffered a heart attack one day after she was robbed at gunpoint while working as a cashier at a Family Dollar Store. We affirm.

At a hearing before the administrative law judge, Edwards testified that she and Tara Hall were closing the Family Dollar Store in Wynne on March 26, 2004, when a man "came out from behind some clothes," put a gun to her head, demanded money, and ordered her and Hall to "get on the floor." Edwards said that the man, who was dressed in a ski mask, gloves, and a coat, crossed her arms and legs behind her and handcuffed them. He then took Edwards's car keys and belongings from her purse and left the store.

Edwards said that she and Hall "laid there for a little while" until Hall's grandmother began "banging" on the door, at which point Edwards and Hall "wiggled around and around" until they could get to the door. When they got there, they kicked the door open, and Hall's grandmother helped Edwards and Hall to their feet. Edwards said that she was "exhausted" and "out of breath" by the time she got to the door, and she had to stand with her feet crossed for ten minutes while waiting for police to arrive. She explained that she had been "pulling and yanking . . . trying to get loose," and that she "was hurting." Police removed Edwards's handcuffs when they arrived.

Edwards explained that she experienced discomfort or pain in her chest "right away" when the gun was pointed at her face. She also stated:

> I was so frightened till it was just like (gasping), it scared me so bad. I mean, it . . . just . . . happened so sudden[ly]. When did I first

> begin worrying about I thought [sic] I might have something wrong with my heart? After I got out of the handcuffs and we were standing out on the front of the store. And I felt it, and I got real sick to my stomach. And . . . [it was] just like I was going to throw up, and just — it was just real sickening.

Edwards said that she went home around 11:00 p.m. on the night of the robbery, and she reported to the hospital around 12:00 noon the next day when her symptoms "didn't go away." She was diagnosed as having had a heart attack, was transported to Jonesboro by ambulance, and subsequently underwent surgery as the result of the heart attack.

Edwards's primary care physician, Dr. Julie Dow, opined in a letter dated June 24, 2004, that Edwards's "acute myocardial infarction was triggered by and largely due to the stress immediately [preceding the] armed [robbery] she witnessed." In a letter dated September 28, 2004, Edwards's cardiologist, Dr. Michael Isaacson, opined that the stress from a recent armed robbery "contributed to her myocardial infarction and hospitalization." On June 15, 2005, Dr. Isaacson opined that the robbery "was indeed the major cause of her . . . myocardial infarction occurring the following day." He explained in the letter that "[i]t has been demonstrated numerous times that an extreme emotional, and in this case even physical event, can precipitate a sudden myocardial infarction" and, in his opinion, "that is exactly what did occur." During a subsequent deposition, Dr. Isaacson stated:

> Basically, particularly in Ms. Edwards' situation where somebody pointed a gun at her, you turn on the nervous system and basically scares the hell out of you. And that really does send a surge from the sympathetic nervous system, adrenaline, epinephrine, norepinephrine, and all of those things that scare and fright type phenomenon, can cause a plaque that heretofore had been a stable plaque to rupture. And that's how a lot of heart attacks occur. In fact, we think 70 percent of heart attacks occur on blockages under 50 percent. And there's a trigger, such as a gun pointed at you that can trigger these things to rupture at a weakened site of the plaque and then clot forms just like putting a gun or a shotgun barrel in the mud and plugging it.
>
> . . . .
>
> The emotional trauma that she was undergoing in the interim between . . . having had the gun pointed at her head, understandably

> would cause a person emotional trauma, that built up over that period of time of 12 to 18 hours, that would lead someone to have a heart attack. I mean . . . you know, obviously it would be easier say if it happened right when she had the — but it does, I mean, you've got the fright and the stress and the come down, as you might say. After having the gun pointed at her head, she's probably on quite an epinephrine high for, you know, I would say 24 hours after that phase.

During further questioning, Dr. Issacson stated:

> As to whether it was more the emotional than the physical, I state probably more of the emotional than physical. I mean, I wasn't there so I don't know the extremes of the physical aspect. I know the emotional aspect was high from that.
>
> As to whether the physical factors also contributed to her heart attack, I think those two go hand in hand. The physical aspect with the way things went down obviously enhanced the emotional aspect as well. So I don't — they're intertwined, I don't know that I can tease those two apart.

Dr. Isaacson also reiterated his opinion that the physical and emotional aspects of the robbery were the "major precipitating cause" of the heart attack.

The law judge found that Edwards had sustained a compensable heart attack, the Commission affirmed and adopted the law judge's opinion, and this appeal followed. 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. *Wheeler Constr. Co. v. Armstrong*, 73 Ark. App. 146, 41 S.W.3d 822 (2001). Substantial evidence is that relevant evidence which a reasonable mind might accept as adequate to support a conclusion. *Id.* The Commission's decision should not be reversed unless it is clear that fair-minded persons could not have reached the same conclusions if presented with the same facts. *Id.*

Arkansas Code Annotated section 11-9-114 (Repl. 2002) states as follows:

> (a) A cardiovascular, coronary, pulmonary, respiratory, or cerebrovascular accident or myocardial infarction causing injury, illness,

> or death is a compensable injury only if, in relation to other factors contributing to the physical harm, an accident is the major cause of the physical harm.
>
> (b)(1) An injury or disease included in subsection (a) of this section shall not be deemed to be a compensable injury unless it is shown that the exertion of the work necessary to precipitate the disability or death was extraordinary and unusual in comparison to the employee's usual work in the course of the employee's regular employment, or, alternately, that some unusual and unpredicted incident occurred which is found to have been the major cause of the physical harm.
>
> (2) Stress, physical or mental, shall not be considered in determining whether the employee or claimant has met his or her burden of proof.

In his findings, the law judge stated:

> The provisions of the Workers' Compensation Act are to be strictly construed. Apparently, based upon the foregoing, [appellants] appear to be arguing that stress cannot be considered in determining whether a claimant has met her burden of proof. However, when A.C.A. § 11-9-114 is read in its entirety, it is apparent that day-to-day job stress, both physical and mental, cannot be considered and that only extraordinary and unusual, physical or mental stress must be found when compared to the employee's usual work in order to find a heart attack compensable. Clearly, in the instant case, the job stress both physically and mentally, was extraordinary and unusual. Accordingly, I find that the claimant has proven, by a preponderance of the credible evidence, that she sustained a compensable heart attack within the meaning of our workers' compensation laws.

Appellants contend that the Commission erred in concluding that Edwards sustained a compensable heart attack in this case because she failed to satisfy her burden of proof. Specifically, they argue that, under Ark. Code Ann. § 11-9-114, emotional stress is not to be considered in determining compensability of a heart attack. They assert that, based on testimony that Edwards developed chest pain prior to expending any physical effort in this case, it was "emotional" stress that triggered her heart attack. Appellants claim that the Commission has "liberalized and broadened" Ark. Code Ann. § 11-9-114 to find that "so long as the stress was extraordinary or unusual, then a heart attack caused by stress is compensable."

We find no error on the part of the Commission in this case. Dr. Isaacson opined that the physical and emotional aspects of the robbery were the "major precipitating cause" of Edwards's heart attack. Subsection (b)(1) of the statute clearly provides that certain on-the-job heart attacks may be compensable when it is shown that the exertion of the work necessary to precipitate the attack was "extraordinary and unusual in comparison to the employee's usual work in the course of the employee's regular employment." No serious argument can be made that the combined physical exertion and emotional distress that Edwards experienced while being robbed at gunpoint during the course of her employment were not "extraordinary and unusual" in comparison to her usual work as a cashier for Family Dollar Stores.

We recognize that subsection (b)(2) of the statute excludes physical and mental stress from consideration in determining compensability of a heart attack. However, it would be an unreasonable interpretation of the statute to hold that the combined effect of subsections (b)(1) and (b)(2) is to allow for the compensability of an on-the-job heart attack arising from the performance of work that is extraordinary or unusual in comparison to the employee's usual work, but to limit that compensability only to those rare employees who are able to perform such extraordinary or unusual work without experiencing any physical or mental stress. To the contrary, we believe that the more logical interpretation of subsections (b)(1) and (b)(2) is that if a heart attack is proved to have been caused by the physical or mental stress arising out of the performance of work that is extraordinary and unusual in comparison to the employee's usual work, the heart attack is compensable; but where an employee suffers an on-the-job heart attack in the absence of work that is unusual and extraordinary, or in the absence of the occurrence of some unusual or unpredicted incident, it is not compensable, regardless of the level of physical or mental distress the employee experiences.

Here, Edwards produced medical testimony that her heart attack was the result of "extraordinary and unusual" work in comparison to her usual work. We therefore hold that the Commission's opinion was supported by substantial evidence.

Appellants further argue that Edwards had pre-existing artery disease and cite the Commission's opinion of *Couch v. Ark. State Police*, WCC E500890 (1998), asserting that the two cases are similar. In *Couch* the Commission held that the physical exertions

of a state trooper involved in a high-speed automobile chase were not proven to be the major cause of the trooper's heart attack where there existed evidence that the trooper suffered from coronary artery disease. Suffice it to say that full Commission opinions are not precedent to this court. *Taylor v. Pfeiffer Plumbing & Heating Co.*, 8 Ark. App. 144, 648 S.W.2d 526 (1983). Furthermore, contrary to the evidence in *Couch*, Edwards presented medical evidence, which the Commission found credible, that the major cause of her heart attack was extreme emotional stress brought on by the extraordinary and unusual event of being the victim of an armed robbery.

Finally, appellants claim that Edwards did not prove that an "accident" was the major cause of her physical harm. Appellants argue that the armed robbery was not an "accident" within the meaning of our workers' compensation laws. However, appellants fail to cite any convincing authority to support this argument and it is not well taken; we therefore need not address it on appeal. *See Rainey v. Hartness*, 339 Ark. 293, 5 S.W.3d 410 (1999) (recognizing that an appellate court does not consider assertions of error that are unsupported by convincing legal authority or argument, unless it is apparent without further research that the argument is well taken). Furthermore, appellants do not show that the Commission made any ruling on this argument. When no ruling has been obtained below, we will not address the merits of the argument on appeal. *See W.W.C. Bingo v. Zwierzynski*, 53 Ark. App. 288, 921 S.W.2d 954 (1996).

For these reasons, we affirm.

HART and GRIFFEN, JJ., agree.

Allen HENDERSON *v.* Dorothy CALLIS

CA 06-352 245 S.W.3d 174

Court of Appeals of Arkansas
Opinion delivered December 13, 2006

Don R. Etherly, for appellant.

Vandell Bland, Sr., for appellee.

WENDELL L. GRIFFEN, Judge. Allen Henderson appeals from an order granting appellee Dorothy Callis's petition to adopt his son, A.H., and terminating appellant's parental rights with regard to his son. He argues that the trial court erred in terminating his parental rights because the court's determination was based solely on the fact that he is or has been incarcerated. We agree and reverse the trial court's order.

This appeal results from appellee's petition to adopt A.H., who was born out of wedlock on August 30, 1999, to appellant and Racquel Mitchell. In her petition, appellee stated that she had been the child's guardian since June 20, 2001; that she had the necessary resources to provide for A.H.; and that appellant and Mitchell were incarcerated. Appellant answered, requesting that the petition be dismissed.

Only appellant and appellee testified at the August 12, 2005 hearing on the petition to adopt. Their testimony established the following facts. Appellant and Mitchell began living together two weeks before A.H. was born; appellant purchased approximately $200 in clothing for the child prior to his birth. Three or four days after A.H. was born, appellant was incarcerated for aggravated robbery and possession of a firearm. He was sentenced to serve ten years in prison and is eligible for parole in December 2006. The trial court acknowledged that, during his incarceration, appellant contacted numerous governmental entities in an attempt to locate his son. He also filed three petitions to establish custody and registered with the Putative Father Registry.

Despite appellant's efforts, he was unable to contact his son and thus, has had no contact with the child since he was incarcerated. Nor has appellant provided any support for his son since he was incarcerated. Appellant admitted that he currently has no means to support his child but testified that, once he is released, he can provide for A.H. Appellant also volunteered to pay child support upon his release. He explained that when he committed the robbery he had no direction or guidance in his life, but insisted that "now I do" and that he was now "a more-spiritually inclined individual." He asked the court to look at the man he is now and the man he intends to be in the future.

Appellee was appointed as A.H.'s guardian in January 2001, when the child was approximately fifteen months old, and he has remained in her custody since then. She conceded that she knew that appellant was incarcerated in an Arkansas facility and that Mitchell was incarcerated in Florida or Tennessee. However, appellee neither attempted to find out precisely where the parents were located nor attempted to contact them. She admitted that appellant sent her a letter during the summer of 2005, after he was notified of the adoption petition, to which she did not respond.

During the hearing, appellant moved to dismiss the adoption petition, arguing that his inability to provide for his son because he was in prison is not a sufficient ground on which to grant the petition, especially where he made diligent efforts to contact his son and where he was due to be released on parole in sixteen months. Appellee responded that she had been the child's sole caretaker since 2001; that appellant was only eligible for parole in 2006 and did not have a transfer date until 2007; that appellant had proven throughout A.H.'s life that he cannot care for him; and that the possibility appellant would provide a stable home for his child

was "bleak at best." She also argued that it was in A.H.'s best interest to solidify the bond that had formed between them.

The trial court stated orally that it was inclined to grant the petition because the child was "entitled to a permanent situation." However, the court withheld judgment on appellant's motion to dismiss. Appellant submitted a posttrial brief, arguing that the petition for adoption should be denied because appellee had not shown by clear and convincing evidence that his rights should be terminated; he also argued that his consent to the adoption was required because his failure to support and contact his son was not willful, as demonstrated by his numerous attempts to contact A.H.

The trial court subsequently entered a memorandum opinion in which it granted the adoption petition. Due to appellant's various attempts to contact his son, the court determined that appellant's consent to the adoption was necessary but that appellant unreasonably withheld his consent. The court reasoned:

> The Respondent here has been incarcerated for approximately eight-and-one half (8 ½) years between the ages of 17-26. He will not be eligible for parole until December 2006 and with a transport date in April 2007, if he is awarded parole. The child, Allen, is now six years of age. By the time the Respondent may be released from his present sentence, the child will be almost eight years [old]. The majority of this time has been in the home of the Petitioner. According to the testimony of Ms. Callis, the child has thrived in her home.
>
> The court finds that it is in the best interest of the child, that the parental rights of the Respondent be terminated. The Court specifically finds that the consent of the non-custodial parent was unreasonably withheld.

The court subsequently entered an order terminating appellant's parental rights.

The trial court ordered termination pursuant to Arkansas Code Annotated § 9-9-220(c)(3) (Supp. 2005), which authorizes a trial court to order termination where a parent who does not have custody unreasonably withholds consent to adopt. The facts warranting termination of parental rights must be proved by clear and convincing evidence. In reviewing the trial court's evaluation of the evidence, this court will not reverse unless the court's finding is clearly erroneous. *See Crawford v. Ark. Dep't of Human Servs.*, 330

Ark. 152, 951 S.W.2d 310 (1997). Clear and convincing evidence is that degree of proof which will produce in the factfinder a firm conviction regarding the allegation sought to be established. *Id.* Furthermore, this court will defer to the trial court's evaluation of the credibility of the witnesses. *Id.*

We hold that the trial court erred in granting the adoption petition and in terminating appellant's parental rights merely because he was or has been incarcerated. Affirming the trial court in this case would require us to hold that, where the child of an incarcerated parent is in the court-ordered custody of another person, that parent has an obligation to consent to the adoption of the child merely because the parent is incarcerated and because the child has thrived in the custody of its guardian, even where the parent has undisputedly and actively attempted to establish contact with and to claim paternity of the child.

Although imprisonment imposes an unusual impediment to a normal parental relationship, it is not conclusive on the termination issue. *See id.* Rather, in deciding whether to terminate the parental rights of a party, the trial court has a duty to look at the entire picture of how that parent has discharged his duties as a parent, the substantial risk of serious harm the parent imposes, and whether or not the parent is unfit. *In re Adoption of K.M.C.*, 62 Ark. App. 95, 969 S.W.2d 197 (1998). Here, appellant did everything a parent in his situation could do to establish and maintain a relationship with his son. Thus, this is not a situation in which the parent refused to have contact with his child while incarcerated or exercised visitation in an inconsistent manner so as to threaten the child's sense of stability.

Moreover, appellant is not deemed to be unfit simply because he is incarcerated, and there is no evidence that appellant poses a risk to his son. The only evidence is that he purchased clothing for A.H. before he was born and thereafter consistently sought to contact his son — actions consistent with a parent who is making a good-faith effort to discharge his parental duties. There are no facts in the record showing that the child would suffer any untoward effect by allowing him to establish a relationship with his father. There is no evidence showing that the child would be adversely affected by knowledge of or association with his father. Even if appellant is not paroled as anticipated, he should be given the opportunity to develop the relationship with his son that he has so ardently worked to establish.

Unless the appellant has been divested of parental rights, appellee, as A.H.'s guardian, has a moral and legal obligation to refrain from engaging in conduct that alienates the child from appellant or that severs the parent-child relationship. However, the record before us shows that appellee consciously took no action to contact appellant regarding the location and welfare of his son even though she knew appellant was located in one of Arkansas's prisons. Yet, she apparently had no trouble finding appellant when she needed his consent to adopt his son.

On these facts, the record contains no showing that appellant unreasonably withheld his consent. Appellant has no obligation to consent merely because he is incarcerated or even because appellee does not want to communicate with him or have the child exposed to him. Even if appellant had consented to the guardianship, he would not have forfeited his parental rights in so doing. *See In re Guardianship of Markham*, 32 Ark. App. 46, 795 S.W.2d 931 (1990). Accordingly, we reverse the trial court's order granting appellee's adoption petition and terminating appellant's rights.

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

PITTMAN, C.J., and GLOVER, J., dissent.

JOHN MAUZY PITTMAN, Chief Judge, dissenting. Appellant argues that the trial court erred in finding that he was unreasonably withholding his consent to adoption. I would affirm.

This is not a case in which termination of parental rights was based solely on the appellant's incarceration. In determining that appellant was unreasonably withholding his consent, the trial judge noted that appellant was not married to the child's mother and had lived with her and the child for only three days before he was incarcerated for aggravated robbery and sentenced to ten years' imprisonment. She also noted that, although he was only twenty-six years of age, appellant had been imprisoned twice, served over eight years in prison between the ages of seventeen and twenty-six, and was still imprisoned at the time of the hearing. Finally, she noted that appellee had cared for the six-year-old child since he was fifteen months of age.

Appellant's argument is premised on the sanctity of his parental rights. However, the parent-child relationship is not one-sided; a parent's rights are based on his fulfillment of the correlative duties of parenthood. At a minimum, the obligations of

parenthood require that a parent express love and affection for the child; express personal concern over the health, education and general welfare of the child; supply necessary food, clothing and medical care; educate the child; give social and religious guidance; and provide an adequate home. *Harper v. Caskin*, 265 Ark. 558, 580 S.W.2d 176 (1979). Although a parent's imprisonment, standing alone, does not automatically require termination of parental rights, appellant in the present case has been repeatedly imprisoned since he was a teenager for highly antisocial behavior. Past actions over a meaningful period are good indicators of what the future may be expected to hold, *In re Adoption of K.M.C.*, 62 Ark. App. 95, 969 S.W.2d 197 (1998), and the trial court has a duty to look at the entire picture of how the parent discharged his parental duties. Here the record shows that, although appellant has exerted himself somewhat to establish his parental rights, he has done nothing to discharge his parental duties.

I respectfully dissent.

DAVID M. GLOVER, Judge, dissenting. I respectfully dissent for two reasons. Initially, I question whether this is a final and appealable order because the last paragraph of the order terminating appellant's parental rights states, "That the issue of the necessity of the consent of the biological mother, Ms. Raquel Mitchell, is reserved by this court." In *Ford Motor Co. v. Harper*, 353 Ark. 328, 330, 107 S.W.3d 168, 169 (2003) (citations omitted), our supreme court held:

> Whether a judgment, decree, or order is final is a jurisdictional issue that this court has a duty to raise, even if the parties do not, in order to avoid piecemeal litigation. Where no final or otherwise appealable order is entered, this court lacks jurisdiction to hear the appeal. In order for a judgment to be final and appealable, it must dismiss parties from court, discharge them from the action or conclude their rights to the subject matter in the controversy.

Arkansas Rule of Appellate Procedure – Civil 2 delineates orders that are considered to be appealable matters. I am unable to place this order into any category under that rule. Clearly this adoption could not be finalized without the determination of whether the consent of the child's biological mother is necessary. Also, a certificate pursuant to Rule 54(b) of the Arkansas Rules of Civil Procedure was not attached to the order. Rule 2(c)(3)(C) provides that the termination of parental rights is a final appealable order in juvenile cases where an out-of-

home placement has been ordered. This case, however, is a probate case, not a juvenile case; therefore I do not believe that subsection (c)(3)(C) is applicable. Procedurally, I can find no basis for construing this order to be a final appealable order when the trial court "reserves" the question as to whether the biological mother's consent is necessary.

Contrary to my analysis, the majority finds no problem with the finality of the order and reverses the trial court's finding that appellant's consent, although necessary, was being unreasonably withheld. If I reached the merits of this case, which I decline in reliance on Rule 2, I would affirm the decision of the trial court, which found that appellant was unreasonably withholding his consent for adoption and terminated appellant's parental rights.

The trial court correctly found that appellant's consent to the adoption was required because, in taking into consideration the resources available to appellant in prison, he had attempted to make contact and establish a bond with his son; had contacted the putative-father registry; and had otherwise attempted to establish paternity. The trial court next turned to the question of whether appellant, as a parent not having custody of the child, was unreasonably withholding his consent contrary to the best interests of the child in violation of Arkansas Code Annotated section 9-9-220(c)(3) (Supp. 2005). On this question, the trial court found that it was in the child's best interest that appellant's parental rights be terminated and that appellant was unreasonably withholding his consent. In making this determination, the trial court quoted from *In re Adoption of K.M.C.*, 62 Ark. App. 95, 97, 969 S.W.2d 197, 199 (1998):

> In making a decision of whether to terminate the parental rights of a party, the trial court had a duty to look at the entire picture of how that parent discharged his duties as a parent, the substantial risk of serious harm the parent imposed, and whether or not the parent was unfit. *Waeltz v. Arkansas Department of Human Services, supra.* Any evidence having probative value as to the present or prospective fitness of a parent is admissible to determine whether consent has been unreasonably withheld. *Lindsey v. Ketchum*, 10 Ark. App. 128, 661 S.W.2d 453 (1983).

In *In re Adoption of K.M.C.*, this court reversed the trial court's finding that the teenage biological father did not unreasonably withhold his consent to the adoption contrary to the best interest of the child,

holding that in making a determination of whether to terminate a party's parental rights, the trial court had to look at the *entire picture*, including past actions prior to the child's birth, in order to attempt to make an accurate prediction of the future.

Here, the majority assumes that the trial court terminated appellant's parental rights "based solely on the fact that he is incarcerated." But this is an incorrect reading of the trial court's decision. That is not the entire picture. In her letter opinion, the trial judge stated:

> The child, Allen, was born on August 30, 1999 to Allen Henderson and Racquel Mitchell. The parents were never married nor has paternity been established. Paternity is not disputed in this matter as the petition states Mr. Henderson is the biological father.
>
> Three [*sic*] days after the birth of the child, the father was incarcerated in the Arkansas Department of Correction. Mr. Henderson was convicted of aggravated robbery and possession of a firearm. He was sentenced to serve 10 years. He will be eligible for parole December 2006. This current incarceration is the second incarceration for the Respondent, now age 26. When Mr. Henderson was age 17, he served a period of 25 months in prison and was 20 years old when he returned.
>
> The Petitioner was appointed the guardian of this child January 2001 and he has remained in the custody of Ms. Callis since that date. It is conceded the Respondent has had no substantial contact with this child and that Ms. Callis has made no effort to determine where the Respondent was located. She was aware both parties were incarcerated, Mr. Henderson in an Arkansas facility and Ms. Mitchell either in Florida or Tennessee.
>
> . . . .
>
> The Respondent here has been incarcerated for approximately eight and a half (8 ½) years between the ages of 17-26. He will not be eligible for parole until December 2006 and with a transport date in April 2007, if he is awarded parole. The child, Allen, is now 6 years of age. By the time the Respondent may be released from his present sentence, the child will be almost 8 years. The majority of this time has been in the home of the petitioner. According to the testimony of Ms. Callis, the child has thrived in her home.

It is clear that the trial judge looked at the "entire picture" of how appellant has discharged his duties as a parent in determining that he was unreasonably withholding his consent to the

adoption. The trial judge did not simply base the termination of appellant's parental rights upon his current incarceration; rather, she noted that appellant had previously served twenty-five months in prison before this, his second, incarceration. At the time of the entry of the order, appellant had been in prison for eight and a half of his twenty-six years, almost one-third of his entire life and practically all of his adult life. He entered prison at age seventeen for twenty-five months and returned to prison at age twenty, four days after the birth of the child. Another year has now passed with appellant still in prison. He may or may not be granted timely parole from his second prison sentence.

Although it is unclear why appellant went to prison the first time, the second time was for aggravated robbery and possession of a firearm, both serious offenses. Appellant asked the trial court not to judge him on who he was but rather to judge him on the man he now is and the man that he intended to be in the future; however, his track record as an adult does not bode well for his future. It is apparent that the trial court took his past actions prior to the child's birth into consideration. Appellant's criminal actions, which have landed him in prison for virtually all of his young adult life, certainly spoke louder than his words to the trial court, and for this reason, I cannot say that the trial court's decision was clearly erroneous. Appellant probably does want to have a relationship with his son, but his own history does not indicate either that he will have a stellar future or that he will in fact be able to provide for his son. Simply wanting to provide for a child is different from actually providing for a child. As a result of his anti-social and criminal conduct, appellant has never had any meaningful contact with his child for the child's entire life. Appellee is the only person the child has known as a parental figure. Unfortunately, appellant has *never* been a part of his child's life. Now it is unfair to ask a seven-and-a-half year old child, having waited his own entire young life, to continue to wait and languish in an uncertain home situation for a yet to be determined additional amount of time to see if appellant can get his own life together to parent his son. I submit that the best interest the majority is considering in its decision is not the same best interest the trial court considered. The adoption would give the child the stability of remaining in Callis's home, the only parental figure he has known since he was fifteen months old. Therefore, I cannot say that the trial judge was clearly erroneous in determining that appellant had unreasonably withheld his consent for adoption.

The majority gratuitously asserts that appellee has a "moral and legal obligation to refrain from engaging in conduct that alienates the child from appellant or that severs the parent-child relationship." Frankly, no authority is asserted for this as a legal proposition and as a moral proposition, it is beyond the scope of our appellate review since we are not an ecclesiastical review body. Further, in its opinion, the majority is unduly harsh on Ms. Callis, stating that although she did not contact appellant to encourage the parental relationship, she certainly knew where to find him when she wanted to adopt his son. A fairer comment would be to praise Ms. Callis for stepping into this child's life in the absence of either of his parents. With neither parent available to parent him, Ms. Callis willingly took on this challenge and provided the child with a stable, and by all accounts, thriving, environment.

The decision of the trial court was not clearly erroneous.

Chad Wesley HAMILTON *v.* STATE of Arkansas

CA CR 06-257 245 S.W.3d 710

Court of Appeals of Arkansas
Opinion delivered December 20, 2006

Hatfield & Lassiter, by: *Jack T. Lassiter* and *Erin Cassinelli Couch*, for appellant.

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

JOSEPHINE LINKER HART, Judge. Chad Wesley Hamilton was convicted in an Arkansas County Circuit Court jury trial of second-degree murder, for which he was sentenced to twenty years in the Arkansas Department of Correction. On appeal he argues that the trial court: 1) erred in denying his motion to suppress evidence obtained through a warrantless search of his home; 2) erred in refusing his proffered jury instruction on self-defense and, instead, "inaccurately" instructed the jury; and 3) abused its discretion by denying his motion to continue the trial to allow a material defense witness to appear. We reverse and remand for a new trial.

We first consider Hamilton's argument concerning the trial court's failure to give his proffered jury instruction on self-defense. Because Hamilton's argument concerns the inadequacy of the self-defense instruction that was given at trial, not that an instruction on self-defense was warranted, we will only briefly summarize the relevant testimony.

Through multiple witnesses it was established that in the early-morning hours of May 8, 2004, Hamilton arrived uninvited at an "after prom" party attended by Stuttgart High School students and some of their college-age friends. He was intoxicated, and it was obvious to those individuals at the party that he was in an impaired state. Most of the guests at the party were consuming alcohol as well and were in various stages of inebriation. Hamilton was confronted by two of the guests who called him a "queer." Hamilton left the party grounds along with several of the guests who were anticipating a fight. Many of the guests were carrying beer bottles, and a beer bottle was thrown at Hamilton. Hamilton testified that he was afraid that "somebody was going to just bust a beer bottle in the back of my head." At least three young men squared off against Hamilton. Hamilton drew a pocket knife from his pocket, which did not dissuade his opponents from continuing to confront him. At some point, twenty-one-year-old Allen Fortune "swung" at Hamilton, and Hamilton stabbed Fortune through the heart with the pocket knife.

At the trial, Hamilton proffered two jury instructions as Defendant's Exhibit B, including AMI Criminal 2d 705 and AMI

Criminal 2d 1302 (modified) Battery in the Second Degree. The jury instruction, which contained both alternatives, read in pertinent part:

> This is a defense only if:
>
> First: Chad Hamilton reasonably believed that Allen Fortune was committing or was about to commit second degree battery, with force or violence, or Chad Hamilton reasonably believed that Allen Fortune was about to use unlawful deadly physical force; and
>
> Second: Chad Hamilton only used such force as he reasonably believed to be necessary.

The State opposed giving both the second-degree battery and the unlawful deadly physical force alternatives, arguing that it was "an either/or proposition." Further, it asserted that the first alternative was only "intended for occasions when you have something other, like a rape or a robbery, because it says commits a 'blank' felony with force or violence." The trial court agreed with the State's argument and only instructed the jury on the "unlawful deadly physical force" alternative in AMI Criminal 2d 705.

On appeal, Hamilton argues that the trial court erred in denying his proffered jury instruction on self-defense and instead inadequately instructed the jury because it omitted the second-degree battery alternative in the version of AMI Criminal 2d 705 that he had proffered. He notes that the model instruction was based on Arkansas Code Annotated section 5-2-607 (Repl. 2006), which provides in pertinent part:

> (a) A person is justified in using deadly physical force upon another person if he reasonably believes that the other person is:
>
> (1) Committing or about to commit a felony involving force or violence;
>
> (2) Using or about to use unlawful deadly physical force;

Hamilton asserts that because there was some evidence to support the instruction that he proffered, the trial court committed reversible error by declining to give it. Further, he argues that he was prejudiced by the deficiency of the self-defense instruction because the given

instruction inappropriately limited his ability to provide a reasonable doubt in the jurors' mind. We agree.

Our case law is clear that a party is entitled to a jury instruction when it is a correct statement of law and when there is some basis in the evidence to support giving the instruction. *Jones v. State*, 336 Ark. 191, 984 S.W.2d 432 (1999). Moreover, a trial court is required to give a jury instruction if there is some evidence to support it. *Id.* In determining if the trial court erred in refusing an instruction in a criminal trial, the test is whether the omission infects the entire trial such that the resulting conviction violates due process. *Henderson v. State*, 349 Ark. 701, 80 S.W.3d 374 (2002); *Branstetter v. State*, 346 Ark. 62, 57 S.W.3d 105 (2001).

There is a presumption that the model instruction is a correct statement of the law, *Porter v. State*, 358 Ark. 403, 191 S.W.3d 531 (2004), and we believe that the plain wording of subsection (a) of our justification statute is fully and faithfully reflected in AMI Criminal 2d 705. Because second-degree battery has as one of the elements the infliction of serious physical injury, we must conclude that it is a "felony involving force or violence." *See* Ark. Code Ann. § 5-13-202 (Repl. 2006). Accordingly, the trial court erred in refusing to give both relevant alternatives in the instruction. Furthermore, the prejudice to Hamilton's case is patent; it is a much more daunting task under these facts to convince a jury that he was confronted with unlawful deadly physical force than to prove that the individuals who were arrayed against him were likely to cause serious physical injury. Accordingly, we reverse and remand this case for a new trial.

Because we are ordering a new trial, and the warrantless entry into Hamilton's residence yielded both incriminating statements and the alleged murder weapon, we next consider Hamilton's argument concerning the trial court's denial of his motion to suppress because this issue will arise again on retrial. At the hearing on Hamilton's motion, only a single witness testified, Stuttgart police officer Ryan Minney. Minney stated that he was acquainted with Hamilton from at least three contacts with him prior to the May 7, 2004 incident that gave rise to his murder conviction and this appeal. Minney claimed that on April 25, 2004, he patted down Hamilton and discovered a black, three-to-four-inch-long knife unfolded in his pocket. Hamilton allegedly told him that he carried the knife "in case he was jumped" and that he was "prepared to do whatever he needed to do with that knife."

Minney also claimed that he saw Hamilton walking down Main Street at 1:45 a.m. on May 8, 2004. He recalled that Hamilton was wearing blue jeans and had a "silvery-gray, silk-looking short-sleeve shirt" wrapped around his head. Hamilton told him that he was walking home. Minney stated that he did not have further contact with Hamilton until after he had arrived at the scene of the homicide.

Minney testified that when he arrived at the AP&L parking lot at 2:13 a.m., the victim, Allen Fortune, was lying on the ground, and another man was holding pressure on Fortune's chest. Minney took over for that individual. Fortune was having trouble breathing and his pulse was faint. Minney stated that he heard "several of the people" standing around say that " 'Chico' or 'Chad' " was the person responsible and that the perpetrator had run south toward South Main Street. Minney knew that they meant Hamilton and knew where Hamilton lived. When the EMT arrived, he "let some of the officers know," and they went to Hamilton's residence at 1702 South Main Street.

Minney arrived at Hamilton's house at approximately 2:30 a.m., and knocked on the door. He got no response, but did see Hamilton's shirt laid over a chair in the dining area. Minney left other police officers, Mike Perry and Deputy Burgess, at the house and returned to the crime scene, where he informed one of the CID officers about what had happened. He and Officer Sandine walked the route that they assumed Hamilton had taken to search for evidence, but they found nothing. When Minney arrived back at Hamilton's residence at 4:32 a.m., he again unsuccessfully tried to make contact. He noticed through the window that the television had been turned on and that the shirt was still visible in the dining area. He returned to the crime scene and informed police lieutenants Austin and Mannis that there were signs of someone in Hamilton's residence. The other officers accompanied him back to Hamilton's residence, where they noticed that the television had been turned off. At that time they were aware that Fortune had died.

At approximately 5:30 a.m., the police decided to enter Hamilton's residence. Austin shouted "very loud" that he was a Stuttgart police officer and asked Hamilton to come to the door. He repeated it "four or five times," then Officer Perry "kicked in the door to gain entry." The police split up to secure the house. He noticed a black knife lying on the dining room table and Hamilton's shirt nearby. Minney asserted that it was the same knife

that he had discovered on Hamilton's person on April 25. He seized the knife and Hamilton's clothing. He claimed that the knife appeared to be damp, as if it had been washed. Minney asserted that he was concerned about securing the evidence before Hamilton could tamper with it. Minney proceeded to the bedroom, where he observed Hamilton being arrested. According to Minney, Hamilton asked them why they were there, and when Mannis told him that he was being arrested for homicide, Hamilton stated, "Nobody died."

The police transported Hamilton to the police station. After he was Mirandized, Hamilton called his grandfather and informed him that he had been arrested. Minney claimed that he overheard Hamilton say, "I used the knife. Nobody had to die. I did what I had to do."

In opposing Hamilton's motion to suppress, the State cited *Humphrey v. State*, 327 Ark. 753, 940 S.W.2d 860 (1997), a case in which the supreme court enumerated six potential exigent circumstances: 1) the commission of a grave offense; 2) belief that the suspect is armed; 3) a clear showing of probable cause; 4) strong reason to suspect that the suspect is in the premises being entered; 5) likelihood that the suspect will escape if not swiftly apprehended; and 6) danger of the destruction of evidence. It argued that only the likelihood of Hamilton's escape was not present in the instant case, and therefore the trial court should find the warrantless entry into Hamilton's home was justified by exigent circumstances. Hamilton cited to the trial court the more recent case of *Mann v. State*, 357 Ark. 159, 161 S.W.3d 826 (2004), in which the supreme court cited with approval *United States v. Duchi*, 906 F.2d 1278 (8th Cir. 1990), a case in which the Eighth Circuit Court of Appeals recognized two factors to be considered in determining whether a warrantless entry is justified by the exigent circumstance that evidence is about to be destroyed: (1) whether the police had the opportunity to seek a warrant, and (2) whether the danger of destruction of the evidence was reasonably foreseeable. The trial court, however, rejected *Mann* as being controlling and relied solely on *Humphrey* in denying Hamilton's motion to suppress.

On appeal, Hamilton argues that the trial court erred in denying his motion to suppress evidence because warrantless entries into private homes are presumptively unreasonable under the Fourth Amendment, and the situation in this case did not constitute the kind of exigent circumstances that would excuse the

failure to seek a warrant. He again cites *Mann*, asserting that the holding in *Mann* limited *Humphrey*, and argues that because the police had ample time to secure a warrant, the trial court erred in finding that there were exigent circumstances. We agree.

In reviewing a circuit court's denial of a motion to suppress evidence, this court conducts a de novo review based on the totality of the circumstances. *See Davis v. State*, 351 Ark. 406, 94 S.W.3d 892 (2003). We review findings of historical facts for clear error, and we determine whether those facts give rise to reasonable suspicion or probable cause, giving considerable weight to the findings of the trial judge in the resolution of evidentiary conflicts and deferring to the superior position of the trial judge to pass upon the credibility of witnesses. *See id.*

It is axiomatic that a warrantless entry into a private residence is presumptively unreasonable under the Fourth Amendment. *Latta v. State*, 350 Ark. 488, 88 S.W.3d 833 (2002). However, a warrantless intrusion may be constitutional if, at the time of entry, there exists probable cause and exigent circumstances. *See Humphrey v. State, supra.* "Exigent circumstances are those requiring immediate aid or action, and, while there is no definite list of what constitutes exigent circumstances, several established examples include the risk of removal or destruction of evidence, danger to the lives of police officers or others, and the hot pursuit of a suspect." *Id.* at 767, 940 S.W.2d at 867.

We believe that Hamilton's reliance on *Mann* is eminently sound. In the instant case, more than three hours had passed from the time that Minney arrived at Hamilton's doorstep until the decision to kick in his door was finally made. That was more than enough time to secure a warrant. As our supreme court noted in discussing *Duchi*, "clearly, if officers have the opportunity to seek a warrant, the situation is not one of urgency." *Mann*, 357 Ark. at 169, 161 S.W.3d at 832. Moreover, that length of time that the officers lingered outside Hamilton's dwelling was more than sufficient for Hamilton to tamper with the evidence if that was his intention, and indeed, he did wash the blood off his knife. The most significant other item of evidence that Minney was supposedly concerned with, Hamilton's shirt, remained in view of the police during their more than three-hour vigil outside his door. Again, citing *Duchi* with approval, our supreme court quoted its discussion of what constitutes the type of "urgency of the situation" that would justify suspension of the warrant requirement:

"The warrant requirement is suspended when — in the press of circumstances beyond a police officer's control — lives are threatened, a suspect's escape looms, or evidence is about to be destroyed." *Id.* at 169, 161 S.W.3d 832. In the instant case, the evidence may have already been tampered with or was not likely to be when the police kicked in the door. Accordingly, we hold that the trial court erred in failing to suppress the fruits of the unlawful intrusion into Hamilton's home.

In finding error in the trial court's denial of Hamilton's motion to suppress, we are mindful that the State has argued on appeal that even if the search was unlawful, in light of the overwhelming evidence that Hamilton stabbed Fortune, the trial court's error was harmless. However, given that this issue is likely to arise on retrial, we reject the State's contention that it was harmless in this case. Furthermore, the identity of the alleged perpetrator was not an issue; it is axiomatic that in any case where a criminal defendant raises a justification defense, his identity as the alleged perpetrator is a given. Accordingly, we hold that the evidence gathered in the illegal entry into Hamilton's residence was erroneously admitted and should not be admitted on retrial.

Regarding Hamilton's third argument, that the trial court abused its discretion by denying his motion to continue the trial to allow a material defense witness to appear, we believe that this situation is unlikely to recur on retrial, and therefore we decline to address it. *See id.*

Reversed and remanded.

BIRD and GRIFFEN, JJ., agree.

Lloyd DUNAWAY, Vernon Wright, Sue Wright, and Kenneth Orrell *v.* GARLAND COUNTY FAIR and LIVESTOCK SHOW ASSOCIATION, INC.

CA 06-724 245 S.W.3d 678

Court of Appeals of Arkansas
Opinion delivered December 20, 2006

Sanders Law Firm, P.A., by: *Michael E. Sanders*, for appellants.

Wood, Smith, Schnipper, Clay & Vines, by: *Don M. Schnipper* and *John T. Vines*, for appellee.

SAM BIRD, Judge. This appeal concerns efforts by appellants Lloyd Dunaway, Vernon Wright, Sue Wright, and Ken-

neth Orrell to challenge the validity of actions taken by appellee Garland County Fair and Livestock Show Association, Inc., in relocating its fairgrounds. Dunaway and the Wrights are members of the association and members of its board. Orrell attempted to become a member of the association but was denied membership. The trial court dismissed some of appellants' claims on motion, refused to appoint a receiver, declined to enjoin the sale of appellee's fairground property, and ordered appellee to amend its bylaws. Appellants assert that the trial court erred in three instances, specifically the denial of their motion for a continuance, the dismissal of their claims to invalidate the board's actions, and the failure to award attorney's fees. Appellee cross-appeals from the trial court's order directing it to amend its bylaws and from the denial of its request for attorney's fees.

Appellee is a nonprofit corporation governed by "Amended and Substituted Articles of Incorporation" filed with the Arkansas Secretary of State on August 24, 1989, which replaced the original articles adopted in 1940. The articles provide that "[m]embership in this association is open to any resident of Garland County, . . . approving of the goals of the corporation and willing to contribute their time and energy to accomplish the purposes of this corporation." The association is governed by a twenty-eight-member board of directors elected by the membership by secret ballot.[1] The articles do not limit the number of members. The 1997 amendments specify that vacancies on the board shall be filled by the president's nominating a person at a regularly scheduled meeting and the board's approving the nomination at the next regularly scheduled meeting. The articles also provide that the corporation shall have all of the general powers listed in Ark. Code Ann. § 4-28-209.

Dunaway was president of the board when the "Constitution and Bylaws of the Garland County Fair And Livestock Show Association" (the "bylaws") were adopted by the officers of the association on April 30, 1996. The bylaws establish a three-tier membership regime. The first tier, labeled "regular members," consists of "elected individuals who wish to contribute their time and energy to help accomplish thereof" and is limited to twenty-eight persons, consisting of twenty-seven regular elected members and the current president of the Garland County Extension

[1] One member is not elected by the membership: the current president of the Garland County Extension Homemakers.

Homemakers. The second membership tier, labeled "honorary members," consists of "individuals selected and approved by a majority of the regular membership." The third tier of membership, labeled "advisors," consists of "individuals selected and approved by a majority of the regular membership" and have no voting rights. The bylaws limit voting rights to the "regular" members.

The bylaws provide a method for filling board vacancies similar to that contained in the 1997 amendment to the articles. The bylaws state that the officers of the association "*shall not* enter into any contracts or agreements with an individual or an organization without a majority vote by the membership at a regular or special called meeting." (Emphasis in original.) The bylaws, as do the articles, provide that directors are to be elected to serve a three-year term, with one-third of the board elected each year. Both the articles and the bylaws provide that, in case of conflict between the articles and the bylaws, the articles will control.

On October 21, 2005, appellee, after being authorized by its board, entered into a contract to sell certain real property to SDI Realty Management, Inc., for the sum of $9.12 million. Thereafter, appellee, again acting through its board, entered into a contract to purchase certain other property for the sum of $1.2 million and to relocate its fairgrounds to the new location. Both transactions were scheduled for simultaneous closings on or before April 17, 2006.

On March 17, 2006, appellants filed suit for injunctive, declaratory, and other relief. The complaint, as amended, alleged that the membership and voting restrictions of the bylaws were illegal; that the board was thus illegally constituted; that the board had acted outside its authority; that the directors had breached their fiduciary duties to the association; and that none of the contracts executed had been properly authorized by the association and were thus void. Appellants sought an order (1) declaring that the restrictions on membership and voting set forth in the bylaws were invalid; (2) declaring that appellee's president James Mattingly was not qualified for membership due to his residency; (3) declaring that the board was illegally constituted; (4) declaring the real-estate contracts void ab initio; (5) removing the board; (6) appointing a receiver to take over the business affairs of appellee to conduct a membership campaign and to oversee an election of a new board; and (7) enjoining the board from taking any further

action with respect to the purchase or sale of any real property until a new board was elected and had conducted appropriate due diligence.

In response, appellee filed a motion to dismiss, alleging that the complaint failed to state facts upon which relief could be granted as to Mattingly's residence; that appellant Orrell lacked standing to raise the claims because he was not a member of the board; that appellants were not entitled to relief for a variety of factors; and that any injunctive relief would cause appellee irreparable harm. Appellee also filed an answer denying the material allegations of the complaint and asserting that res judicata barred any claims by appellant Dunaway and that, if injunctive relief were granted, appellants be required to post a bond in the amount of $10.3 million, as provided by Ark. R. Civ. P. 65(d) and 65.1.

At a March 21, 2006 in-chambers conference, the trial court, based upon the tacit agreement of all counsel, scheduled an expedited trial date of April 5, 2006. The trial court also denied appellants' request for a preliminary injunction due to appellants' inability to post the required bond. After having announced its intention at the March 21 conference, appellee filed a motion to dismiss on March 29, 2006. On April 3, 2006, appellants filed their motion for continuance, asserting the need for additional time for discovery and that the Arkansas Rules of Civil Procedure provide certain time frames to allow for responses to discovery and to motions. On April 4, 2006, the trial court denied appellants' motion for continuance, citing its untimeliness and the previous agreement of counsel to be ready for trial on April 5, 2006.

At the combined motions hearing and bench trial, appellee argued that appellants' complaint failed to state facts upon which relief could be granted regarding the James Mattingly's residence and the membership and composition of the board. Appellants stated that they could not produce any evidence to controvert those issues. Appellee also asserted that all actions were taken with proper board approval. Appellants, again, stated that they could not dispute that fact. The trial court asked if there were any members of the association who were not also members of the board. Appellee's counsel stated that there were not, and appellants did not dispute that assertion.

Appellee's counsel admitted that there were two vacancies on the board but stated that they had been hard to fill since the dispute over relocation arose. Counsel also asserted that the board had been acting with a proper quorum of at least fifteen members.

Appellants argued that there was a conflict between state law, the articles, and the bylaws regarding the classes of membership in the association. They also argued that the articles did not limit membership to twenty-seven members, as they contended the bylaws did.

The trial court ruled from the bench and dismissed all but two of appellants' claims, finding that James Mattingly was a resident of Garland County; that the bylaws did not set any time limit during which the association must fill vacancies on the board; that there was no conflict between the bylaws, the articles, and the law regarding the nomination and election of directors; and that the board of directors was properly constituted. The case proceeded to trial on the issues of whether appellee should revise the process for membership in the association and whether appellee had violated any statutory provisions, specifically Ark. Code Ann. § 4-28-412(2) (Repl. 2001).

At trial, Lloyd Dunaway testified that he had been involved with the association for thirty years, including serving as president for twelve or thirteen years. After identifying the articles, bylaws, and the real-estate contracts at issue, he said that there was no method for a person to become a member of the association without also being on the board. He opined that, based on the articles, the association could not sell its real estate without a vote of the membership. According to Dunaway, no appraisals were conducted prior to execution of the contracts. He said that the board had not investigated the cost of relocating the fairgrounds. Dunaway admitted that he was involved in the relocation process, having chaired the relocation committee. He said that his committee investigated and discussed three possible sites but never discussed having an appraisal or a feasibility study conducted. He said that, although there were no formal estimates for contracting work or architectural plans commissioned, such plans and estimates were available. The architectural plans were made by Jeremy Stone, a registered engineer and a member of the board. According to Dunaway, these estimates showed that the cost of the excavation work would be $257,000 and the total cost of the new fairgrounds would be $8,381,301. Although Dunaway voted with the majority to sell the current fairgrounds in October 2005, he testified that he later changed his mind. He stated that his objection was not to the sale of the fairgrounds property but to whether the proceeds from that sale would be sufficient to build new fairgrounds.

After trial, the court found that appellee did not violate any statutory provisions. The court, however, ruled that appellee must clarify its process for membership in its association. Judgment was entered accordingly, and this appeal and cross-appeal timely followed.

Appellants raise three points for reversal, each with several subpoints. The main points are that the trial court erred in not granting their motion for a continuance of the trial date, that the trial court erred in dismissing their claims, and that the trial court should have awarded appellants their attorney's fees. Appellee asserts two points on cross-appeal: that the trial court erred in ordering it to amend and clarify its membership process and that the trial court erred in not awarding its attorney's fees.

Appellants first contend that the trial court erred in denying their motion for a continuance. In order for this court to reverse the trial court's denial of a continuance, appellants must show that the trial court abused its discretion. *Bennett v. Lonoke Bancshares, Inc.*, 356 Ark. 371, 155 S.W.3d 15 (2004).

In a "Notice of Hearing on Motions and Non-Jury Trial," dated March 21, 2006, the parties were notified that motions would be heard and a non-jury trial would be held on April 5, 2006. The notice also stated that "[a]ny Motions for Continuance should be filed within 7 days after receipt of this Notice." Appellants filed their motion on April 3, 2006. The trial court denied the motion, citing the parties' agreement as to the trial date and the tardiness of the motion for the continuance. The trial court also noted that, at the pretrial conference, the only discovery appellants indicated needing were some depositions.

Appellants renewed the motion for continuance immediately prior to trial, stating that they were not provided with all of the documents they requested. The trial court again denied the motion, stating:

> I gave the parties information that if there was any problem with discovery I should be informed immediately and I'd take care of it. I wasn't informed of any problems until late Monday.... I'm going to deny the Continuance Motion and we will go forward with the trial on the merits.

Appellants argue that the trial court set an unreasonable trial schedule and that they were entitled to conduct discovery and to time to

respond to appellee's motion to dismiss. Lack of diligence is a factor to consider in denying a continuance. *Morris v. Cullipher*, 306 Ark. 646, 816 S.W.2d 878 (1991). Here, appellants did not comply with the court's directive to file their motion for continuance in a timely fashion. Also, when the continuance is based on a request for additional discovery, the appellant must not only show that there has been an abuse of discretion but also that the additional discovery would have changed the outcome of the trial. *Id.* Appellants do not explain how the result would have been different had the trial court continued the case; rather, they assert that they should have been allowed to conduct "appropriate discovery." Therefore, appellants have not shown any prejudice, and we will not reverse without a showing of prejudice.

For their second point, appellants argue that the trial court erred in dismissing their claims. This case was decided partially on summary judgment and partially by bench trial. In *Crooked Creek, III, Inc. v. City of Greenwood*, 352 Ark. 465, 101 S.W.3d 829 (2003), the supreme court set forth the standard of review for such cases as follows:

> Summary judgment is to be granted by a trial court only when it is clear that there are no genuine issues of material fact to be litigated, and the party is entitled to judgment as a matter of law. Once the moving party has established a prima facie entitlement to summary judgment, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact. On appellate review, we determine if summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of the motion leave a material fact. In bench trials, the standard of review on appeal is not whether there is any substantial evidence to support the finding of the court, but whether the judge's findings were clearly erroneous or clearly against the preponderance of the evidence.

352 Ark. at 469-70, 101 S.W.3d at 832 (citations omitted).

Under this point, appellants first argue that the trial court erred in finding that Mattingly was a resident of Garland County and was thus ineligible for membership in the association. Citing *Clement v. Daniels*, 366 Ark. 352, 235 S.W.3d 521 (2006), they note that questions of intent are particularly inappropriate for summary judgment. However, in the present case appellee presented documentary evidence in the form of Mattingly's affidavit,

tax records, voter-registration card, driver's license, and utility bills to show Mattingly's residence was in Garland County. Appellants conceded that they could not present any evidence to controvert that fact. Instead, they assert that, given more time for discovery, they could cross-examine Mattingly or produce school records showing that Mattingly's children attend school in Hot Spring County. If a party responding to a summary-judgment motion cannot meet proof with proof on an essential element of his claim, the movant is entitled to judgment as a matter of law. *See Caplener v. Bluebonnet Milling Co.*, 322 Ark. 751, 911 S.W.2d 586 (1995).

In several subpoints, appellants argue that the membership of the association and of the board are illegally constituted and that the real-estate transactions are void because they were not approved by the full association membership.

Arkansas Code Annotated section 4-28-210(a) (Repl. 2001) provides that a nonprofit corporation may have one or more classes of members, or may have no members, as provided in the articles. Here, the bylaws provide for three classes of members and limit "regular" membership to twenty-seven. The articles are silent on classes of membership, stating only that membership is open to all Garland County residents who support the association's goals. This creates an apparent conflict between the articles and the bylaws regarding the number of members. If there is a conflict between the charter and the statutes under which the charter issued, the charter must yield to the laws of the state. *Allen v. Malvern Country Club*, 295 Ark. 65, 746 S.W.2d 546 (1988). Arkansas Code Annotated section 4-28-212(a) (Repl. 2001) provides, in part, that "each member shall be entitled to one (1) vote in the election of the board of directors." Section 4-28-212(b) allows the articles to specify the voting rights of members on other issues. This implies that a class or classes of members may not have voting rights on certain issues.

Appellants rely on the supreme court's decision in *Giss v. Apple*, 239 Ark. 1124, 396 S.W.2d 813 (1965), in arguing that the entire membership of the association should be allowed to vote on the transactions. In *Giss*, a nonprofit corporation (a country club) sought to sell substantially all of its assets and move the country club to a new location. The articles of incorporation and bylaws were silent as to the vote requirement for the proposal. A close vote of the membership was taken at which a majority of the

number of members present at the meeting voted to approve the sale but not a majority of the number of members having voting rights. The supreme court, after noting that the relevant act, the Arkansas Nonprofit Corporation Act of 1963, was silent on the question, cited some general treatises on the law of corporations and placed emphasis on analogous actions of the corporation in giving the directors similar power, such as to mortgage the property of the association (which, under the articles of incorporation, required a vote of a majority of members having voting power). The court held that, in order to sell substantially all of the corporate property, a majority vote of the corporation's members having voting rights was necessary. The court thus filled the statutory void as to the sale of all assets as best it could, looking to general corporate law and the past actions of the corporation. If therefore, the sale of the fairground property is a sale of all assets without a dissolution, it appears that the vote requirement, according to *Giss*, in the absence of any controlling provision in the corporate articles or bylaws, is a majority of the members having voting power. That being said, it appears that membership in the association is consonant with membership on the board. Further, although there were two vacancies on the board, there was no evidence presented as to the vote approving both transactions.[2] Therefore, we cannot say that the transactions were not approved by a majority of the membership having voting rights.

Appellants also assert that the trial court should have removed all of the board members for breaching their fiduciary duty to the corporation. This comes under appellants' allegation that the board violated Ark. Code Ann. § 4-28-412(2), which prohibits a charitable organization from "[engaging] in any financial transaction that knowingly jeopardizes or interferes with the ability of the charitable organization to accomplish its charitable purpose." Among the ways the board is alleged to have breached its duty is by failing to have proper studies done as to the feasibility of relocating and in not obtaining estimates as to the cost of construction. However, Lloyd Dunaway testified that his committee considered several possible sites for relocating the association.

[2] In their complaint, appellants allege that the vote to approve the purchase and relocation of the fairgrounds passed by a vote of thirteen to twelve. However, there was no evidence, documentary or testimonial, to support this assertion.

He also identified documents showing that cost estimates were obtained and plans developed. Despite the informality of the process, there was no showing that these estimates were not reasonable or accurate. Therefore, we cannot say that the trial court was clearly erroneous in finding that the board did not violate section 4-28-412(2) or in not removing the board.

Appellants also argue that the trial court erred in not appointing a receiver to manage the association's affairs. Rule 66 of the Arkansas Rules of Civil Procedure provides that "[c]ourts of equity may appoint receivers for any lawful purpose when such appointment shall be deemed necessary and proper," and under our standard of review, we must determine whether the appointment of a receiver was an abuse of discretion. The appointment of receivers rests within the discretion of courts of equity, to be exercised with restraint and caution, and ordinarily in conjunction with a pending proceeding, and rarely as a means in itself, but whenever unusual circumstances warrant. *Union Planters Nat'l Bank v. E. Cent. Ark. Econ. Dev. Corp.*, 340 Ark. 706, 13 S.W.3d 578 (2000). The power to appoint a receiver is, of course, a harsh and dangerous one and should be exercised with great circumspection. *Chapin v. Stuckey*, 286 Ark. 359, 692 S.W.2d 609 (1985) (citing *Kory v. Less*, 180 Ark. 342, 22 S.W.2d 25 (1929)). The cases in which receivers ordinarily will be appointed are confined to those in which it can be established to the satisfaction of a court that the appointment of a receiver is necessary to save the property from injury or threatened loss or destruction. *Union Planters Nat'l Bank, supra.* Here, there has been no such showing. Instead, there is evidence that the board, through Dunaway's committee, considered the matter before acting.

As their last argument under this point, appellants also argue that the trial court should have enjoined the real-estate transactions until a new board could be elected. The granting or denying of an injunction is a matter falling within the sound discretion of the trial court and its decision will not be reversed on appeal unless it is clearly erroneous. *Southeast Ark. Landfill, Inc. v. State*, 313 Ark. 669, 858 S.W.2d 665 (1993). Because we affirm the trial court on the previous subpoints, there is no basis for the issuance of an injunction.

We discuss appellants' third point and appellee's second point on cross-appeal together. In those points, appellants and appellee each argue that the trial court erred in not awarding them

their attorney's fees. However, it does not appear that either party presented their request to the trial court or obtained a ruling. An issue cannot be raised for the first time on appeal. *Cole v. Laws*, 349 Ark. 177, 76 S.W.3d 878 (2002). We therefore refuse to address these arguments.

On cross-appeal, appellee argues that the trial court erred in ordering it to revise its bylaws to set forth the process for membership. For the reasons stated above in appellants' second point, there is a conflict between the articles and the bylaws regarding classes of membership. Further, appellee cites no authority in support of its argument. Therefore, it is appropriate for the court to require revision to address that conflict, especially where appellants sought declaratory relief.

Affirmed on direct appeal; affirmed on cross-appeal.

HART and GRIFFEN, JJ., agree.

JOHN GIBSON AUTO SALES, INC. *v.*
DIRECT INSURANCE COMPANY

CA 06-316 245 S.W.3d 700

Court of Appeals of Arkansas
Opinion delivered December 20, 2006

Daniel D. Becker, for appellant.

Wright, Lindsey & Jennings, LLP, by: *Kathryn A. Pryor* and *Gary D. Marts, Jr.*, for appellee.

SAM BIRD, Judge. Appellant John Gibson Auto Sales, Inc. (Gibson), appeals from an order granting summary judgment in favor of appellee Direct Insurance Company (Direct). Gibson is an automobile dealer in Hot Springs. On February 9, 2005, pursuant to an Installment Sale Contract, Gibson sold a 1998 GMC Suburban vehicle to Rochelle Hunter. According to the contract, Hunter paid $1,000 as a down payment and Gibson financed a balance of $11,700, to be paid in monthly installments of principal and interest. The contract required Hunter to obtain a casualty insurance policy covering the vehicle, and she acquired such a policy from Direct. On June 5, 2005, the vehicle sustained a loss, and Gibson, claiming to be a lien holder and loss payee under the policy, made demand upon Direct for payment of its loss. Direct refused to pay, contending that the insurance policy had been cancelled prior to the loss to the vehicle due to non-payment of premiums.

On June 25, 2005, Gibson filed a complaint in the Garland County Circuit Court praying for judgment in the amount of $11,849.59, less applicable deductibles, and for statutory penalties, costs, interest, and attorney fees. In its answer, Direct denied that Hunter's insurance policy was in effect on June 5, 2005, denied that Gibson was a loss payee on that date, and alleged that the insurance policy in question had been effectively cancelled on June 3, 2005, due to non-payment of premiums.

On November 1, 2005, Gibson filed a motion for summary judgment, contending that Direct had failed to give Gibson proper notice of cancellation of the policy as required by Ark. Code Ann. § 23-89-304. In the brief supporting its motion, Gibson argued that, under the statute, an insurer's notice of cancellation of an insurance policy must be given at least twenty days prior to termination, except that where the cancellation is for non-

payment of premiums, the notice is not effective unless it is given at least ten days prior to termination and contains a statement of the reason the policy is to be cancelled.

Gibson attached to its motion the written notice of cancellation that it received from Direct, which was dated May 23, 2005, and provided for an effective date of June 3, 2005, but which did not contain a statement of the reason why the policy was being cancelled. In addition, Gibson attached a "Cancellation of Policy" dated June 13, 2005. Gibson contended that, because the May 23 notice did not contain the reason why the policy was being canceled, the cancellation could not have been effective until June 13, which was twenty days after the notice was sent. Furthermore, pointing to the June 13 cancellation notice, Gibson argued that Direct's "own documents show the policy was in effect on the date of the loss." Gibson therefore claimed that coverage under the policy was in effect on the date of the loss, which was June 5, 2005.

Direct filed a cross-motion for summary judgment on November 21, 2005, claiming that Gibson was "not a bank or other lending institution" and that statutory notice of intent to cancel the policy was required to be given only to the insured and "any bank or lending institution shown on the policy and having a lien on the insured's automobile." Direct argued that because Gibson was neither a bank nor other lending institution, Gibson was not entitled to notice, but that notice had been given to Gibson as a courtesy, rather than as a requirement of Ark. Code Ann. § 23-89-304.

In its reply to Direct's motion, Gibson conceded that it was not a bank but argued that it was a lending institution under the statute. To support its claim, Gibson asserted that, in its normal course of business, it loaned monies and was subject to both state and federal regulations as to lending. It also asserted that the intent of the statute is to give notice of cancellation to a lien holder, so the lien holder can take appropriate action to protect its interest.

By letter dated January 6, 2006, the trial court announced that it was granting Direct's cross-motion for summary judgment, finding that the "[sole] issue [was] whether plaintiff [Gibson] in this case is a 'lending institution.' " The court determined that Gibson was not a lending institution, and Gibson now appeals.

Summary judgment was appropriate in this case, as both parties concede that there are no issues of material fact left to be resolved and the issue is purely one of law, involving the interpre-

tation of Ark. Code Ann. § 23-89-304(b) (Supp. 2003). *See State Farm Mut. Auto. Ins. Co. v. Henderson*, 356 Ark. 335, 150 S.W.3d 276 (2004). We review issues of statutory interpretation de novo, as it is for this court to decide what a statute means. *Id.* 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. *Id.*

Arkansas Code Annotated section 23-89-304(b) states as follows:

> (1) No notice of cancellation to any bank or other lending institution shown on the policy and having a lien on the insured's automobile shall be effective unless mailed or delivered by the insurer to the bank or other lending institution.
>
> (2) No notice of cancellation to any bank or other lending institution shall be effective unless mailed or delivered at least twenty (20) days prior to the termination of the insurance protecting the interest of the bank or lending institution, provided that, when cancellation is for nonpayment of premium, at least ten (10) days' notice of cancellation accompanied by the reason therefor shall be given.

Simply stated, subsection (1) provides that, to be effective, policy cancellation notices must be mailed or delivered to banks or other lending institutions that have a lien on an insured's automobile and are shown on the policy. Subsection (2) further provides that, to be effective, insurance policy cancellation notices to banks or other lending institutions must be mailed or delivered at least twenty days before termination of the insurance policy, except that, when the reason for the cancellation is non-payment of premiums, the time for giving effective notice is reduced to ten days and the notice must contain the reason for the policy's cancellation.

On appeal, Gibson contends that the trial court erred in its finding that Ark. Code Ann. § 23-89-304(b) did not require that it be given notice of cancellation of the insurance policy, arguing that the clear intent of the statute was to provide advance notice to lien holders that insurance would be cancelled. Gibson asserts that, although it is not a bank, as an "other lending institution" it is entitled to notice under the statute, pointing to the fact that it is regulated by both state and federal regulations for lending.

The problem with this argument is that there is nothing in the record to establish that Gibson is a "lending institution." Although Gibson asserted that it loaned monies and was subject to

both state and federal regulations as to lending, it produced no evidence that its primary function was the business of lending. We recognize that the term "lending institution," as used in Ark. Code Ann. § 23-89-304(b), is not defined in the statute. However, in our view, the term "lending institution" means an organization that is primarily engaged in the lending business; if the organization's credit and lending operations, however extensive, and even though regularly carried on, is an incidental function of its main business, then the organization is not a lending institution for the purpose of Ark. Code Ann. § 23-89-304(b).

Here, there is simply no proof that Gibson's primary function was the business of lending. Rather, the evidence shows that Gibson was an automobile dealer and that its loan to Hunter was simply an extension of credit that was incidental to Gibson's main business — selling automobiles. Though Gibson claimed that it "loaned monies," it produced no evidence to show that this was its primary function. We therefore hold that Gibson was not a "lending institution" within the meaning of Ark. Code Ann. § 23-89-304(b), and we affirm the trial court's decision to grant summary judgment in favor of Direct.

The dissenting judge does not disagree with the trial court's conclusion that Gibson was not a lending institution within the meaning of Ark. Code Ann. § 23-89-304. Rather, the dissent contends that whether or not Gibson is a lending institution is irrelevant because Direct did not offer proof that the policy had been terminated prior to the loss to the vehicle on June 5, 2005. The dissenting position ignores the pleadings, summary-judgment motions, and arguments of the parties below, and overlooks the sole basis of the trial court's decision. The parties' pleadings and motions demonstrate that the case presented to the trial court evolved into the single question of whether Gibson was a lending institution.

For example, the essence of Gibson's complaint is that it was entitled to recover for the June 5, 2005 damage to Hunter's car because Gibson was named in the policy as a loss payee. Direct's answer denied that the policy was in effect because the policy had been cancelled on June 3, 2005, due to non-payment of premiums. On November 1, 2005, Gibson filed its summary-judgment motion to which was attached, among other things, copies of notices of "Intent to Cancel Policy" addressed to John Gibson Auto dated May 23, 2005 and June 13, 2005, respectively. Both notices bore the applicable policy number, identified the insured (Hunter) and

the insured vehicle, and contained an effective cancellation date of June 3, 2005. Gibson did not argue in its motion that it did not receive notices of the policy's cancellation on June 3, 2005. Rather, it argued that "proper notice of cancellation was not given" in the manner required by Ark. Code Ann. § 23-89-304. Specifically, it argued that since the notice dated May 23 did not contain a statement of the reason for the cancellation as required by Ark. Code Ann § 23-89-304(b)(2), it was not effective to cancel the policy until twenty days after the notice was given. Gibson then pointed to the June 13, 2005 cancellation notice and argued that Direct's "own documents" demonstrate that the policy was still in effect on June 5.

On November 21, 2005, Direct filed its cross-motion for summary judgment alleging and arguing that, because Gibson was not a bank or other lending institution, it was not entitled, under Ark. Code Ann. § 23-89-304(b)(1)-(2), to notice of cancellation of a policy. In its reply to Direct's motion, Gibson alleged that the parties were in agreement as to the relevant facts in this case, and conceded that the "true issue is whether [Gibson] as a loss payee was entitled to the 20 day notice as required by A.C.A. § 23-89-304(b)(1)." Gibson admitted that it was not a bank but argued that, as a lien holder, it was an "other lending institution" within the meaning of the statute.

From the foregoing summary of the pleadings and arguments, it is clear that the issue framed by the parties in their respective pleadings and motions for summary judgment was whether Gibson was a "bank or other lending institution" within the meaning of § 23-89-304. In the letter setting forth its findings, the court noted that "the [sole] issue is whether [appellant] in this case is a 'lending institution.' " In its order granting Direct's motion for summary judgment, the only finding made by the court was that Gibson "has not established that it is a lending institution." Gibson's only point on appeal is that the trial court erred in its finding that Ark. Code Ann. § 23-89-304(b) did not require that notice of cancellation of the insurance policy be given to Gibson.

The dissenting judge would have us decide this case upon an issue that was not ruled upon by the trial court. When a party does not obtain a ruling on an argument before the trial court, the issue is procedurally barred from our consideration on appeal. *Israel v. Oskey*, 92 Ark. App. 192, 212 S.W.3d 45 (2005). Therefore, we

cannot decide this case, as the dissent urges us to, on the issue of whether the casualty insurance policy had been terminated prior to the loss of the vehicle.

Affirmed.

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

BAKER, J., dissents.

KAREN R. BAKER, Judge, dissenting. I dissent from the majority's opinion affirming the trial court's grant of summary judgment to appellee. First, and foremost, we must be mindful that we are reviewing the trial court's order that simultaneously denied appellant's motion for summary judgment and granted appellee's motion for summary judgment. Therefore, we must review the matter with awareness that the trial court's decision, and our subsequent approval or disapproval of the trial court's action, directly affects the parties' access to our judicial system:

> Our supreme court has stated that we only approve the granting of the motion when the state of the evidence as portrayed by the pleadings, affidavits, discovery responses, and admissions on file *is such that the nonmoving party is not entitled to a day in court, i.e.*, when there is not any genuine remaining issue of material fact and the moving party is entitled to judgment as a matter of law. *Wallace v. Broyles*, 332 Ark. 189, 961 S.W.2d 712 (1998) (emphasis added). Neither Arkansas Rule of Civil Procedure 12 nor Rule 56 authorizes the trial court to summarily dismiss a complaint where there are matters before the court that show there is an issue of fact to be decided. *Maas v. Merrell Assoc., Inc.*, 13 Ark. App. 240, 682 S.W.2d 769 (1985).

Buie v. Certain Underwriters at Lloyds of London, 79 Ark. App. 344, 349, 87 S.W.3d 832, 836 (2002).

> Arkansas Rule of Civil Procedure 56(e) states that, "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." . . . However, Rule 56(e) further states, "If he does not so respond, summary judgment, *if appropriate*, shall be entered against him." (emphasis added).

Id., 79 Ark. App. at 349-50, 87 S.W.3d at 836. Furthermore, summary judgment is not proper where the evidence, although not in material dispute as to actuality, reveals aspects from which inconsistent hypotheses may be drawn. *Luningham v. Ark. Poultry Fed'n Ins. Trust*, 53 Ark. App. 280, 922 S.W.2d 1 (1996).

One of the difficulties that I have with the majority's conclusion in this case is that it is premised on the finding that the parties conceded that the only issue before the trial court was the interpretation of Ark. Code Ann. § 23-89-304(b). I have examined the pleadings and can find no such concession by appellant either below or on appeal. Appellant's motion for summary judgment reads as follows:

> Comes now the Plaintiff, JOHN GIBSON AUTO SALES, INC., and for it's [sic] Motion states:
>
> 1. Plaintiff filed it's [sic] Complaint herein against the Defendant' [sic] seeking payment for a loss under a policy of insurance.
>
> 2. That Plaintiff submits with this Motion the Affidavit of Mona Hamilton, and a supporting brief.
>
> 3. That there are no material issues as to liability and Plaintiff is entitled to judgment as a matter of law.
>
> 4. That pursuant to Rule 56 of the Rules of Civil Procedure, this Honorable Court should enter an order granting judgment in Plaintiff's favor as to liability under the policy of insurance.
>
> WHEREFORE, Plaintiff prays that this Honorable Court enter a judgment finding a liability to Plaintiff under the policy of the insurance.

This motion for summary judgment does not cite Ark. Code Ann. § 23-89-304(b), nor does it mention statutory construction, but it does assert that there are no material issues as to liability. Examining further, the brief in support of the first motion for summary judgment is entitled "Brief in Support of Motion for Summary Judgment on Liability." The first paragraph reads as follows:

> On February 9, 2005, Plaintiff sold to Defendant's insured, ROCHELLE HUNTER, one 1998 GMC suburban vehicle. (A

> copy of the Sales Contract is attached hereto as Exhibit A). Plaintiff was noted as a lien holder under a policy of insurance issued by Defendant. (See response to Interrogatory No. 4 attached hereto as Exhibit B). That on June 5, 2005, the subject vehicle suffered a casualty loss. Thereafter, Plaintiff made claim to the Defendant for benefits under the policy. On June 27, 2005, Danette Dilworth, a Claims Adjuster working behalf of the Defendant submitted to Plaintiff a letter with attachments stating "Letter of intent to cancel was mailed on May 23, 2005 and the actual cancellation letter was mailed on June 13 2005") [sic] A copy of said letter and attachments are attached to the supporting Affidavit of Mona Hamilton.

The first paragraph does not mention Ark. Code Ann. § 23-89-304(b), or that the only issue before the trial court is one of statutory construction. It appears that this paragraph merely establishes the timeline that shows that the loss occurred after the notice of intent to cancel was mailed, but prior to the cancellation of the policy. If that timeline is accurate, then the policy was still in effect at the time of the loss. Yet, the majority has concluded that appellant conceded that the statutory construction of Ark. Code Ann. § 23-89-304(b) was the only issue before the court.

The second paragraph of appellant's brief in support of its motion for summary judgment reads as follows:

> Defendant denied coverage contending the policy lapsed for non-payment. Plaintiff asserts that proper notice of cancellation was not given and seeks recovery under the policy.

That statement makes no concession that the only issue before the trial court was one of statutory construction. It is followed by argument that cites Ark. Code Ann. § 23-89-304, and the statute is set forth line-by-line. Appellant argues that as a lienholder it was entitled to statutory notice.

In the next paragraph, after establishing the timeline that proved that the insurance policy was still in effect at the time of the loss, appellant mentions that appellee also failed to comply with a statutory notice. The brief in support specifically cites only Ark. Code Ann. § 23-89-304(a)(2). Yet, somehow, the majority concludes that the parties conceded that the only issue before the court was a matter of statutory interpretation for Ark. Code Ann. § 23-89-304(b). The next paragraph reads in full:

> Subsection (a)(2) requires that 20 days notice of cancellation be provided to a lien holder, unless the cancellation is based upon

> non-payment of premium, then only a ten day notice is required, but the reason for cancellation must be given. The notice of intent to cancel dated May 23, 2005, and marked as Exhibit B to the Affidavit of Mona Hamilton does not state the reason why the policy was to be canceled. Accordingly pursuant to subsection (a)(2) of A.C.A. § 23-89-304, the cancellation could not be effective until 20 days after May 23, 2005. Since the loss occurred on June 5, 2005, Plaintiff is entitled to coverage under the policy.

The reference is repeated for subsection (a)(2), and again there is no reference to subsection (b). Subsection (a)(2) addresses notices to a named insured. After all, "by the plain language of section 23-89-304, an insurance company must give notice of cancellation to both the insured and to any bank or other lienholder on the named insured's automobile for cancellation to be effective." *Stanley Wood Chevrolet-Pontiac, Inc. v. Progressive Cas. Ins. Co.*, 79 Ark. App. 37, 83 S.W.3d 445 (2002). A lienholder, sometimes designated as a mortgagee, who is named as a loss payee is a named insured, *Price v. Harris*, 251 Ark. 793, 475 S.W.2d 162 (1972), even if not an insured for all purposes, *see Dalrymple v. Royal-Globe Ins. Co.*, 280 Ark. 514, 659 S.W.2d 938 (1983). One does not have to be a lending institution to be designated a loss payee. *See Farmers Mutual Ins. Co. v. Lane*, 278 Ark. 53, 643 S.W.2d 544 (1982); *Price, supra.*

Next appellant's brief sets forth analysis under other statutory provisions regarding insurance that awards statutory protections to a secured party who qualifies as an insured. *See Sphere Drake Ins. Co. v. Bank of Wilson*, 312 Ark. 540, 543, 851 S.W.2d 430, 432 (1993) (stating that while we know of no case directly on point decided by this court, Sphere Drake has given us no reason to hold that a secured party who qualifies as an insured is not entitled to the benefit of the statutory provision). Furthermore, under a subsection titled "Unfair methods of competition and unfair or deceptive acts or practices defined," Arkansas Code Annotated section 23-66-206(9)(B) (Supp. 2005) provides as follows:

> Cancellations of property and casualty policies shall only be effective when notice of cancellation is mailed or delivered by the insurer to the named insured and to any lienholder or loss payee named in the policy at least twenty (20) days prior to the effective date of cancellation. However, where cancellation is for nonpayment of premuim, at least ten (10) days' notice of cancellation accompanied by the reason for cancellation shall be given.

See also Columbia Mut. Ins. Co. v. Home Mut. Fire Ins. Co., 74 Ark. App. 166, 47 S.W.3d 909 (2001).

Given that there is case law and statutory law supporting appellant's argument that a loss payee lienholder can qualify as an insured on an insurance policy, I think it is possible that appellant intentionally cited subsection (a)(2) and not subsection (b). Nor is any concession that the statutory interpretation of Ark. Code Ann. § 23-89-304(b) is the only issue before the court to be found in the final two paragraphs of the appellant's brief in support of its motion for summary judgment:

> Defendant's own notice of cancellation dated June 13, 2005, attached as exhibit C to the Affidavit of Mona Hamilton shows the cancellation date of June 13, 2005. Again the loss was on June 5, 2005, coverage was in effect. It should be noted that the intent to cancel was dated May 23, 2005 and the notice of cancellation was June 13, 2005, taking into account the 20 day requirement of A.C.A. § 23-89-304.
>
> Since Defendant's own documents show the policy was in effect on the date of loss, and that A.C.A. § 23-89-304 was not complied with, Defendant should be held responsible under the policy.

The conclusion of appellant's brief in support states that the policy was in effect on the day of the loss and that the notice of cancellation was sent twenty days after the notice of intent to cancel. The timeline set out by appellant is consistent with the statute requirement that an insurer provide twenty days notice prior to the cancellation of the insurance policy.

I can find no concession by appellant that the only issue before the trial court was the interpretation of Ark. Code Ann. § 23-89-304(b).

In response to appellant's motion, appellee filed a document entitled "Cross-motion for Summary Judgment and Response to Plaintiff's Motion for Summary Judgment." It does not refute appellant's claim that the policy was in effect at the time of the loss of the vehicle. It does cite Ark. Code Ann. § 23-89-304(b), but does not reference Ark. Code Ann. § 23-89-304(a)(2). It claims that it provided a ten (10) day notice of cancellation as a courtesy, but that it was not required to provide any notice whatsoever. The basis for its claim that appellant was not entitled to notice of the cancellation of this policy, for which it was a loss payee lienholder,

was that appellant is an automobile dealer. Specifically, appellee argues that "[b]ecause the statute does not require notice to motor vehicle dealers who sell vehicles under an installment sales contract, plaintiff in this case was not entitled to any notice, and its complaint against Direct is without merit." In furtherance of that claim, appellee argues as follows:

> Under the statutory construction maxim *inclusion unius est exclusion alterius*, which the Arkansas Supreme Court has called a "settled rule of construction," the inclusion of one in a list works to exclude all others. *Arthur v. Zearley*, 320 Ark. 273, 281, 895 S.W.2d 928 (1995). Applying the maxim, one concludes that the inclusion in the statute of banks and other lending institutions is an exclusion of other entities that might hold a lien on an insured vehicle.

It appears that appellee is arguing that the inclusion of banks and other lending institutions in Ark. Code Ann. § 23-89-304(b) excludes any secured party who qualifies as an insured under subsection (a) who might be entitled to notice. Because appellee does not mention Ark. Code Ann. § 23-89-304(a), it is possible that appellee is arguing that the inclusion of banks and other lending institutions in Ark. Code Ann. § 23-89-304(b) excludes any secured party from any other statutory protection provided by the law in the State of Arkansas. As broad as this latter assertion seems, it is consistent with appellee's claim that "Arkansas law thus does not entitle plaintiff to any notice of its cancellation of [the] automobile insurance policy and that the notice that was given was a courtesy rather than a fulfillment of a requirement." Appellee does not directly respond to appellant's argument that it was entitled to notice under Ark. Code Ann. § 23-89-304(a). There were no affidavits or other documents attached to appellee's motion. Clearly appellee was proposing that Ark. Code Ann. § 23-89-304(b) excludes an automobile dealer that holds a lien on a vehicle from receiving notice of the cancellation of a policy on which it is a loss payee.

In addition to the fact that appellee omitted any specific reference to Ark. Code Ann. § 23-89-304(a), not once did appellee say that the policy was terminated on a specific date, or attach a copy of the cancellation, or even state that the policy was cancelled prior to the date of the loss. Instead, appellee argues only that Arkansas law specifically excludes all lienholders on automobiles from notice of a policy cancellation unless the lienholder proves that it is a bank or lending institution. As the majority

writes this concept into law, a lienholder must prove that it is in the business of loaning money separate and apart from any other business before it can be legally entitled to the same protection that a lienholder who is in the business of loaning money is afforded. The question that then arises is who might loan people money to buy cars. Banks loan money to people with good credit and work histories. Sometimes though, people do not qualify for bank loans. Sometimes people are considered too high a risk for a bank to loan money to them.

We have a higher percentage of people in this State below the poverty level than the national average. In this largely rural state, people need cars to get to jobs, buy groceries, take their children to schools, and go to the doctor. Car insurance is not an unnecessary luxury. We require people to maintain and prove insurance coverage for licensing and traffic use. The majority's opinion reinforces the belief that our laws afford no protection to those who loan money to the economically disadvantaged and, in fact, specifically excludes them from the protection afforded other secured parties.

Next at the summary judgment stage, appellant filed a document entitled "Plaintiff's Reply Brief." Appellant's reply brief argues that if you're going to look at Ark. Code Ann. § 23-89-304(b) then it includes lienholders. Appellant also filed a document entitled "Plaintiff's Response to Defendant's Cross Motion for Summary Judgment." In that document, appellant admits the allegations of Defendant's paragraph seven which reads, "Direct states that Arkansas law requires statutory notice of insurance cancellation be sent only to the insured and to 'any bank or lending institution shown on the policy and having a lien on the insured's automobile.' Ark. Code Ann § 23-89-304." Then appellant denied paragraph eight of appellee's motion that reads, "Direct states that plaintiff was neither the insured on the policy of insurance in question nor a bank or other lending institution as described in the statute." Those answers indicate that appellant was asserting that it was afforded protection under subsection (a) as well as (b).

On appeal, appellant focuses on the fact that the trial court erred in finding that the application of Ark. Code Ann. § 23-89-304(b) precluded recovery for appellant because it was not entitled to notice. The majority misconstrues that focus, an argument directed at the trial court's ruling, as a concession that the inter-

pretation of Ark. Code Ann. § 23-89-304(b) was the only issue and that appellant had abandoned any other claim.

We are reviewing a motion for summary judgment. On appeal, appellant states that "[s]ince the loss occurred on June 5, 2005, the twenty days had not expired, and the policy was in effect." The pleadings of appellant to the trial court asserted that the policy was in effect at the time of the loss. Before this court should undertake an analysis of the notice provision, we should first determine whether or not, as a matter of law, the policy was cancelled prior to the loss. Appellant initially cited those statutory notices provisions to bolster its position that the policy was still in effect at the time of the loss. Appellant did not argue that the policy had been cancelled prior to the loss, but that cancellation was ineffective to it, due to improper notice. A factual determination of when the policy is cancelled is a prerequisite for any analysis regarding statutory notice requirements. For that reason alone, this case should be reversed.

Under no analysis of the pleadings can I find that appellant ever conceded that the only issue before the trial court on summary judgment was the interpretation of Ark. Code Ann. § 23-89-304(b). However, even had appellee established by sufficient proof that the policy was terminated prior to the loss, and if the only issue before the trial court had indeed been an interpretation of Ark. Code Ann. § 23-89-304(b), I still could not accept the majority's conclusion that the law of this State protects lienholders, when named as a loss payee in a policy of insurance, only if they prove they are institutions exclusively in the business of loaning money.

Accordingly, I dissent.

John D. JONES *v.* XTREME PIZZA

CA 06-451 245 S.W.3d 670

Court of Appeals of Arkansas
Opinion delivered December 20, 2006

[redacted]

[redacted]

Thomas W. Mickel, P.A., by: *Thomas W. Mickel*, for appellant.

Bridges, Young, Matthews & Drake, PLC, by: *R. Scott Morgan* and *Brandon C. Robinson*, for appellees.

WENDELL L. GRIFFEN, Judge. The Arkansas Workers' Compensation Commission denied benefits to appellant John D. Jones because it determined that Jones was not performing employment services when he was injured because he was driving to work. We reverse the Commission's order and remand for an award of benefits.

The facts in this case are not disputed. Jones, who lived in Jacksonville, Arkansas, was employed by appellee Xtreme Pizza as the general manager of a Domino's Pizza in Bryant, Arkansas. In addition to the usual in-house duties required to operate a pizza franchise, when necessary, Jones was also required to use his personal vehicle to leave the store and purchase food ingredients.

He was also required to attend manager meetings and off-site training seminars. The manager meetings were usually held at the home of Jones's immediate supervisor, Mr. Acklin, who lived in Conway, Arkansas. The training seminars, conducted by the franchisor, Domino's Pizza, were usually held in hotel meeting rooms. Jones was not provided mileage or travel expenses when he attended seminars or manager meetings.

Jones suffered injuries to his neck on August 20, 2003, while on his way to the pizza store in Bryant, where he was scheduled to work at 3:00 p.m. However, Jones was not merely traveling directly from his home to work. Prior to the accident, at Acklin's request, Jones attended both a corporate meeting in North Little Rock and a demonstration meeting at a Little Rock Domino's. The corporate meeting began at 8:00 a.m. or 9:00 a.m. and lasted two to three hours.

After that meeting concluded, Jones met Acklin at a gas station on Highway 10 in Little Rock because Acklin did not want to drive to the Little Rock Domino's store alone. Jones rode with Acklin to the Domino's store on Chenal Parkway; the purpose of this meeting was to demonstrate the correct way to make a new pizza that was to be marketed. This meeting lasted approximately one-and-one-half hours. Acklin then drove Jones back to his vehicle on Highway 10. Jones called one of his employees to cover for him at the store, because he would not be there by 3:00 p.m., as scheduled.

Jones then proceeded to the Bryant store. To avoid construction on Interstate 30, he took the Stagecoach Road exit, a route that he sometimes takes when he drives directly from home to work. Approximately two blocks from the pizza store, Jones's car was rear-ended as he stopped and waited for traffic to clear so he could make a left turn. Immediately thereafter, Jones telephoned Acklin and informed him of the accident. He then drove to Acklin's house in Conway, pursuant to Acklin's request, where, among other things, they discussed the wreck and issues regarding the stores. Jones reported to Acklin at that time that his upper neck was hurting; he said that Acklin knew he was going to the emergency room.

Jones did not immediately pursue a workers' compensation claim, but did seek emergency treatment and follow-up treatment for upper neck pain, shoulder pain, and headaches. He missed work from September 9, 2003, until November 10, 2003. He then returned to work and continued to work until January 16, 2004, at which time he left appellee's employ due to an unspecified problem that he had with Acklin that was unrelated to his injury. After Jones left appellee's employ, he claimed entitlement to workers' compensation benefits. The employer controverted Jones's claim, and a hearing was held before an Administrative Law Judge (ALJ).

Jones was the sole witness at the hearing. The ALJ found Jones's undisputed testimony credible and determined that he proved entitlement to benefits from September 9, 2003, through November 10, 2003, noting an objective finding of muscle spasms in Jones's medical records. The ALJ awarded benefits, concluding that Jones's activity in driving to the Bryant store following the training seminar furthered appellee's interests, and thus, constituted employment services.

The Commission reversed on the sole basis that Jones was not performing employment services at the time of the accident. The Commission reasoned:

> At the time of the injury the claimant was driving to work. Earlier in the day the claimant had attended a management meeting and a new product demonstration. The claimant was not injured during either of these activities which took place away from the claimant's store. The claimant was no longer attending managerial meetings and he was not in route [sic] to or from a new product demonstration when he had an accident. *After this meeting and demonstration, the claimant could have returned home had he not been scheduled to work that afternoon. Accordingly, we cannot find that the claimant's activities from the morning have any bearing upon the claimant's status at the time of the wreck.* In our opinion, *the claimant's morning activities of managerial meetings and new product demonstrations had ended. Had he not been scheduled to work, the claimant's work day would have ended at that time. After these meetings, the claimant's job duties and his responsibilities were not to resume until he arrived at his store in Bryant. At the time of his injury the claimant was merely driving to work like he usually did every day he was scheduled to work. At the time of the accident the claimant was not on the clock nor was he in any manner performing any activity that either directly or indirectly advanced his employer's interest other than going to work.*

(Emphasis added.) Thus, the Commission denied benefits because it concluded that Jones was not performing employment services when he was injured. The sole issue in this case is whether Jones was performing employment services at the time of the accident or whether he is precluded by the going-and-coming rule from receiving benefits because he was on his way to work.

In reviewing decisions from the Workers' Compensation Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commis-

sion's findings, and we affirm if the decision is supported by substantial evidence. *Whitlach v. Southland Land & Dev.*, 84 Ark. App. 399, 141 S.W.3d 916 (2004). Substantial evidence exists if reasonable minds could reach the Commission's conclusion. *Id.* When a claim is denied because the claimant has failed to show an entitlement to compensation by a preponderance of the evidence, the substantial-evidence standard of review requires us to affirm if the Commission's opinion displays a substantial basis for the denial of relief. *Id.*

We reverse the Commission's decision and remand for an award of benefits because reasonable minds could not have reached the Commission's conclusion on the facts before us. To be compensable under workers' compensation law, an injury must arise out of and in the course of employment. Ark. Code Ann. § 11-9-102(4)(A)(i) (Supp. 2001). An injury is not compensable if it was inflicted upon an employee at a time when employment services were not being performed. *Id.* § 11-9-102(4)(B)(iii). An employee is performing "employment services" when he or she is doing something that is generally required by his or her employer. *Collins v. Excel Specialty Prods.*, 347 Ark. 811, 69 S.W.3d 14 (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" — whether the injury occurred within the time and space boundaries of the employment, when the employee was carrying out the employer's purpose or advancing the employer's interest directly or indirectly. In reaching this determination, we consider whether the employee was engaged in the primary activity that she was hired to perform or in incidental activities that are inherently necessary for the performance of the primary activity. *See Olsten Kimberly Quality Care v. Pettey*, 55 Ark. App. 343, 934 S.W.2d 956 (1996).

An employee is not generally considered to be performing employment services while merely traveling to or from the workplace; thus, the going-and-coming rule ordinarily precludes compensation for injuries received while an employee is going to or returning from work. *Moncus v. Billingsley Logging & Am. Ins. Co.*, 366 Ark. 383, 235 S.W.3d 877 (2006). The rationale for this rule is that all persons, including employees, are subject to the recognized hazards of travel to and from work in a vehicle. *Id.* However, exceptions to the going-and-coming rule exist, two of which are relevant in this case.

First, the going-and-coming rule does not preclude benefits where the journey itself is part of the employment service; that is, where the employee must travel from jobsite to jobsite, whether or not he or she is paid for that travel time. *Id.* The rationale behind this exception is that where the employee is required to travel from jobsite to jobsite, such travel is an integral part of the job itself, even if the travel is not the activity for which a claimant was primarily employed. *Id.* Second, the going-and-coming rule does not preclude benefits where the employee is injured on a special mission or errand. *See Swearengin v. Evergreen Lawns*, 85 Ark. App. 61, 145 S.W.3d 830 (2004).

In the simplest terms, the going-and-coming rule does not preclude an award of benefits here because this is not a going-and-coming case. That rule precludes benefits where the claimant is merely driving from home to work, has not yet received instructions from his employer, and where the employer is not dictating the conduct of the employee's work. *See Moncus, supra.* Here, despite the fact that Jones was on his way to his primary place of employment, he was not "merely driving to work like he usually did every day he was scheduled to work" as the Commission found.

Rather, as a result of the special errands imposed by his employer, Jones clearly was going from one job site to the other, and thus, was required to subject himself to the hazards of driving, not from home to work, but from one job site to the next. *See Olsten, supra.* Thus, it cannot be said that Jones was merely driving from his home to work as usual, that he had not received instructions from his employer before his workday began, or that his employer was not dictating the course of his work. Instead, Jones was where he was when the accident happened due to his employment-related activities. *See Moncus, supra* (awarding benefits where the claimant was injured in an automobile accident, noting that the employer was responsible for the claimant's location on the road at the time of the accident).

While Jones may have been injured on the same route he usually takes from home, he was in fact, late for work at the Bryant store due to that day's previous employer-mandated activities; it would require speculation to assume that he would have also been late for work and would have been in the precise location where the accident occurred had he gone from his home directly to work. Moreover, Jones's driving did not represent a deviation from his

usual employment because he was required to drive as a regular part of his employment — whether it be to pick up food for the store, to attend a meeting at his supervisor's house in Conway, or to attend other meetings as required, such as the meetings in the instant case.

The Commission's assertion that Jones's "morning activities" (which lasted well beyond noon) had no bearing on his status at the time of the wreck is incomprehensible given that Jones was clearly driving to his primary place of employment directly following his activities that were undisputedly mandated by his employer. Equally puzzling is the Commission's conclusion that had Jones not been scheduled to work, his work day would have ended when he returned to his vehicle. In so stating, the Commission not only relies on facts that were irrelevant because they were not present in this case, but it also seems to concede the dispositive point in this case — Jones's workday clearly *had not ended at that point* because he *was* scheduled to work immediately thereafter. In fact, he was required to telephone the Bryant store when Acklin returned him to his car after the second meeting because *his employer-mandated meetings rendered him unable to get to the Bryant store by 3:00 p.m. to begin work as scheduled.* Thus, it cannot be said that at the time of his injury, Jones was not performing any activities that directly or indirectly advanced his employer's interests, other than going to work.

The cases cited by the Commission are either not binding on this court or are distinguishable.[1] *Coble v. Modern Business Systems*, 62 Ark. App. 26, 966 S.W.2d 938 (1998) and *Harding v. City of Texarkana*, 62 Ark. App. 137, 970 S.W.2d 303 (1998), are both distinguishable because in each of those cases, the claimants were involved in deviations from their primary employment. That is not the case here, where Jones decidedly did not deviate from his primary employment by going from his other employer-mandated activities to his primary place of employment. In *Maupin v. Pulaski County Sheriff's Office*, 90 Ark. App. 1, 203 S.W.3d 668 (2005), also cited by the Commission, the claimant, a police officer, was injured while merely driving to work and had not yet begun his

[1] The Commission first cited two of its own opinions. While the Commission may rely on its own opinions, our appellate courts are not bound by the same; thus, the litigants and the appellate courts are better served if the Commission also relies on decisions rendered by our appellate courts.

shift. Again, that is not the case here because Jones was not merely driving to work to *begin* his shift.

The Commission also relies on *Wallace v. West Fraser South, Inc.*, 90 Ark. App. 38, 203 S.W.3d 646 (2005) *aff'd*, 365 Ark. 68, 225 S.W.3d 361 (2006), because in that case this court stated that it is the activity occurring at the time of the injury, and not the activity preceding the injury that is relevant to the question of whether an employee is performing employment services at the time of the injury. *Id.* The *Wallace* claimant was injured when he fell from a board into mud when returning from a paid, scheduled work break. He remained on the clock and was not allowed to leave the workplace during the break, and could be called back to work from his break. Thus, the *Wallace* court determined that the *Wallace* claimant was acting in a manner consistent with furthering his employer's benefits and thus, was performing employment services. *Id.*

The *Wallace* case does not stand for the proposition that *work-related* activity that immediately precedes an injury is irrelevant in determining whether a claimant was performing employment services when he was injured. Rather, the *Wallace* court determined that the *nonwork* activity (the work break) that immediately preceded the injury did not *preclude* an award of benefits. In fact, the *Wallace* case actually supports the view that the Commission's decision here was in error; like the *Wallace* claimant who was returning to work as required by his employer's schedule, Jones was performing his work related-activities pursuant to the schedule set by his employer. If anything, the instant facts are more compelling to supporting a finding of compensability than are the *Wallace* facts, because, unlike the *Wallace* claimant, there was no break in Jones's work-related activities.

More persuasive is the case of *Bell v. Tri-Lakes Services*, 76 Ark. App. 42, 61 S.W.3d 867 (2001). In that case the employee was found to be performing employment services when he was injured in an automobile accident after his employer instructed him to drive to another city to pick up tools needed for work. There, the claimant was occasionally required to travel. On the day he was injured, he had worked for several hours before being instructed to retrieve the tools, and had he completed the task and returned, would have been given the option of finishing the workday or going home. Thus, the *Tri-Lake* Court concluded that the claimant's accident in that case was compensable because it

occurred after he began his employment duties but before the work day was scheduled to end. *See also Moncus, supra.*

The same is true here. Jones's work day began with the first meeting, no later than 9:00 a.m., and was not scheduled to end until he finished the 3:00 p.m. shift at the Bryant store. Thus, his accident, which occurred as he was driving from the second employer-mandated meeting to the Bryant store, occurred after his work day had begun and well before his work day was scheduled to end. If the *Bell* claimant's accident was compensable there is little room to assert that Jones's accident is not compensable because unlike the *Bell* claimant, Jones did not have the option of going home when his meetings ended — rather, he was required to go from one job site to another. Accordingly, the Commission in the instant case erred in denying benefits.

Reversed and remanded for an award of benefits.

HART and BIRD, JJ., agree.

Melia FENDLEY *v.* PEA RIDGE SCHOOL DISTRICT

CA 06-585 245 S.W.3d 676

Court of Appeals of Arkansas
Opinion delivered December 20, 2006

Tolley & Brooks, P.A., by: *Evelyn E. Brooks*, for appellant.

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

LARRY D. VAUGHT, Judge. Melia Fendley appeals from a decision of the Arkansas Workers' Compensation Commission. She contends that she is entitled to additional temporary total disability benefits from August 24, 2004, to March 27, 2005. Appellee Pea Ridge School District responds that as of August 24, 2004, Fendley was no longer totally incapacitated from earning wages, and therefore she is not entitled to additional benefits. We reverse and remand.

Fendley worked as a teacher in the Pea Ridge School District until September 26, 2003. On the 26th, she was leaving one class and walking to another class when she slipped on an incline and fell, injuring her right ankle. She remained off work and was receiving medical treatment for her ankle. She underwent surgery in April 2004. She was paid temporary total disability benefits from November 14, 2003, through August 23, 2004. Another hearing was held before an administrative law judge on August 17, 2005, to determine if Fendley was entitled to additional benefits through March 27, 2005.

At the hearing there was evidence presented that on November 12, 2004, Fendley underwent outpatient surgery to remove hardware — metal screws — from her right heel. Following the surgery, Fendley's treating surgeon, Dr. Ruth Thomas, outlined the following restrictions: elevate the foot above heart level for forty-eight to seventy-two hours, weight bear as tolerated, wear a wooden shoe if placing full weight on the operated foot after surgery, and return for a post-operative follow-up appointment on April 19, 2005. Additionally, the Outpatient Surgery Discharge Instructions stated that Fendley would be able to resume most normal activities the day after surgery.

With regard to her post-surgical medical treatment, Fendley testified that Dr. Thomas placed her in physical therapy in order to strengthen her right leg. Fendley also stated that — as part of her ankle-injury rehabilitation — each day she would run and walk, lifts weights, perform Pilates, toe raises, and various other leg-strengthening exercises. Fendley also introduced a letter from Dr. Thomas dated April 27, 2005. In this letter, Dr. Thomas wrote:

> I have reviewed Ms. Fendley's chart. As you know she underwent reconstruction surgery right foot, April 16, 2004. She is employed

> as a physical education teacher. Ms. Fendley insisted to me that she could not do her work duties because of prolonged weakness following the surgery. Our reports suggest that she worked hard in therapy trying to regain her strength. Even on her last clinic visit of March 27, 2005 she demonstrated 2cm atrophy of the right calf when compared to the non-operative side. I believe Ms. Fendley could have performed some type of employment if it did not require the full strength of her operated calf. Accordingly, sitting and teaching would have been appropriate; demonstrating physical activities such as gymnastics and running would not have been appropriate. I hope this information is helpful.

Based on this evidence, the ALJ awarded additional benefits. The Pea Ridge School District appealed the decision of the ALJ to the Commission arguing that as of August 24, 2004, Fendley was no longer totally incapacitated from earning wages and therefore was not entitled to additional benefits. The Commission agreed and reversed the ALJ's award of benefits. It is from this decision that Fendley appeals.

As a starting point in our analysis of this appeal, we note the importance of the fact that Fendley's injury is a "scheduled" injury. Therefore, the standard used for temporary total disability for a non-scheduled injury, which only allows benefits when a claimant is within her healing period and when she suffers a total incapacity to earn wages, does not apply. *See Ark. State Highway & Transp. Dep't v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981) (setting out non-scheduled injury standard). Instead, as we outlined in *Wheeler Construction Co. v. Armstrong*, 73 Ark. App. 146, 41 S.W.3d 822 (2001), it is not necessary for a claimant with a scheduled injury to prove that she is totally incapacitated from earning wages in order to collect temporary total disability benefits. Arkansas Code Annotated § 11-9-521 provides that a claimant is entitled to temporary total disability benefits "during the healing period or until the employee returns to work, whichever occurs first."

■ Although we agree with the Commission that this language cannot be considered in a vacuum and that the employees' failure to return to work must be causally related to the injury, we take issue with the Commission's conclusion that because Fendley "has failed to prove that she was totally incapacitated from earning wages" her claim for additional benefits is "denied." In making this determination, the Commission's own opinion evi-

dences that it held Fendley to a stricter standard than required by law. Because Fendley suffered from a scheduled injury, she was not required to show that she was totally incapacitated from working — only that she had not returned to work because she remained in her healing period.

Because the Commission held Fendley to the incorrect standard, requiring that she prove a total incapacity to work, we reverse and remand this case to the Commission. We further instruct the Commission to make specific findings relating to the purpose of Fendley's second surgery as it relates to her improved range-of-motion.

Reversed and remanded.

GLOVER and CRABTREE, JJ., agree.

Kevin Wayne HODGE *v.* Mary HODGE

CA 06-494 245 S.W.3d 695

Court of Appeals of Arkansas
Opinion delivered December 20, 2006

Talbott & Ladd, P.A., by: *Kathleen Talbott*, for appellant.

Ann B. Hudson, for appellee.

LARRY D. VAUGHT, Judge. This is a child-custody dispute where appellant Kevin Hodge appeals the trial court's decision to award custody of his daughter to appellee Mary Hodge. Kevin argues on appeal that the trial court erred in failing to use the appropriate legal standard in changing custody, erred in not considering the presumption in favor of Kevin's relocation, and abused its discretion in changing custody from Kevin to Mary. We reverse and remand.

Mary filed for divorce from Kevin on June 2, 1997. Mary was awarded temporary custody of their daughter, B.J.H. (born on March 18, 1994), while the divorce was pending. The final, uncontested divorce decree was entered on March 5, 1998, and Mary was awarded primary custody of B.J.H. In November 1998, Kevin filed a petition for contempt alleging that Mary had denied him visitation with B.J.H. On February 23, 1999, the court entered an order admonishing Mary to comply with the court's ordered visitation but refusing to find her in contempt.

On June 1, 1999, Kevin filed a petition to change custody, and on January 14, 2000, the court held a hearing on the petition. Testimony at the hearing established that Kevin had remarried; that Kevin was not being allowed his court-ordered visitation; that the child had suffered from severe emotional and psychological problems; that Mary had moved three times in three years; that Mary had trouble controlling B.J.H.'s behavior, including instances where six-year-old B.J.H. had attacked her mother; that a psychiatrist had put B.J.H. on prescription drugs for her condition; that Kevin had not been allowed to participate in his child's medical treatment; and that Mary was currently living in a HUD apartment. The court granted Kevin's petition, finding that due to a material change in circumstances, B.J.H. needed to be placed in his custody. The court stated that the change was temporary and would be reviewed during the summer of 2000. No such review was ever held.

Mary filed a petition in November 2002 for change of custody and specific visitation. The parties filed an agreed visitation order on December 6, 2002, setting out Mary's specific visitation, and reaffirming all other provisions of the January 2000 order.

In February 2005 Kevin filed a motion to modify the visitation and for child support based on the fact that he was being relocated from Little Rock Air Force Base in Jacksonville, Arkansas, to Barksdale Air Force Base in Shreveport, Louisiana. Mary responded by filing a petition for change of custody. Kevin argued that the January 2000 custody order was a permanent order, requiring a material change in circumstances to modify, while Mary argued that the order was temporary, therefore only requiring a best-interests analysis. The court held that the order was temporary and that it was in the child's best interest for Mary to be granted custody.

In child-custody cases, the primary consideration is the welfare and best interest of the child involved. *Bernal v. Shirley*, 96 Ark. App. 148, 239 S.W.3d 11 (2006). Custody will not be modified unless it is shown that there are changed conditions demonstrating that a modification is in the best interest of the child. *Id.* In cases involving child custody and related matters, we review the case de novo, but we will not reverse a trial judge's findings in this regard unless they are clearly erroneous. *Id.* A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been made. *Id.* Because the question of whether the trial court's findings are clearly erroneous turns largely on the credibility of the witnesses, we give special deference to the superior position of the trial judge to evaluate the witnesses, their testimony, and the child's best interest. *Id.* However, a trial court's conclusion on a question of law is given no deference on appeal. *Moiser v. Ark. Dep't of Human Servs.*, 95 Ark. App. 32, 233 S.W.3d 172 (2006).

For his first point on appeal, Kevin argues that the court used the wrong legal standard in analyzing the custody determination.[1] The trial judge determined that because the January 2000 order awarding custody to Kevin was temporary, it was not necessary for

[1] The dissent goes to great lengths in arguing that neither the permanent versus temporary nature of the order nor the relocation presumption was preserved. We are satisfied that the record reflects that appellant argued that the order was permanent and that the trial court ruled that it was temporary. However, the issue before us is whether the court used the proper legal standard in making a custody determination. With regard to the *Hollandsworth* presumption on relocation, we are not reversing on that issue, but instructing the court to consider it on remand.

Mary to prove a material change in circumstances in order for the court to modify the custodial arrangement.

In *Chancellor v. Chancellor*, 282 Ark. 227, 667 S.W.2d 950 (1984) — a case involving whether a custody order was a final, appealable order — our supreme court held that regardless of the "label" attached to an order, where the parties have completed their proof and submitted their matter to the court, the order is final. *See also Walker v. Eldridge*, 219 Ark. 594, 243 S.W.2d 638 (1951). However, our supreme court has also stated that there is, in effect, no "final order" in a custody case, until the children have reached the age of majority and that all custody orders are temporary by their very nature. *Purtle v. Comm. on Prof'l Conduct*, 317 Ark. 278, 878 S.W.2d 714 (1994).

In *Tipton v. Aaron*, 87 Ark. App. 1, 185 S.W.3d 142 (2004), we reviewed a case where maternal grandparents had temporary custody of the child because the unmarried parents were minors. There, we stated that:

> Usually, when we address cases involving change of custody, a child is being moved from one parent to another. In those cases, the original decree is a final adjudication that one parent or the other was the proper person to have care and custody of the children. *Carver v. May*, 81 Ark. App. 292, 101 S.W.3d 256 (2003). 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. *White v. Taylor*, 19 Ark. App. 104, 717 S.W.2d 497 (1986). For a change of custody, the chancellor must first determine that a material change in circumstances has occurred since the last order of custody; if that threshold requirement is met, he must then determine who should have custody with the sole consideration being the best interest of the children. *Schwarz v. Moody*, 55 Ark. App. 6, 928 S.W.2d 800 (1996). This court has further held that its reasons for requiring more stringent standards for modifications than for initial custody determinations are to promote stability and continuity in the life of the child, and to discourage the repeated litigation of the same issues. *Lloyd v. Butts*, 343 Ark. 620, 37 S.W.3d 603 (2001). Of course, whether an initial proceeding or a modification proceeding, the polestar remains the best interest and welfare of the child. *Id.*

Tipton, 87 Ark. App. at 6, 185 S.W.3d at 145.

A temporary-custody order is often entered during a pending divorce or other action until a time when the court can further review the issue and make a final custody decision. In this case, the January 2000 order was not entered into during a pending action. Rather, an initial-custody determination had already been made in May 1998 granting Mary custody. The 2000 order modified the initial determination — relying on the material-change standard — and granted custody to Kevin. Under the specific facts of this case the court erred by finding that the January 2000 order was still a temporary order. The order on its face had a temporal limit to its temporary nature. Although the court planned to review the 2000 order a few months later, it never did so, and Mary never asked the court to review the order. Two years later, Mary petitioned for a change of custody, arguing that a material change in circumstances warranted a change of custody. Although she argues that the 2000 order was and still is a temporary order, she nonetheless asserted the permanent-order standard in her 2002 petition. Every change of custody after that initial determination in 1998 — whether denoted temporary or permanent — was a modification of custody and required a showing of material change of circumstances. This determination fits with the public policy that provides the basis for the material-change standard to begin with — consistency and stability in a child's life and prevention of re-litigation of issues before the court.

Because we hold that the January 2000 order was indeed a permanent order, we reverse and remand this case to the trial court for it to determine if a material change in circumstances supported a change of custody from Kevin to Mary. In determining that issue, the trial court is charged with analyzing the factors outlined in *Hollandsworth v. Knyzewski*, 353 Ark. 470, 109 S.W.3d 653 (2003), on the relocation issue and determining what is in the child's best interest.

Reversed and remanded.

ROBBINS, NEAL, and CRABTREE, JJ., agree.

HART and BAKER, JJ., dissent.

KAREN R. BAKER, Judge, dissenting. I dissent from the majority's conclusion that the temporary award of custody in this case somehow underwent a metamorphosis that changed it from a temporary order into a permanent decree of custody. The trial judge accurately identified the temporary nature of the pending order,

accurately articulated the applicable legal standards, and applied those standards appropriately to the specific facts of this case.

When the trial court temporarily placed custody of the child with the father, he withheld a determination of the best interests of the child which was proper given the temporary nature of the placement. *See Smith v. McCracken*, 96 Ark. App. 270, 240 S.W.3d 621 (2006) (holding that dismissal of adoption petitions did not resolve the issue of the best interest of the child because the prior custody order the circuit court had entered in case was a *temporary* order). The trial court in this case explained that it had awarded the father temporary custody in order to give the custodial mother the opportunity to improve her housing and financial situation. This approach was entirely proper for the trial judge to employ and, in fact and practice, is in compliance with our precedents wherein our appellate courts consistently refuse to modify custody merely because one parent has more resources or income. *Taylor v. Taylor*, 353 Ark. 69, 110 S.W.3d 731 (2003); *Blair v. Blair*, 95 Ark. App. 242, 235 S.W.3d 916 (2006); *Malone v. Malone*, 4 Ark. App. 366, 631 S.W.2d 318 (1982).

The majority embraces the fact that a review hearing contemplated by the trial court did not occur and uses that fact to support its conclusion that the temporary order became permanent. This court specifically rejected the premise that the failure of a trial court to hold an anticipated hearing renders the temporary order a permanent one. In *Arkansas Department of Human Services v. McManus*, 91 Ark. App. 1, 207 S.W.3d 589 (2005), DHS asserted that the ex parte order granting temporary custody was appealable, claiming that it was a mandatory injunction and that, when the trial court failed to have a hearing on appellant's motion and did not set aside its order of temporary custody, the order became permanent for all practical purposes. DHS maintained that this matter was somewhat similar to the situation in *Walker v. Eldridge*, 219 Ark. 594, 243 S.W.2d 638 (1951), in that there was no trial on the merits of the case that was pending. We disagreed and held that the ex parte order, as it was entered in the original divorce action, was not a final appealable order.

The majority's holding that the temporary custody order in this case at some undetermined point became a permanent and appealable decree of custody conflicts with our supreme court's rulings on the appealability of temporary orders in custody cases. I recognize that historically, cases which focused on the appealability of custody orders concerning children held that a decree

awarding or changing custody of children is a final decree from which an appeal may be taken. *See Wood v. Wood*, 226 Ark. 52, 287 S.W.2d 902 (1956); *Walker v. Eldridge*, 219 Ark. 35, 240 S.W.2d 43 (1951). However, beginning with the decision in *Chancellor v. Chancellor*, 282 Ark. 227, 667 S.W.2d 950 (1984), and later in *Sandlin v. Sandlin*, 290 Ark. 366, 719 S.W.2d 433 (1986), our supreme court modified that rule such that a temporary order of custody is not appealable if further presentation of proof on the issue of custody is contemplated.

Not all jurisdictions follow the rule as set forth by our supreme court. The Connecticut supreme court in *Madigan v. Madigan*, 620 A.2d 1276 (Conn. 1993), rejected our supreme court's approach to the appealability of a temporary custody order. The Connecticut court held that temporary custody orders are final judgments that are immediately appealable because an immediate appeal is the only reasonable method of insuring that important rights surrounding the parent-child relationship are adequately protected. The Connecticut court reasoned:

> An inquiry into the law of other jurisdictions supports our conclusion that temporary custody orders are immediately appealable. Although a number of jurisdictions have held that such orders are not immediately appealable, emphasizing the broad rule that interlocutory orders must await the end of an action to be appealed; see, e.g., *Chancellor v. Chancellor*, 282 Ark. 227, 230, 667 S.W.2d 950 (1984); *In re Temporary Custody of Five Minors*, 105 Nev. 441, 443, 777 P.2d 901 (1989); *Craft v. Craft*, 579 S.W.2d 506, 508 (Tex.App.1979); others recognize that temporary orders may be appealed pursuant to local rules recognizing interlocutory appeals. See, e.g., *Sanchez v. Walker County Department of Family & Children Services*, 235 Ga. 817, 818, 221 S.E.2d 589 (1976); *In re Marriage of Kitchen*, 126 Ill. App.3d 192, 194-95, 81 Ill.Dec. 644, 467 N.E.2d 344 (1984). Likewise, a limited number of jurisdictions recognize temporary custody orders as final for the purpose of immediate appeal. See, e.g., *In re Interests of L.W.*, 241 Neb. 84, 486 N.W.2d 486, 495 (1992); *In re Murray*, 52 Ohio St.3d 155, 159-61, 556 N.E.2d 1169 (1990). On balance, we find that the rationale for allowing immediate appeals adopted in the latter jurisdictions, in conjunction with the practice in other jurisdictions that allow these appeals by special interlocutory appeals rules, to be more persuasive than the traditional reasons of judicial economy generally offered as a justification to adhere to a rule of nonappealability.

Madigan supra at 1279 n.9.

While the supreme court of Connecticut is free to reject our supreme court's precedent, we are not. We have no authority to overrule our supreme court on this issue. Even if we did have the authority, the majority's decision raises due process concerns. Appellee could not have known at what point the temporary order would ripen into a final decree of custody under the majority's analysis so her right to appeal was lost. In this case the trial court correctly found that the previous custody order was temporary and the question before him was the best interest of the child. After the proof was presented, the trial court set out detailed findings supporting his decision that it was in the best interest of the child to place custody with appellee. We should affirm.

RHEEM MANUFACTURING, INC., Old Republic Insurance Co. and Second Injury Fund *v.* Jimmy BARK

CA 06-539 245 S.W.3d 716

Court of Appeals of Arkansas
Opinion delivered December 20, 2006

Ledbetter, Cogbill, Arnold & Harrison, LLP, by: *E. Diane Graham* and *R. Chris Parks*, for appellants.

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

LARRY D. VAUGHT, Judge. The single issue in this appeal from the Arkansas Workers' Compensation Commission concerns the proper calculation method for determining an average-weekly wage pursuant to Arkansas Code Annotated section 11-9-518(c) (Repl. 2002). We affirm.

On March 24, 2005, an administrative law judge found that appellant Jimmy Bark's average weekly wage was $391, which entitled him to compensation at the rate of $261 per week for total disability benefits. After a de novo review of the record, the Commission reversed the ALJ's decision and found that Bark had an average weekly wage of $570, which entitled him to compensation at the rate of $380 per week for total disability benefits. It is from this decision that Rheem Manufacturing, Inc., appeals.

Bark had been employed by Rheem for twenty-eight years. The parties stipulated that Bark had suffered a compensable injury to his lumbar spine while working for Rheem on November 20, 2003. As a result of that compensable injury, Bark was assigned a permanent physical impairment rating in an amount equal to ten percent to the body as a whole, which was accepted and paid by Rheem. Additionally, the Second Injury Fund accepted liability for benefits and agreed that Bark was permanently and totally disabled.

Bark testified that he worked for Rheem as a full-time employee and was required to be available for work forty hours per week, even though he did not always work forty hours in a week.

Prior to November 20, 2003, Bark acknowledged that he had undergone numerous surgical procedures, some of which were work related and others that were not. Bark also admitted that he did miss work as a result of these surgeries. Specifically, he missed work from May 8, 2003, through September 28, 2003, for a non-work-related surgery to his knee. He also testified that he missed work for various periods of time under the Family Medical Leave Act and for "company convenience."[1]

The Commission, agreeing in part with the ALJ, found that because Bark did not have a contract to work forty hours a week, he was not entitled to a $608 average weekly wage. However, after recognizing that the case presented exceptional circumstances, the Commission took exception with the method in which the ALJ determined the average weekly wage. Specifically, the Commission expressed concern that the ALJ included the weeks that Bark missed work for other types of leave in its calculation of Bark's average weekly wage. The Commission concluded that the method used by the ALJ was "not just and fair to all parties concerned" and that Bark "should not be penalized for missing work for legitimate health reasons."

In its calculation of Bark's average weekly wage, the Commission began with Bark's final statement, which showed total wages of $20,289.11. The Commission then subtracted out the wages that Bark earned during the week of his injury — $355.39 — resulting in a total wage of $19,933.72. The Commission then divided the total wage by the thirty-five weeks that Bark actually worked. This calculation produced an average weekly wage of $570, which translated to a compensation rate of $380 for total disability benefits. It is from this decision that both Bark and Rheem appeal.

On appeal, Rheem argues that the Commission erred in its calculation of Bark's average weekly wage. Specifically it contends that the only "fair and just" way to approach the calculation is to use the same method employed by the ALJ. Rheem contends that the Commission's award has resulted in a "double recovery" for Bark and therefore cannot be either just or fair.

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[1] Company convenience occurred when Rheem did not have sufficient work available. Employees with enough seniority could chose to take off work with no pay, and the absence would not count against them. Bark testified that he frequently took off under company convenience in order to take care of his wife.

In determining the sufficiency of the evidence to support the findings of the Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to its findings, and we will affirm if those findings are supported by substantial evidence. *Winslow v. D & B Mech. Contractors*, 69 Ark. App. 285, 13 S.W.3d 180 (2000). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.* The determination of the credibility and weight to be given a witness's testimony is within the sole province of the Commission. *Farmers Coop. v. Biles*, 77 Ark. App. 1, 69 S.W.3d 899 (2002). The Commission is not required to believe the testimony of the claimant or any other witness, but may accept and translate into findings of fact only those portions of the testimony it deems worthy of belief. *Id.* We will not reverse the Commission's decision unless we are convinced that fair-minded persons with the same facts before them could not have reached the conclusions arrived at by the Commission. *Wal-Mart Stores, Inc. v. Sands*, 80 Ark. App. 51, 91 S.W.3d 93 (2002).

The statute governing average weekly wages as a basis for compensation is codified at Arkansas Code Annotated section 11-9-518 (Repl. 2002). That statute states in pertinent part:

> (a)(1) Compensation shall be computed on the average weekly wage earned by the employee under the contract of hire in force at the time of the accident and in no case shall be computed on less than a full-time workweek in the employment. . . .
>
> . . . .
>
> (c) If, because of exceptional circumstances, the average weekly wage cannot be fairly and justly determined by the above formulas, the commission may determine the average weekly wage by a method that is just and fair to all parties concerned.

Viewing the evidence in the light most favorable to the Commission's findings, the record shows that the Commission followed a method of calculation consistent with its statutory call. The Commission made a finding that Bark should not be punished for legitimate leave time. We are satisfied that the Commission's refusal to dilute Bark's average weekly wage based on time he missed due to excused leave did not produce a "double recovery." Because the Commission's approach to determining Bark's average weekly wage was "fair and just," we affirm the decision of the Commission.

In the appeal brief submitted to our court, Bark contends that at the time of his injury he had a contract of hire for forty hours per week, which amounts to an average weekly wage of $608. He argues that the Commission erred in its decision finding otherwise. Although Bark did file a notice of cross-appeal, he did not file a brief setting forth his arguments in support of his cross-appeal. Instead he made his argument in response to the arguments of Rheem on appeal. He did not include in his brief a separate argument in support of his cross-appeal. Our supreme court has dealt with a similar scenario.

In *Hall v. Freeman*, 327 Ark. 720, 942 S.W.2d 230 (1997), appellee Freeman filed a notice of cross-appeal and filed a brief in response to appellant's brief on appeal. Freeman did not include separate arguments in support of his cross-appeal in his brief. The supreme court held that because Freeman did not include a section in his brief setting forth his arguments on cross-appeal, he had in effect presented no cross-appeal even though he had advanced similar arguments in his brief in response to appellant's argument. In short, the supreme court concluded that where appellee is also the cross-appellant, a separate argument must be presented in its brief in order to present a cross-appeal. Making an argument reflecting the substance of the cross-appeal in response to appellant's argument simply is not enough to present the argument for appellate review. Therefore, based on the reasoning of the *Hall* decision, we refuse to reach the merits of Bark's argument.

Affirmed.

GLOVER and CRABTREE, JJ., agree.

TECHNOLOGY PARTNERS, INC. *v.* REGIONS BANK

CA 06-648 245 S.W.3d 687

Court of Appeals of Arkansas
Opinion delivered December 20, 2006

Newland & Associates, PLLC, by: *Joel F. Hoover, Ray S. Pierce* and *Jessica A. Middleton*, for appellant.

Friday, Eldredge & Clark, LLP, by: *William A. Waddell, Jr.* and *Amanda Capps Rose*, for appellee.

TERRY CRABTREE, Judge. In this case from Pulaski County Circuit Court, the trial judge granted summary judgment in favor of appellee Regions Bank (Regions), ruling that the claims of

appellant, Technology Partners, Inc. (TPI), were barred by the statute of limitations. We affirm.

TPI was engaged in the business of selling computers and other office technology. Computer manufacturers often provided sales incentives to TPI in the form of rebates when a certain number or dollar amount of the manufacturers' products were sold. According to TPI's president, Tom Allen, and its vice president, Janet McGee, TPI had no system in place to keep up with the rebate checks because the rebate programs changed frequently and TPI had "no idea" what the amount of the rebates would be or when they would arrive.

In February 2001, while investigating a missing check of another type, TPI discovered that it had not received certain rebate checks to which it was entitled. After learning from the manufacturer that the checks had been sent, TPI contacted its bank, appellee Regions, to determine what had happened to the checks. Regions, for reasons of privacy, imparted little information because the person who had taken the checks was a customer of Regions; however, the bank prompted TPI to "look further." TPI sought the assistance of the Little Rock Police Department, and its investigation revealed that, between February and December 2000, TPI's sales manager and former part-owner, Wayne Newson, had intercepted numerous rebate checks worth $32,137.64, and had either cashed them or deposited them into his personal account at Regions. TPI filed affidavits of forgery, and Regions reimbursed TPI for the checks on March 30, 2001. Newson pled guilty to theft in January 2002.

According to Tom Allen, once TPI was reimbursed for the checks that Newson stole in 2000, Allen tried to obtain information from Regions regarding any other checks that Newson may have cashed or deposited. However, again for reasons of privacy, Regions declined to provide TPI with such information. As a result, in March 2002, TPI sued Newson (Pulaski County Docket No. CV02-2845) in what Allen termed an attempt to "get access to that information." Newson quickly filed bankruptcy, and the lawsuit was dismissed in June 2002. At some point thereafter, TPI obtained copies of checks and deposit slips showing that, in 1997, 1998, and 1999, Newson cashed and deposited approximately twenty-five other rebate checks at Regions in the amount of $73,668.15.

Based on this information, TPI, in June 2003, filed an amended complaint in the dismissed action, CV02-2845, attempting to add Regions and others as defendants. The trial court

dismissed the amended complaint, ruling that it had no jurisdiction because CV02-2845 had remained in a state of dismissal and had not been re-opened. However, the court stated that it would not prohibit TPI from filing a separate action against Regions.

On January 14, 2004, TPI filed the present action against Regions, seeking $73,668.15 for the checks that Newson negotiated between 1997-99 and asserting causes of action for conversion, negligence, breach of fiduciary duty, civil conspiracy, constructive fraud, and fraudulent concealment. The complaint alleged, in pertinent part, that Newson's embezzlement was ongoing from April 1998 through December 2000 and possibly began as early as 1992; that all rebate checks were made payable to TPI or one of its fictitious names; that, contrary to proper banking procedure, Regions permitted Newson to cash or deposit the embezzled checks into his personal account; that tellers who questioned Newson about the transactions received authorization to proceed from Regions officers; and that Regions never notified TPI of Newson's actions or attempted to verify Newson's authority to cash or deposit the checks. Regions responded that TPI's claims were barred by the statute of limitations.

Regions elaborated on this defense when, on January 5, 2006, it filed a motion for summary judgment. It argued that, because TPI alleged that Newson negotiated the stolen checks in the year 2000 or earlier, the 2004 complaint was filed outside the three-year statute of limitations.[1] TPI responded that the statute of limitations had not run because 1) the last embezzled check was negotiated by Newson on January 18, 2001, thus making the January 14, 2004, filing timely; 2) its conversion action did not accrue until March 2001, which was the date that Regions reimbursed TPI for some embezzled checks but not others; 3) the Arkansas saving statute applied because the complaint was filed within one year of the trial court's dismissal of the action in CV02-2845; 4) the statute of limitations was tolled by Regions's fraudulent concealment.

Regions replied that the only checks at issue in this case were negotiated between 1997 and 1999, thus making the 2001 check (for which TPI had already been reimbursed) irrelevant for statute-of-limitations purposes. It also argued that TPI could show no affirmative

[1] There appears to be no dispute that a three-year statute of limitations applies to the causes of action asserted by TPI. *See generally* Ark. Code Ann. § 16-56-105 (Repl. 2005).

acts of concealment sufficient to toll the statute of limitations, that TPI failed to exercise due diligence in discovering Newson's theft of the checks, and that the saving statute did not apply.

After considering the parties' pleadings and attachments, the trial court granted summary judgment in favor of Regions, ruling that: 1) the three-year statute of limitations began to run when each check was negotiated, which, with regard to the particular checks at issue in this case, was, at the latest, February 26, 1999, thereby making TPI's 2004 complaint untimely; 2) TPI showed no acts of fraudulent concealment by Regions that would toll the statute of limitations; 3) the Arkansas saving statute did not apply. TPI appeals from that order.

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. *Davis v. Parham*, 362 Ark. 352, 208 S.W.3d 162 (2005). Once the moving party has established a prima facie entitlement to summary judgment, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact. *Id.* On appeal, we determine if summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of the motion leave a material fact unanswered. *Id.* We view the evidence in a light most favorable to the party against whom the motion was filed, resolving all doubts and inferences against the moving party. *Id.* Summary judgment is not proper where the evidence, although in no material dispute as to actuality, reveals aspects from which inconsistent hypotheses might reasonably be drawn and reasonable minds might differ. *Id.*

When the running of the statute of limitations is raised as a defense, the defendant has the burden of affirmatively pleading this defense. *Meadors v. Still*, 344 Ark. 307, 40 S.W.3d 294 (2001). However, once it is clear from the face of the complaint that the action is barred by the applicable limitations period, the burden shifts to the plaintiff to prove by a preponderance of the evidence that the statute of limitations was in fact tolled. *Id.*

TPI begins by arguing that its claims for common-law conversion, breach of fiduciary duty, constructive fraud, and fraudulent concealment accrued at two different times: 1) upon the wrongful payment of each check, and 2) in February 2001 when the embezzlement was discovered and Regions failed to reimburse TPI for all of the checks stolen by Newson. TPI contends that, because this "second accrual" occurred in February 2001, its claims were not barred when the January 2004 complaint was filed.

We note at the outset that the trial court did not rule on this aspect of TPI's argument. The court determined that the statute of limitations began to run, at the latest, in 1999, when the final check at issue was negotiated. However, the court expressed no opinion as to whether a second accrual period existed, nor did it address the effect of Regions's 2001 reimbursement on the statute of limitations. In the absence of a ruling on this matter, there is nothing for this court to review. *See In re Estate of Keathley*, 367 Ark. 568, 242 S.W.3d 223 (2006).

In any event, TPI's very limited argument on this point fails to persuade. It is clear that TPI is attempting to avoid the 1999 (and earlier) accrual date of its causes of action by describing Regions's February 2001 reimbursement decision as a "second act of conversion." No convincing argument is made, nor is any authority cited, for the proposition that property, having once been completely converted, may be converted again at a later date. TPI's similar argument that Regions's 2001 "failure to reimburse the full amount" of the embezzled checks created a second accrual period on its claims for breach of fiduciary duty and fraud is likewise unsupported by convincing argument or authority. Assignments of error that are unsupported by convincing argument or authority will not be considered on appeal unless it is apparent without further research that they are well taken. *Israel v. Oskey*, 92 Ark. App. 192, 212 S.W.3d 45 (2005).

We turn next to TPI's argument that the statute of limitations was tolled by Regions's fraudulent concealment of its causes of action. A limitations period generally begins to run when the wrong occurs and not when it is discovered. *See Gibson v. Herring*, 63 Ark. App. 155, 975 S.W.2d 860 (1998). In the case at bar (and based on our discussion of the previous issue), Regions's alleged wrongful conduct occurred in 1999 or earlier, which would render TPI's January 2004 complaint untimely. However, TPI asserts that the statute of limitations was tolled because Regions, in failing to notify TPI that Newson negotiated the checks, fraudulently concealed TPI's causes of action.

When a defendant has engaged in affirmative acts of concealment, the statute of limitations begins to run at the time the cause of action is discovered or should have been discovered by reasonable diligence. *See id.* Mere ignorance on the part of the plaintiff of his rights or the mere silence of one who is under no obligation to speak will not toll the statute. *Id.* There must be some positive act of fraud, something so furtively planned and secretly

executed as to keep plaintiff's cause of action concealed, or perpetrated in a way that it conceals itself. *Id.*

TPI candidly admits that it has shown no affirmative acts of concealment by Regions. Nevertheless, it argues that fraudulent concealment occurred because Regions perpetrated acts in such a way that they concealed themselves. We disagree. Even this aspect of fraudulent concealment — an act perpetrated in such a manner as to conceal itself — requires some evidence of a cover-up, subterfuge, or design to prevent the plaintiff from learning that wrongful conduct has occurred. For example, in *Gibson, supra,* the plaintiff took a two-carat diamond to the defendant jeweler in 1992 to be mounted. In 1996, the plaintiff discovered that the ring contained a cubic zirconium rather than a diamond. He sued the jeweler in 1997, who defended on the basis of the statute of limitations. The trial court granted summary judgment to the jeweler, but we reversed, holding that a fact question remained as to whether the jeweler committed the type of fraud that concealed itself. In doing so, we observed that a cubic zirconium is designed to look like and be mistaken for a diamond.

By contrast, in the present case, there is no evidence that Regions's actions were designed to conceal themselves, nor is there evidence that Regions engaged in cunning or artifice to conceal its conduct. *See Courtney v. First Nat'l Bank,* 300 Ark. 498, 780 S.W.2d 536 (1989) (holding that no fraudulent concealment occurred where, even though the bank failed to follow its customer's instructions, there was no evidence that the bank took any steps to conceal that failure); *see also Hampton v. Taylor,* 318 Ark. 771, 887 S.W.2d 535 (1994) (holding that no fraudulent concealment occurred where, despite the fact that a bookkeeper made an erroneous statement, there was no evidence of an attempt to conceal it). Further, there is no evidence that Regions pointedly tried to prevent TPI from learning of its actions. *Cf. Howard v. N.W. Ark. Surgical Clinic,* 324 Ark. 375, 921 S.W.2d 596 (1996) (holding that summary judgment was improper on the issue of fraudulent concealment where there was evidence that a physician knowingly concealed the fact that a foreign object had been left in the patient during surgery). Rather, TPI has shown that, at most, between 1997 and 1999 Regions failed to disclose Newson's banking activity and, thereafter, continued the nondisclosure until 2001. Because fraudulent concealment requires more than the continuation of a prior nondisclosure, *see Davis, supra,* we find no error on this point.

TPI argues next that, because it enjoyed a special relationship with Regions, Regions's failure to disclose Newson's activities amounted to fraudulent concealment, tolling the statute of limitations. As TPI correctly notes, there are times when a failure to speak may be the equivalent of fraudulent concealment. *See Ward v. Worthen Bank & Trust Co.*, 284 Ark. 355, 681 S.W.2d 365 (1984); *Berkeley Pump Co. v. Reed-Joseph Land Co.*, 279 Ark. 384, 653 S.W.2d 128 (1983). This occurs when there are special circumstances such as a confidential relationship in existence, so that a duty to speak arises where one party knows that another is relying on misinformation to his detriment. *See Ward, supra*; *Berkeley, supra*; *see also Camp v. First Fed. Sav. & Loan*, 12 Ark. App. 150, 671 S.W.2d 213 (1984) (holding that the question to be answered is whether there is sufficient evidence of a confidential or "other similar relationship"). However, we disagree with TPI's contention that a confidential relationship or other special circumstances were present here.

TPI asserts that the customer-bank relationship should be sufficient to establish the special circumstances necessary to create a duty by Regions to speak. However, this is contrary to established law. The relationship between a bank and its customer is generally one of debtor and creditor and not a fiduciary relationship. *See J. W. Reynolds Lumber Co. v. Smackover State Bank*, 310 Ark. 342, 836 S.W.2d 853 (1992); *Marsh v. Nat'l Bank of Commerce*, 37 Ark. App. 41, 822 S.W.2d 404 (1992). Something more than the mere existence of the traditional banking relationship has been required to establish special circumstances requiring disclosure. *See, e.g.*, *Mans v. Peoples Bank*, 340 Ark. 518, 10 S.W.3d 885 (2000); *Country Corner Food & Drug v. First State Bank*, 332 Ark. 645, 966 S.W.2d 894 (1998).

TPI contends alternatively that "something more" did exist between it and Regions, over and above the traditional banking relationship. It points to the fact that it had its own account officer at Regions; that it opened a "sweep account" at Regions, where customers would send their payments to a Regions lockbox and Regions would sweep the box daily and make deposits; and that Regions provided a "private banker to the president of TPI." None of these factors take TPI's and Regions's relationship out of the ordinary realm. A business having an account officer is commonplace rather than special. As for the sweep account, its existence does not create a confidential or special relationship in any way that is relevant to this case; it is undisputed that none of the checks at issue here went through

the sweep account. *Cf. Camp, supra* (where a bank actively participated in the plaintiff's house-buying activity and therefore may have owed her a duty to disclose that the house was in a flood plain). Finally, Tom Allen testified in his deposition that Regions's officer Franklin Shirrell was Allen's banker for personal accounts and loans.

Next, TPI argues that Regions's failure to verify Newson's authority before allowing him to negotiate the checks constituted constructive fraud that tolled the statute of limitations. Constructive fraud is a breach of a legal or equitable duty which, irrespective of the moral guilt of the fraud feasor, the law declares fraudulent because of its tendency to deceive others; neither actual dishonesty of purpose nor intent to deceive is an essential element of constructive fraud. *Riley v. Hoisington*, 80 Ark. App. 346, 96 S.W.3d 743 (2003).

On this point, TPI cites *First Bank & Trust of Jonesboro v. Vaccari*, 288 Ark. 233, 703 S.W.2d 867 (1986), for its recognition that there are decisions holding that, as a matter of law, it is commercially unreasonable for a bank to accept for deposit in an individual account a check made payable to a corporation without first making an inquiry as to the authority of the depositor/endorser. TPI interprets this to mean that a bank has a duty to verify a depositor's authority and failure to do so constitutes constructive fraud. Even if *Vaccari* reflects the current state of Arkansas law,[2] and even if Regions could have been held liable in tort for failing to verify Newson's authority, the relevant question for our purposes remains whether Regions committed any act of fraud that would toll the running of the statute of limitations. We see nothing in Regions's actions evidencing a fraudulent tendency to deceive or avoid scrutiny of its conduct. *Cf. Hyde v. Quinn*, 298 Ark. 569, 769 S.W.2d 24 (1989) (holding that constructive fraud occurred where public officials failed to comply with a statutory duty to file an annual report of their expenditures, which prevented taxpayers from learning about supposedly wrongful expenditures for several years).

Based on the foregoing, we conclude that the trial court was correct in granting summary judgment. We recognize that the issue of fraudulent concealment is normally a question of fact that is not suited for summary judgment. *See Meadors, supra*. However, when, as in the case at bar, the evidence leaves no room for a reasonable difference

[2] *J.W. Reynolds Lumber Co., supra*, stated that *Vaccari* was based on prior law and was only applicable to conversion claims under the UCC.

of opinion, the issue may be resolved as a matter of law. *Id.* We therefore affirm the trial court's conclusion that the statute of limitations was not tolled by fraudulent concealment.[3]

The next matter before us is whether TPI's 2004 complaint was rendered timely by the Arkansas saving statute, Ark. Code Ann. § 16-56-126(a)(1) (Repl. 2005). That statute reads:

> If any action is commenced within the time respectively prescribed in this act, in §§ 16-116-101 - 16-116-107, in §§ 16-114-201 - 16-114-209, or in any other act, and the plaintiff therein suffers a nonsuit, or after a verdict for him or her the judgment is arrested, or after judgment for him or her the judgment is reversed on appeal or writ of error, the plaintiff may commence a new action within one (1) year after the nonsuit suffered or judgment arrested or reversed.

TPI argues that the lawsuit it filed against Newson in 2002, Pulaski County Docket No. CV02-2845, was dismissed in December 2003, and, therefore, its lawsuit against Regions, filed on January 14, 2004, was commenced within one year of the dismissal. This argument fails for several reasons, but we need only mention one. TPI's lawsuit in Docket No. CV02-2845 was originally filed against Newson only. That suit was dismissed on June 17, 2002. On June 16, 2003, TPI tried to sue Regions by simply amending the complaint in the dismissed action. According to *West v. G.D. Searle & Co.*, 317 Ark. 525, 879 S.W.2d 412 (1994), a new action was required to be filed, not simply an amended complaint adding a new defendant in the dismissed action. The 2002 dismissal therefore remained in effect for over one year, and Regions was not made a party to any valid lawsuit until January 2004. The saving statute therefore did not apply, as the trial court correctly ruled.

TPI's final argument is that fact questions remain on various matters that pertain to issues that have already been discussed herein. In light of our holding that the trial court's rulings have been proper, there is no purpose to be served in addressing these points.

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

GLOVER and VAUGHT, JJ., agree.

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[3] Our ruling makes it unnecessary to examine one of the primary issues argued by the parties, which was whether TPI was diligent in learning of Newson's activities.

Patsy BREWER, d/b/a Jimmy Doyle Country Club *v.*
ALCOHOLIC BEVERAGE CONTROL DIVISION

CA 06-205 245 S.W.3d 719

Court of Appeals of Arkansas
Opinion delivered December 20, 2006

Lynn Arthur Davis, for appellant.

Donald Richard Bennett, for appellee.

PER CURIAM. Appellee Alcoholic Beverage Control Division (ABC) found appellant guilty of allowing minors to consume alcoholic beverages, allowing minors to be present in a private club where no food service was available, and selling alcoholic beverages to a minor. Appellant was fined $2500, had her permit suspended for one week, and was placed on probation for one year. She appealed to the Pulaski County Circuit Court, which upheld the ABC's decision. Appellant has now appealed to this court. However, because appellant's notice of appeal was untimely and she failed to obtain a valid extension, we must dismiss the appeal.

The order of the Pulaski County Circuit Court upholding the ABC's decision was entered on October 27, 2005. Appellant's notice of appeal was due to be filed by Monday,

November 28, 2005. *See* Ark. R. App. P. – Civil 4(a) (2005) (declaring that the notice of appeal shall be filed within thirty days from the entry of the order appealed from). However, it was not filed until December 1, 2005. In the absence of a timely notice of appeal, this court has no jurisdiction to hear the appeal. *See generally Wandrey v. Etchison*, 363 Ark. 36, 210 S.W.3d 892 (2005); *Oak Hill Manor, LLC v. Ark. Health Servs. Agency*, 72 Ark. App. 458, 37 S.W.3d 681 (2001).

However, there is an additional circumstance to consider in this case. On December 27, 2005, appellant's counsel filed a "Motion To Enlarge Time For Filing Notice of Appeal." He stated that, "during this time frame and to the present day, "he was under the care of several doctors and "numerous drugs were administered . . . causing unavoidable delays in tending to [counsel's] mail to note the arrival of the signed order and delaying response thereto." He also stated that, during the same period, his computer malfunctioned "necessitating a new hard drive" and that all pleadings in the present case were lost. The trial court, with no objection from the ABC, entered an order on December 27, 2005, retroactively extending the time for filing the notice of appeal to December 1, 2005.

Arkansas Rule of Appellate Procedure – Civil 4(b)(3), as it was in effect in 2005, provided in pertinent part:

> Upon a showing of failure to receive notice of the judgment, decree or order from which appeal is sought and a determination that no party would be prejudiced, the circuit court shall, upon motion filed within 180 days of entry of the judgment, decree, or order, extend the time for filing the notice of appeal for a period of fourteen (14) days from the day of entry of the extension order.

While this rule clearly contemplates that an extension of time to file a notice of appeal may be granted where the appellant did not receive notice of a judgment being entered, it makes no provision for an extension in any other circumstances. *See In The Matter of the Adoption of Revised Rules of Appellate Procedure*, 321 Ark. 663, 900 S.W.2d 560 (1995), where our supreme court included the following reporter's note pertaining to Arkansas Rule of Appellate Procedure – Civil 4:

> Under Federal Rule 4, the trial court is empowered to extend the time for filing a notice of appeal upon a showing of excusable neglect. No such provision is included in [Arkansas's] Rule 4 for the reason that Arkansas has long considered the filing of a notice of

> appeal as jurisdictional and unless timely filed, there can be no appeal. The Committee saw no need to change this settled rule of law.

Id. at 688 (citation omitted).

In the present case, appellant's counsel did not allege that he failed to receive notice of the judgment. Instead, twenty-seven days after the notice of appeal had been filed, counsel moved for an extension on the ground of "unavoidable casualty," stating the reasons previously mentioned. Under the language of Rule 4, such reasons did not warrant an extension.[1]

Because appellant's notice of appeal was untimely and no extension was properly granted, we have no jurisdiction of this case, and the appeal must be dismissed. *See Arkco Corp. v. Askew*, 360 Ark. 222, 200 S.W.3d 444 (2004) (dismissing an appeal where the trial court erroneously granted an extension of time to file a notice of appeal).

Dismissed.

Christopher Joe POWELL *v.* STATE of Arkansas

CA CR 06-370 246 S.W.3d 891

Court of Appeals of Arkansas
Opinion delivered January 17, 2007

[1] The ABC's lack of objection to the extension does not alter the outcome. The jurisdiction of our court cannot be conferred by consent. *See LaRue v. LaRue*, 268 Ark. 86, 593 S.W.2d 185 (1980).

Hancock Lane & Barrett, by: *Jonathan T. Lane*, for appellant.

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

ROBERT J. GLADWIN, Judge. Appellant Christopher Joe Powell appeals his conviction in the Drew County Circuit Court for theft of property and computer fraud. Appellant claims that the trial court erred in asserting jurisdiction over this matter, contending that all elements of the offenses charged occurred outside the territorial jurisdiction of Arkansas. We affirm.

Appellant, a resident of Georgia, met Vanneise Collins, a resident of Drew County, Arkansas, on an internet website for singles. Over the course of several months, the two engaged in lengthy e-mail and telephone communications, striking up a romance. The romance culminated in three face-to-face meetings in Georgia, and ultimately, a marriage proposal. Throughout the course of their romance, appellant made certain representations about himself that proved to be wholly fabricated, such as his being unmarried, being in the army, and being deployed in Iraq during portions of the time he and Collins were in contact. Collins made concrete marriage plans, such as putting a deposit down on a wedding dress and mailing out wedding invitations. All the while, Collins sent appellant money when he asked, via Western Union, for a variety of reasons, including new golf clubs, property taxes on inherited property, medical bills, a new military dress uniform, and

to "grease palms" while being separated from his unit in Iraq. Appellant obtained about $15,000 from Collins. When she began to doubt him, she verified that there was no record of him being in the military and eventually went to the police.

It is undisputed that appellant never entered the State of Arkansas until such time as he was arrested and transported to Arkansas to answer the criminal charges of theft and computer fraud in Drew County. He challenged Arkansas' exercise of jurisdiction over him by written motion, at the omnibus hearing, and at the close of all evidence. The trial court found appellant guilty of the offenses charged and sentenced him to eight years' imprisonment for theft of property, five years' imprisonment suspended for theft of property, six years' imprisonment for computer fraud, and three years' imprisonment for failure to appear for trial on August 24, 2005. All sentences are to run concurrently. From the denial of appellant's motion challenging jurisdiction and the ultimate conviction comes this appeal.

Territorial jurisdiction over a criminal defendant is controlled by statute. *Ridling v. State*, 360 Ark. 424, 203 S.W.3d 63 (2005) (citing *Kirwan v. State*, 351 Ark. 603, 96 S.W.3d 724 (2003)). The Arkansas Supreme Court has stated that "when reviewing the evidence on a jurisdictional question, [we] need only determine whether there is substantial evidence to support the finding of jurisdiction." *Dunham v. State*, 315 Ark. 580, 581, 868 S.W.2d 496, 497 (1994). A person may be convicted under a law of this state for an offense committed by his own conduct for which he is legally accountable if either the conduct or a result that is an element of the offense occurs within this state. Ark. Code Ann. § 5-1-104(a)(1) (Repl. 2006).

Appellant argues that criminal statutes must be strictly construed in favor of the defendant. *Smith v. State*, 352 Ark. 92, 98 S.W.3d 433 (2003). The theft of property statute provides in pertinent part as follows:

> Ark. Code Ann. § 5-36-103 (Repl. 2005). Theft of property
>
> (a) A person commits theft of property if he or she knowingly:
>
> . . . .
>
> (2) Obtains the property of another person, by deception or by threat, with the purpose of depriving the owner of the property.

The computer fraud statute provides in pertinent part as follows:

> Ark. Code Ann. § 5-41-103 (Repl. 2005). Computer fraud
>
> (a) A person commits computer fraud if the person intentionally accesses or causes to be accessed any computer, computer system, computer network, or any part of a computer, computer system, or computer network for the purpose of:
>
> (1) Devising or executing any scheme or artifice to defraud or extort; or
>
> (2) Obtaining money, property, or a service with a false or fraudulent intent, representation, or promise.

Appellant claims that a strict construction of these statutes shows that these crimes are defined by the conscious act of the wrongdoer. *Cousins v. State*, 202 Ark. 500, 151 S.W.2d 658 (1941), provides that if a crime covers only the conscious act of the wrongdoer, regardless of its consequences, the crime takes place and is punishable only where he acts. Therefore, appellant argues that the conduct of obtaining the property of another by deception and accessing a computer system or network, occurred in Georgia.

He argues that he only sent an e-mail from Georgia through the network to Arkansas, which the complainant then accessed in Arkansas. The scheme was devised in Georgia, and the money was obtained in Georgia. Appellant claims that the "devising" and "obtaining money with false promises" clauses refer to the mental state, not the end result or consequence. He argues that if the legislature had intended these acts to include a result, the act would be drafted in a manner such as: "knowingly obtaining the property of another *thereby depriving* the owner thereof." He claims that because the legislature defines these offenses as the purpose of the wrongdoer, all elements of the crimes occurred in Georgia, outside the territorial jurisdiction of Arkansas.

However, *Cousins*, *supra*, also contains the following language:

> [I]f a man standing beyond our boundary line, in Texas, were, by firing a gun, or propelling any other implement of death, to kill a person in Arkansas, he would be guilty of murder here, and answerable to our laws, because the crime is regarded as being committed where the shot, or other implement propelled, takes effect.

Cousins, 202 Ark. at 503, 151 S.W.2d at 660 (citing *State v. Chapin*, 17 Ark. 561 (1856)). The *Cousins* court continues where appellant left off by finishing the statement, "If a crime covers only the conscious act of the wrongdoer, regardless of its consequences, the crime takes place and is punishable only where he acts," with the following: "[B]ut, if a crime is defined so as to include some of the consequences of an act, as well as the act itself, the crime is generally regarded as having been committed where the consequences occur, regardless of where the act took place . . . ." *Id.* at 503, 151 S.W.2d at 660.

Further, under *Kirwan v. State*, 351 Ark. 603, 96 S.W.3d 724 (2003), the defendant was convicted of distributing, shipping or exchanging pictures over the internet of children participating in sex acts. He did so by sending the pictures from a computer in Texas to an undercover officer in Arkansas. The Arkansas Supreme Court held that the defendant's actions, as well as the result of his conduct, occurred in Arkansas, as he sent the pictures from outside of Arkansas to a destination within Arkansas. Essentially, once the offending e-mail arrives at the computer in Arkansas, a crime has been committed.

The State alleges that Ark. Code Ann. § 5-1-104(a)(1) controls because the State can show that the conduct or result that is an element of the offense occurred within Arkansas. We agree. Appellant sent e-mail correspondence to Collins and contacted her by telephone while she was in Arkansas. During the course of those communications, appellant actively deceived Collins into sending him money. Moreover, appellant caused Collins to access her computer by virtue of his e-mail correspondence, for the purpose of obtaining money with a false or fraudulent intent, representation, or promise. The deception and promises were his extensive fabrications. We hold, therefore, that substantial evidence existed to support the trial court's finding that it had jurisdiction in the instant case.

Affirmed.

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

Curtis DRUMMOND *v.* Randall SHEPHERD,
Shirley Shepherd, Brian Thomas and Dennis Shepherd

CA 06-438 247 S.W.3d 526

Court of Appeals of Arkansas
Opinion delivered January 24, 2007

The Baker Law Firm, PLLC, by: *Rinda Baker*, for appellant.

Bagby Law Firm, P.A., by: *Philip A. Bagby*, for appellees.

LARRY D. VAUGHT, Judge. Appellant Curtis Drummond argues that the trial court erred by dismissing his prescriptive-easement action and erroneously granting appellees' motion for attorney's fees. We affirm in part and reverse in part.

This case began in October 2004, when Drummond filed a complaint asserting a right-of-use easement (on a gravel drive) across appellees' property. In response to his claim, appellees filed

a 12(b)(6) motion to dismiss — arguing that Drummond had previously sought to have this same drive designated a roadway-by-necessity in county court. Appellees noted that the necessity action had been dismissed on March 4, 2004, after the court-appointed reviewers determined that Drummond did in fact have access to his property by other means. Appellees also moved the court for an award of attorney's fees pursuant to Ark. Code Ann. § 16-22-309 (Repl. 1999), arguing that Drummond's claim for a prescriptive easement was wholly without merit. The motions were denied, and the matter went to trial on November 15, 2005. At trial, appellees renewed their motion to dismiss and their motion for attorney's fees, arguing that Drummond failed to present a justiciable issue. The court again denied their motions.

At trial, Drummond testified that in 2002 he purchased a forty-acre tract near the Bidville Community in northern Crawford County. He stated that he was born in 1935 and had lived in the area of the property from 1939 until 1949. He offered proof that he and his cousins had crossed over the property periodically from the 1930s through 1967. However, the only proof of actual continuous usage of a particular route was from the time of Drummond's purchase of the neighboring property in 2002, until he ceased using the route in 2004. Specifically, Drummond testified that he had used the roadway "since I got it [the property in 2002] until about a year ago, whenever Ellison's wife stopped me there and told me she didn't want me going across her property no more."

At the close of the case-in-chief, appellees moved to dismiss the case, arguing that Drummond had only established two years of continuous use. The court then granted the motion, stating that Drummond's proof was "woefully short" of the minimum usage of seven consecutive years required to establish a prescriptive easement. In a post-trial motion, appellees claimed they incurred $4476 in attorney's fees defending against Drummond's easement complaint. In response to appellees' motion, the court concluded that, because Drummond presented no justiciable issue of law or fact in his complaint, appellees were entitled to an award of attorney's fees as mandated by section 16-22-309.[1] Drummond

[1] Despite holding that Drummond failed to present a justiciable issue, the court reduced appellees' fee award to $1500, although the statute would have allowed a full recovery of the fees incurred by appellees. *See* Ark. Code Ann. § 16-22-309(a)(1) (Repl. 1999).

tendered a timely appeal, claiming that the trial court erroneously dismissed his complaint and erred by concluding that he failed to present a justiciable issue.

We first consider Drummond's challenge to the trial court's grant of appellees' motion to dismiss. A motion to dismiss is identical to a motion for a directed verdict in a jury trial and is a challenge to the sufficiency of the evidence. *See Reed v. State*, 91 Ark. App. 267, 209 S.W.3d 449 (2005). On appeal, we review 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 therefrom. *Woodall v. Chuck Dory Auto Sales, Inc.*, 347 Ark. 260, 61 S.W.3d 835 (2001). A motion for directed verdict should be granted only if there is no substantial evidence to support a jury verdict. *Id.* at 264, 61 S.W.3d at 838. 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. *Id.*, 61 S.W.3d at 838. It is a trial court's duty to review a motion for directed verdict or dismissal at the conclusion of a plaintiff's case by deciding whether, if it were a jury trial, the evidence would be sufficient to present to the jury. *Id.*, 61 S.W.3d at 838.

In Arkansas, one asserting an easement by prescription must show — by a preponderance of the evidence — use that is adverse to the true owner and under a claim of right for at least seven years. *Gazaway v. Pugh*, 69 Ark. App. 297, 12 S.W.3d 662 (2000); Ark. Code Ann. § 18-61-101 (Repl. 2003), *see also* Ark. Code Ann. § 18-11-106 (Repl. 2003). Here, considering the evidence in the light most favorable to Drummond, there is proof that he continuously used the roadway for approximately two years. However, by his own account, once he was told to stop using the road — he did. Therefore, he made no showing of adverse use, and it was not error for the trial court to dismiss the claim.

Drummond also argues that the trial court erred in its decision to award appellees attorney's fees because his complaint contained a justiciable issue. Arkansas Code Annotated § 16-22-309 provides that an attorney's fee shall be awarded in any action where the trial court finds that there was a complete absence of a justiciable issue of either law or fact. In order to support a determination that no justiciable issue exists, the court must determine that a complaint was filed in bad faith solely for purposes

of harassing or maliciously injuring another, or delaying adjudication without just cause or that an attorney or party signed a pleading not grounded in fact, not warranted by existing law or a good faith argument for a change in the law, or filed for an improper purpose. *See State v. Craighead County Bd. of Election Comm'rs*, 300 Ark. 405, 779 S.W.2d 169 (1989).

According to the statutory language, on appeal, the question as to "whether there was a complete absence of a justiciable issue is determined de novo on the record of the trial court alone." Ark. Code Ann. § 16-22-309(d) (Repl. 1999); *Stilley v. Hubbs*, 344 Ark. 1, 40 S.W.3d 209 (2001). Additionally, our case law requires that we not reverse the trial court's factual findings, unless they are clearly erroneous. *Stanley v. Burchett*, 93 Ark. App. 54, 216 S.W.3d 615 (2005). In this case, although the trial court expressly held that there was an absence of a justiciable issue, it made no factual findings supporting its legal conclusion. Therefore, we are left with the singular task of determining whether — as a matter of law — Drummond presented a justiciable claim. Further, contrary to appellees' assertion that the trial court did not abuse its discretion in making the fee award, which is generally the ultimate test for the propriety of an award of attorney's fees, we do not review matters of law under an abuse-of-discretion standard.

Although Drummond fell short of his ultimate burden, proving seven years of adverse use, he did present a valid claim and offered some evidence that he had used the roadway over the course of many years. Indeed, his claim had sufficient merit that the trial court twice refused to dismiss the claim before its ultimate decision to dismiss. Therefore, based on our de novo review of the trial record, we conclude that Drummond presented a weak but justiciable claim. The trial court is reversed on this point.

Affirmed in part; reversed in part.

GLOVER and MARSHALL, JJ., agree.

ST. JOSEPH'S MERCY HEALTH CENTER, Sisters of Mercy Health System, Second Injury Fund *v.* Brenda LAMB

CA 06-665 248 S.W.3d 514

Court of Appeals of Arkansas
Opinion delivered January 31, 2007

Anderson, Murphy & Hopkins, LLP, by: *Randy P. Murphy*, for appellants.

Bachelor & Newell, by: *C. Burt Newell*, for appellee.

JOSEPHINE LINKER HART, Judge. In this workers' compensation case, appellants argue that the Arkansas Workers' Compensation Commission erred when it vacated a change-of-physician order after it concluded that the order was not effective to provide a new treating physician for appellee, Brenda Lamb. We affirm.

As stipulated by the parties, appellee suffered a compensable back injury on February 25, 2004. A change-of-physician order was entered January 24, 2005, changing appellee's treating physician from Dr. William Ackerman to Dr. Bud Dickson. The order was entered pursuant to Ark. Code Ann. § 11-9-514(a)(3)(A)(iii) (Repl. 2002), which provides as follows:

> Where the employer does not have a contract with a managed care organization certified by the commission, the claimant employee, however, shall be allowed to change physicians by petitioning the commission one (1) time only for a change of physician, to a physician who must either be associated with any managed care entity certified by the commission or be the regular treating physician of the employee who maintains the employee's medical records and with whom the employee has a bona fide doctor-patient relationship demonstrated by a history of regular treatment prior to the onset of the compensable injury, but only if the primary care physician agrees to refer the employee to a physician associated with any managed care entity certified by the commission for any specialized treatment, including physical therapy, and only if the primary care physician agrees to comply with all the rules, terms, and conditions regarding services performed by any managed care entity certified by the commission.

But following a hearing, the administrative law judge (ALJ) entered an order determining that the change-of-physician order was not effective to provide a new treating physician for appellee, and consequently the ALJ vacated the change-of-physician order and changed appellee's treating physician to Dr. Thomas M. Ward. In this order, the ALJ noted that, in his deposition, Dr. Dickson left "no doubt that he understood his role to be that of an independent medical examiner and not a treating physician." The ALJ concluded that, consequently, Dr. Dickson "has not acted and will not act as [appellee's] treating physician." The ALJ also noted that while Dr. Dickson did not believe that appellee was a surgical candidate, he testified that he was not an expert in spine surgery, although he had been trained to do back surgery. Further, the ALJ observed that Dr. Dickson stated that he was not a psychiatrist but "thought [appellee's] primary problems were neuro-psychiatric more than they were orthopedic or spine" but that "he did not do enough of that to refer her to a physician for such problems." The ALJ ruled that the change-of-physician order "was not effective because it did not provide the claimant with a new treating physician, the whole point of the right to change physicians." The ALJ concluded that "in order for [appellee] to exercise her right to change physicians, it is necessary that she be provided with a different physician who will consider [appellee] a patient and act as a treating physician, whether that includes therapy that he per-

forms or supervises or referrals to other appropriate physicians." On appeal to the Commission, the Commission adopted the ALJ's opinion.

On appeal to this court, appellants argue that the statute allows appellee a one-time change of physician, and the Commission has erroneously permitted a second change of physician not contemplated by the statute. Further, appellants assert that Dr. Dickson had the appropriate training and experience to evaluate appellee's needs and determine whether she needed any additional treatment as a result of her injury. Also, appellants note that Dr. Dickson's conclusions were consistent with the conclusions of appellee's previous treating physicians.

We review the Commission's decision to see if it is supported by substantial evidence, which is relevant evidence a reasonable mind might accept as adequate to support a conclusion, and if reasonable minds could reach the result found by the Commission, we affirm the decision. *Am. Standard Travelers Indem. Co. v. Post*, 78 Ark. App. 79, 77 S.W.3d 554 (2002). As we held in *Collins v. Lennox Indus., Inc.*, 77 Ark. App. 303, 75 S.W.3d 204 (2002), the language in the statute providing that a claimant employee "shall be allowed to change physicians by petitioning the commission one (1) time only for a change of physician," provides an absolute right to a change of physician. Here, the Commission had before it evidence that Dr. Dickson did not act in a manner consistent with being appellee's physician. In both a letter and his deposition, Dr. Dickson stated that he saw appellee for an independent medical evaluation. Moreover, Dr. Dickson testified during his deposition that he was not an expert in spine surgery, that he did not perform back surgery, and that he instead performed reconstructive hip and knee surgery. Accordingly, we conclude that substantial evidence supported the Commission's decision to vacate the change-of-physician order after concluding that the order was not effective to provide a new treating physician for appellee.

Affirmed.

MARSHALL and HEFFLEY, JJ., agree.

Marty POWERS *v.* CITY of FAYETTEVILLE, Employer, and Municipal League, WCT, Carrier

CA 06-685 248 S.W.3d 516

Court of Appeals of Arkansas
Opinion delivered January 31, 2007

Martin & Kieklak Law Firm, by: *Aaron L. Martin*, for appellant.

J. Chris Bradley, for appellees.

ROBERT J. GLADWIN, Judge. Appellant Marty Powers appeals the April 6, 2006 decision of the Arkansas Workers' Compensation Commission, which determined that his claim is barred by the statute of limitations and that he failed to prove that he sustained a compensable injury. Appellant contends that his claim is not barred by the statute of limitations and that there was not substantial evidence to support the Commission's decision. We hold that the statute of limitations does not prevent appellant's claim; however, we affirm the decision finding substantial evidence to deny appellant's claim.

Appellant began working for the Fayetteville Fire Department in 1986 and first sought medical treatment for hearing problems with ear, nose, and throat specialist Dr. Thermon Crocker in 1992. Dr. Crocker ordered audiological diagnostic testing for appellant again in 1995, 1998, and 2001. Dr. Crocker testified that appellant suffered a normal reduction in hearing loss at the testing done in 1995, and the 1998 testing did not reveal a significant change. In 2001, however, significant change to appellant's hearing was detected, and the doctor considered him a candidate for hearing aids. His hearing loss had not been severe enough to qualify him for an impairment rating until 2001. Dr. Crocker also testified that, while he considered the impact of other causation factors for the injury such as guns, power tools, and loud

music, his opinion within a reasonable degree of medical certainty was that the major cause of appellant's hearing loss, but not the only cause, resulted from exposure to occupational noise as a firefighter.

Appellant filed a claim for workers' compensation benefits on July 31, 2002. Stipulations were made by appellant and appellees at a prehearing conference before the administrative law judge (ALJ) that included an agreement that appellant had hearing loss at the impairment level of nine-point-four percent. Although the ALJ accepted this stipulation as fact in the course of rendering his opinion, it nevertheless was determined that appellant failed to prove the existence of a compensable injury because of the lack of objective findings. The ALJ found that the diagnostic testing relied upon by appellant was within the voluntary control of the patient and therefore cannot be considered an objective finding that would satisfy the statutory requirement for compensable injuries. Appellant appealed the ALJ's denial of benefits to the Commission, which affirmed and adopted the ALJ's decision.

On previous appeal, this court reversed the decision of the Commission, finding that because the ALJ and the Commission accepted the stipulation as fact, the Commission's denial of benefits based on the rejection of audiological testing to establish objectively a compensable injury was without a rational basis. This court remanded for a determination of fact concerning a causal relationship between the appellant's hearing loss and his employment, as well as a determination of all other issues raised by the parties.

Upon remand, the Commission heard the issues of appellee's statute-of-limitations defense and the compensability of appellant's injury. The Commission ruled that appellant's claim was barred by the statute of limitations and, even if it were not, appellant failed to prove that he sustained a compensable injury. From the Commission's decision comes this appeal.

When an appeal is taken from the denial of a claim by the Workers' Compensation Commission, the substantial-evidence standard of review requires that we affirm the Commission's decision if its opinion contains a substantial basis for the denial of relief. *Dalton v. Allen Eng'g Co.*, 66 Ark. App. 201, 989 S.W.2d 543 (1999). In determining the sufficiency of the evidence to support the findings of the Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings, and we affirm if those findings are supported by substantial evidence. *Winslow v. D.B. Mech.*

Contractors, 69 Ark. App 285, 13 S.W.3d 180 (2000). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Mays v. Alumnitec, Inc.*, 76 Ark. App. 274, 64 S.W.3d 772 (2001). There may be substantial evidence to support the Commission's decision even though the appellate court might have reached a different conclusion if it had sat as the trier of fact or heard the case de novo. *Brower Mfg. Co. v. Willis*, 252 Ark. 755, 480 S.W.2d 950 (1972).

We will not reverse the Commission's decision unless we are convinced that fair-minded persons with the same facts before them could not have reached the conclusions arrived at by the Commission. *White v. Georgia-Pacific Corp.*, 339 Ark. 474, 6 S.W.3d 98 (1999). In making our review, we recognize that it is the function of the Commission to determine the credibility of witnesses and the weight to be given their testimony. *Wal-Mart Stores, Inc. v. Stotts*, 74 Ark. App. 428, 49 S.W.3d 667 (2001). When the Commission weighs medical evidence and the evidence is conflicting, its resolution is a question of fact for the Commission. *Green Bay Packaging v. Bartlett*, 67 Ark. App. 332, 999 S.W.2d 695 (1999). Moreover, the Commission can reject or accept medical evidence and determine the probative value to assign to medical testimony. *Hamilton v. Gregory Trucking*, 90 Ark. App. 248, 205 S.W.3d 181 (2005). The appellate court reviews the decision of the Commission and not that of the ALJ. *High Capacity Prods. v. Moore*, 61 Ark. App. 1, 962 S.W.2d 831 (1998).

I. Statute of limitations

Appellant's argument that the statute of limitations does not bar his claim is two-fold. The applicable statute of limitations is found in Ark. Code Ann. § 11-9-702, which provides in pertinent part as follows:

> (a) TIME FOR FILING.
>
> (1) A claim for compensation for disability on account of an injury, other than an occupational disease and occupational infection, shall be barred unless filed with the Workers' Compensation Commission within two (2) years from the date of the compensable injury. If during the two-year period following the filing of the claim the claimant receives no weekly benefit compensation and receives no medical treatment resulting from the alleged injury, the claim shall be barred thereafter. For purposes of this section, the

> date of the compensable injury shall be defined as the date an injury is caused by an accident as set forth in § 11-9-102(4).

First, appellant argues that the statute of limitations for hearing loss does not begin to run until the injury is permanent. Under Ark. Code Ann. § 11-9-521, when the employee's scheduled injury is permanent, then he qualifies for "weekly benefits in the amount of the permanent partial disability rate attributable to the injury." Appellant claims that it logically follows that if the injury is not permanent then an employee does not qualify for these weekly benefits. Also, if the claimant does not qualify for these weekly benefits, then he has not suffered a loss of earnings, which the Arkansas Supreme Court, in *Minnesota Mining & Manufacturing v. Baker*, 337 Ark. 94, 989 S.W.2d 151 (1999), held are presumed in these weekly benefits. Therefore, appellant argues that the statute of limitations should not run until a scheduled injury is permanent and qualifies for these weekly benefits.

Appellant claims that, until now, this court has not been presented with a case that is ripe for a determination on the issue of whether a deteriorating condition tolls the statute of limitations. In other words, appellant claims that this court has not ruled on the issue of whether the statute of limitations begins to run at the discovery of the condition, or after the condition has stabilized. Appellant argues that, here, he properly raised this argument to the Commission and there are audiograms that prove his progressive hearing loss.

Appellant initially sought treatment for hearing loss in 1992. He returned in 1995, and the tests did not show a dramatic change. There were admittedly no changes in 1998, but his hearing loss progressed significantly in 2001. He emphasizes that Dr. Crocker testified that the appellant's hearing loss was progressive, and the medical records and audiograms corroborate his opinion. The Commission concluded that the appellant's condition stabilized in 1998 and that the statute of limitations should run from that date. However, appellant claims that it is clear that his condition was not stable in 1998. In fact, he claims his injury continued to progress with further deterioration in his hearing loss because of his continued exposure to occupational noise as a firefighter. We agree. Appellant's hearing loss finally stabilized in 2001 when he retired and was no longer exposed to occupational noise. Because he filed his claim in July 2002, he was within the two-year limitations period.

Second, appellant argues in the alternative that the statute of limitations for hearing loss does not begin until an injury is permanent and qualifies for a disability rating. An employee who sustains a scheduled injury is entitled to compensation during the healing period. Ark. Code Ann. § 11-9-521. When the scheduled injury is permanent, then the employee qualifies for "weekly benefits in the amount of the permanent partial disability rate attributable to the injury." *Id.* However, a claimant would not qualify for weekly benefits for a permanent injury if there is no permanent partial disability rate attributable to the injury. Therefore, the statute of limitations does not begin to run until a scheduled injury is permanent and a rating can be attributed to the injury.

Appellant's hearing loss was not severe enough to qualify for a rating until 2001. Based on appellant's audiogram from 1998, Dr. Crocker formulated a rating of zero percent. However, his hearing loss in 2001 entitled him to a nine-point-four percent rating. Therefore, although appellant may have been aware of his loss in 1992, he did not suffer a presumed loss in earnings until 2001, when his condition was permanent and he qualified for a disability rating.

Appellee argues that, for purposes of commencing the statute of limitations under Ark. Code Ann. § 11-9-702(a)(1), an "injury" is not to be construed as "compensable" until: (1) the injury develops or becomes apparent; and (2) the claimant suffers a loss in earnings on account of the injury, which loss is presumed in hearing-loss cases as in those of scheduled injuries. *Baker, supra.* Appellee claims that, consequently, the statute of limitations, with respect to a claim for hearing loss, begins to run when the hearing loss becomes apparent to the claimant. *Id.* Appellee claims that, in this case, appellant's hearing loss manifested nearly ten years before he filed his claim with the Commission. However, this argument belies Dr. Crocker's 1998 rating of zero percent. Again, appellant may have recognized a problem with his hearing early on, but he did not qualify for a disability rating until 2001.

Appellee contends that appellant's claims regarding the deterioration of his hearing loss have their origins in *Baker, supra.* In *Baker*, the court seemed to associate the application of the statute of limitations to the absence of continued hearing loss when it stated, "[Appellee] became aware of his hearing loss in February 1978. The statute of limitations began to run in February 1978,

and because his hearing did not continue to deteriorate, appellee's claim became time barred in February 1980, pursuant to Arkansas Code Annotated section 11-9-702(a)(1) (1987)." *Id.* at 104, 989 S.W.2d at 157. Subsequently, in *Pina v. Wal-Mart Stores, Inc.*, 91 Ark. App 77, 208 S.W.3d 236 (2005), this court expounded on the *Baker* dicta, commenting:

> The initial claim in *Baker* was for permanent disability benefits. Therefore, in order to be entitled to permanent disability benefits, the hearing loss had to reach a point of stability. Accordingly, it is our view that the requirement that the injury stabilize is limited to hearing-loss claims, and the *Baker* dicta supports only a narrow view of the stabilization requirement. Further, in hearing-loss claims the annual hearing tests quantify the amount of loss experienced by the claimant. Such annual testing objectively demonstrates the amount of loss and the time period in which the loss occurred, removing all elements of subjectivity as to time and amount of loss from the fact finding.

Appellee argues that the *Pina* dictum, with respect to a stabilization requirement, seems to be based upon the presence of annual hearing tests that objectively demonstrate the amount of loss and the time of loss. In the instant case, yearly tests were not given. However, tests were administered in 1992, 1995, 1998, and 2001. Because the results support the claim that additional hearing loss occurred between 1998 and 2001 when a disability rating was assigned, we hold that appellant's hearing loss was not stabilized in 1998.

Appellee argues that appellant's alternative argument that the statute of limitations is not tolled until the injury is susceptible of an impairment rating is also flawed. This approach would allow for hearing loss injuries to continue until the day the claimant finally sees a doctor who is able to assess an impairment rating. However, in the instant case, appellant did see a doctor and submitted to hearing tests at least four times between 1992 and 2001. He received a disability rating of nine-point-four percent in 2001. He continued to work as a firefighter throughout this period, and Dr. Crocker testified that his hearing loss was attributable to his occupation. Therefore, appellant's claim was not stale.

II. Substantial evidence claim

Appellant claims that there was not substantial evidence to support the Commission's determination that appellant failed to

prove that he sustained a compensable injury. Appellant argues that the issue is whether the major cause of his hearing loss was his exposure to occupational noise. A claimant is required to prove by a preponderance of the evidence that a work-related injury is the major cause of his disability or need for treatment. Ark. Code Ann. § 11-9-102(4)(E)(ii). "Major cause" is defined as merely more than fifty percent. Ark. Code Ann. § 11-9-102(14)(A). Appellant argues that the preponderance of the evidence shows that the major cause of his hearing loss was his exposure to occupational noise.

Appellant points to the evidence that he worked as a firefighter for sixteen years. In the first six years, he was routinely exposed to running engines and water pumps. He had to ride in open-air styled cabs, and the sirens and horns were located directly above his head. In 1992, he was transferred to Station 2 located at the University of Arkansas. While there, he and others responded to several alarms at the Bud Walton Arena and various residence halls. The firefighters had to search through the entire building while the alarms remained activated. These alarms registered eighty-seven-point-eight and eighty-nine decibels from ten feet away. During his last years as a firefighter, he worked at Station 3 located at Drake Field Airport. While working there he would routinely inspect hangars while mechanics were running jet engines.

Further, appellant's treating physician, Dr. Crocker, provided expert opinion that the major cause of appellant's hearing loss was the occupational noise from his work as a firefighter. Dr. Crocker testified that he considered the decibel readings of various equipment at the Fayetteville Fire Station and the decibel levels of the alarms at the University of Arkansas. He also considered a narrative of the appellant's exposure to work-related and non-work-related noise.

Also, Dr. Doernhoffer, an independent examiner who reviewed the appellant's claim for in-the-line-of-duty disability benefits through the Arkansas Local Police and Fire Retirement System, issued his opinion that the job exposure to noise was the cause of appellant's hearing loss. Therefore, appellant argues that these two opinions are more than enough evidence to prove that occupational noise was the major cause of appellant's hearing loss.

However, the Commission rejected these two opinions, instead relying on testimony from Lewis McGrail and Jimmy Key. McGrail and Key work for Key Audiometrics in Garfield, Arkan-

sas, and perform annual hearing testing, baseline testing, and noise surveys. They performed a noise survey and baseline testing for the City of Fayetteville Fire Department. Key testified that any type of hearing protection would benefit firefighters. McGrail claimed that with exposure to long periods of time without ear protection, a firefighter could sustain some substantial hearing loss.

Appellant argues that the Commission failed to consider that Key and McGrail improperly assumed the use of hearing protection by appellant. Further, both Key and McGrail failed to consider the exposure to false alarms on the university campus because they did not have the decibel readings from these alarms. Finally, appellant claims that Key and McGrail did not consider the decibel levels from the jet engines that appellant was exposed to while stationed at Drake Field.

Nevertheless, appellee claims that there is substantial evidence to support the Commission's findings that appellant did not suffer a compensable injury in the form of a hearing loss as a result of his employment. Appellee reiterates that the Commission is authorized to accept or reject medical opinions. *Estridge v. Waste Mgmt.*, 343 Ark. 276, 33 S.W.3d 167 (2000). Further, appellee points out that McGrail and Key provided the only testimony that carried weight. Appellee argues that these specialists went to the scene, made measurements, compared data to national standards, and reached a different conclusion as to causation. Key testified that ninety percent of the firefighters he surveyed used hearing protection that would reduce sound levels to below ninety decibels. He further testified that a lawnmower puts out 105 decibels, a chainsaw about 100 decibels or more, circular saws can get up to 100 decibels, and a jet engine was about 120 to 140 decibels. Lastly, Key testified that impact noises such as gunshots were the most dangerous. McGrail testified that without hearing protection, appellant would have had a substantial hearing loss had he been exposed to the noise levels captured at the City of Fayetteville. Because the hearing loss was twelve percent over a ten-year period, McGrail testified that appellant probably did use hearing protection. He also noted that if appellant were normal in 1992, then it would indicate appellant never wore ear protection and that he was exposed to a lot more than ninety decibels, but that only changing twelve to thirteen decibels over a ten-year period was a minimal change that may or may not be associated with the

workplace. Therefore, we cannot say that the Commission did not have substantial evidence before it to find that appellant did not sustain a compensable injury.

Accordingly, the statute of limitations does not prevent appellant's claim; however, the Commission's decision that appellant did not sustain a compensable injury is affirmed.

Affirmed.

BIRD, and BAKER, JJ., agree.

Sheila JUDKINS *v.* Donnie DUVALL, Michael Wayne Duvall, Susanna Duvall, Bobby Judkins, Lola Judkins, Office of Child Support Enforcement and Arkansas Department of Human Services

CA 06-258 248 S.W.3d 492

Court of Appeals of Arkansas
Opinion delivered January 31, 2007

Michael S. Robbins, P.A., by: *Michael S. Robbins*, for appellant.

Hilburn, Calhoon, Harper, Pruniski & Calhoun, Ltd., by: *Sam Hilburn* and *Traci LaCerra*, for appellee Donnie Duvall.

JOHN B. ROBBINS, Judge. Appellant Sheila Judkins appeals a permanency planning order entered by the Pope County Circuit Court that granted custody of her son Braydon to his biologi-

cal father, appellee Donnie Duvall. Appellant asserts that the trial court erred (1) in denying the motion to remove the child's attorney ad litem; (2) in granting temporary and later permanent custody to appellee, which is contrary to the goal of the Juvenile Code; (3) in considering a change in custody absent a finding of a material change in circumstances; and (4) in changing custody where it was not in the child's best interest. We disagree with her arguments and affirm.

These parties were never married. Braydon was born in March 1998. Appellee, a resident of Russellville, sought to determine his paternity in a Pope County proceeding, and he was found to be the biological father in a June 19, 2000 order. Appellee was granted visitation and was ordered to pay child support. Appellant and Braydon lived in Atkins at that time. The relationship between appellant and appellee was acrimonious.

On December 2, 2002, appellant filed a petition to halt appellee's visitation due to her belief that appellee had sexually abused their four-year-old son. Appellant attached a letter from Braydon's counselor, wherein the counselor recounted being informed of this allegation, and her recommendation to the mother to take the child to his pediatrician and to call the child abuse hotline. On December 4, 2002, appellee filed a motion for contempt due to appellant refusing him his Thanksgiving holiday visitation. More motions seeking identical relief were filed by each party in January 2003. In March 2003, appellee filed a motion to change custody in response to appellant having coached their son to make false allegations of abuse.

In May 2003, the trial judge entered an order based upon the opinions of Braydon's pediatrician and counselor that appellee's visitation should be modified, and that appellant had legitimate concern for her child's welfare. Braydon exhibited emotional issues and aggression. Visitation was thereafter allowed, provided that there were neutral parties to make the exchange. In December 2003, appellant again asked that visitation be suspended due to new allegations of sexual abuse that appellee perpetrated on Braydon. Although DHS had determined that the allegations were unfounded, appellant asserted that she was convinced that such abuse was occurring. In addition, appellant asked that a family-in-need-of-services ("FINS") case be opened.

In July 2004, the trial judge decided that Braydon was a member of a family in need of services, as defined in Ark. Code Ann. § 9-27-303. The judge found that in order to protect the

child, it was necessary that DHS take custody of him. The judge found compelling the opinion of psychologist, Dr. DeYoub, that appellant had a personality disorder that was adversely affecting Braydon. Braydon was at that time a patient in a mental health facility in Little Rock. Each parent was allowed to have unsupervised visitation and was ordered to undergo counseling. Current and overdue child support were directed to be paid to DHS. Also in July 2004, the trial court appointed an attorney ad litem via the public defender's office. As a result of that order, the managing public defender appointed Jefferson Faught as attorney ad litem to represent Braydon's interest.

Both sets of grandparents intervened in this case. Appellant's parents filed a motion to remove the attorney ad litem on the basis that he was biased and adverse toward appellant because he had represented her former husband in divorce proceedings. Appellant joined her parents' motion. The ad litem assured the trial judge that he could perform his duties as ad litem without being influenced by the previous litigation experience with appellant. The trial judge denied the motion after a pretrial hearing conducted in November 2004.

A mandatory review hearing was conducted in January 2005, during which the trial judge weighed the value of the opinions rendered by various mental health service providers, among whom there was "tremendous disagreement." The trial judge found that appellant suffered from some mental problems, that the numerous sexual-abuse allegations were all unsubstantiated, that no further allegations had been made against appellee subsequent to the child's removal from appellant's custody in July 2004, that the child's mental health had improved since his removal, that the child's affect was good when he was around his father in contrast to times with his mother, and that temporary custody would be placed with appellee. Appellant was allowed to have visitation with her son, and DHS was ordered to open a protective-services case on the family. Counseling was ordered to continue.

Appellant filed a motion for the trial court to reconsider its findings entered from the January 2005 review hearing. She challenged the accuracy of Dr. DeYoub's conclusions regarding appellant's mental health, and she challenged the placement of her son with his father as contrary to the goals of a FINS case. Appellant's parents (as Intervenors) moved the trial court to

reconsider removing the attorney ad litem as biased against their daughter, appellant. The trial court denied this second motion.

After a permanency planning hearing, the trial court issued a permanency planning order, which is the subject of this appeal. It was filed on October 20, 2005, and it reflected that the trial court had considered a permanent plan for Braydon pursuant to Ark. Code Ann. § 9-27-338 (Supp. 2005) and the options for placement in order of statutory preference. The trial judge found in relevant part that:

> [T]he juvenile is no longer in need of the services of the Arkansas Department of Health and Human Services. Return to the custody of the mother is contrary to the welfare of the juvenile and placement of the juvenile in the permanent custody of the father is in the best interests of and necessary to the protection of the juvenile's health and safety.
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> . . . .
>
> That the juvenile cannot be returned home to his mother in that it is not in the best interest of the juvenile to return home to his mother and that the juvenile's health and safety cannot be adequately safeguarded if returned home to his mother[.]
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> . . . .
>
> That it is in the best interest of the juvenile that the goal of this case be changed to authorizing a plan to place the juvenile in the permanent custody of his father, Donnie Duvall.

The judge found that the protective services case should be closed. Appellant was allowed visitation. Appellant filed a timely notice of appeal from the permanency planning order.

For her first point of appeal, appellant contends that the trial court erred in denying her motion to remove the attorney ad litem appointed for her child on the basis that he was adverse to her and could not be impartial. We affirm the trial court's denial of her motion to remove attorney Faught.

In *Kimmons v. Kimmons*, 1 Ark. App. 63, 613 S.W.2d 110 (1981), our court emphasized that an attorney ad litem may be appointed to represent the child's interest in custody litigation.

More specific to FINS cases, "the juvenile has the right to be represented at all stages of the proceedings by counsel." Ark. Code Ann. § 9-27-316(a)(1) (Supp. 2005). Appellant does not dispute that an attorney ad litem could be beneficial. Instead, she argues that this particular one should have been disqualified.

Appellant fails to persuade because she does not offer any evidence that attorney Faught was in fact adversely biased against her. Her belief, alone, will not support such an accusation. The trial court was persuaded by attorney Faught's reassurance that he could provide attorney ad litem services to the child without any effects from prior litigation experience with appellant. This decision resulted from a pretrial hearing, which was not recorded and transmitted for appeal. It is presumed that the discussion during the unrecorded hearing supports the trial court's findings. *See Rush v. Wallace*, 23 Ark. App. 61, 742 S.W.2d 952 (1988); *Wagh v. Wagh*, 7 Ark. App. 122, 644 S.W.2d 630 (1983). It is appellant's burden to bring up a record sufficient to demonstrate that the trial court was in error. *See Dodge v. Lee*, 352 Ark. 235, 100 S.W.3d 707 (2003); *Estate of Seay v. Quinn*, 352 Ark. 113, 98 S.W.3d 821 (2003). Appellant has failed to demonstrate that the trial court erred in denying her motion to remove the attorney ad litem. We affirm this point.

Appellant's second point on appeal is that the trial court erred in granting temporary and then permanent custody of the child to appellee. She asserts that this decision is in contravention of the goal stated in Ark. Code Ann. § 9-27-303(25)(B) (Supp. 2005), in a FINS case, which is to reunite the child with the parent from whom custody was taken. This argument is not well taken.

Appellant's attorney asked that this case be deemed a FINS case, and this request was honored and ordered by the trial court in July 2004. When the case came to be heard for permanency planning, the trial court had before it six options to set as a goal for the case pursuant to Ark. Code Ann. § 9-27-338(c) (Supp. 2005). While the highest preference would have been to return the child to the parent from whom he had been taken, that choice would be valid only if it was in the child's best interest to do so and if the child's health and safety could be adequately guarded if returned to appellant's custody. *See id.* § 9-27-338(c)(1). Instead, the trial judge chose option (c)(4), which was to authorize a plan to obtain permanent custody with a relative, in this case his father, appellee.

Appellant has failed to demonstrate that the trial court erred in applying the statutory preferences. The trial court specifically stated that it considered the alternatives in order of such preference but that it was in the child's best interest to be in the custody of his father, which is a permissible disposition. We affirm this point.

Appellant's third point on appeal is that the trial court erred in failing to require a showing of a material change in circumstances to warrant a change of custody. She bases her argument on the premise that she was the custodian of this child born out of wedlock, and that the biological father bore the burden to establish a material change of circumstances since the order establishing paternity in June 2000. She cites *Norwood v. Robinson*, 315 Ark. 255, 866 S.W.2d 398 (1993). Had this case been a purely domestic relations proceeding, such a burden would be placed upon the biological father to show such a change. This case was converted, by appellant's request and by the trial judge's agreement with that assessment, into a FINS case. With that, the disposition of the child removed from the home and the permanency placement plan were governed solely by the Juvenile Code. Ark. Code Ann. § 9-27-301 *et seq.*

Appellant's final argument for reversal is that the trial court erred in finding that it was in Braydon's best interest to grant custody of him to his father. Appellant contends primarily that Dr. DeYoub's evaluation of her mental status was faulty at best, and his opinion should not have been credited. She recounts the evidence of sexual abuse that she deems more than credible. In short, she asserts that the trial court clearly erred in deciding that Braydon should live with his father.

In equity matters, such as juvenile proceedings, the standard of review on appeal is de novo, although we do not reverse unless the trial court's findings are clearly erroneous. *See Moiser v. Ark. Dep't of Human Servs.*, 95 Ark. App. 32, 233 S.W.3d 172 (2006). 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. *See id.*

We give due deference to the superior position of the trial court to view and judge the credibility of the witnesses. *Noland v. Noland*, 330 Ark. 660, 956 S.W.2d 173 (1997). This deference to

the trial court is even greater in cases involving child custody, as a heavier burden is placed on the trial judge to utilize to the fullest extent his or her powers of perception in evaluating the witnesses, their testimony, and the best interest of the children. *Hamilton v. Barrett*, 337 Ark. 460, 989 S.W.2d 520 (1999).

There were undoubtedly variations of opinion about whether these sexual abuse allegations were true, and whether appellant's mental health was as fragile as asserted by Dr. DeYoub. This is precisely the function of the trier of fact — to weigh the credibility of the witnesses and the weight to be accorded the testimony — which we will not disturb on appeal. Because we are not left with a distinct and firm conviction that a mistake has been committed, we affirm. *See Forrest Constr., Inc. v. Milam*, 345 Ark. 1, 43 S.W.3d 140 (2001); *Harris v. City of Little Rock*, 344 Ark. 95, 40 S.W.3d 214 (2001).

The permanency planning order is affirmed.

GLOVER and MILLER, JJ., agree.

ARKANSAS DEPARTMENT of HEALTH & HUMAN SERVICES *v.* Jessica JONES and Jacob Hines

CA 06-630 248 S.W.3d 507

Court of Appeals of Arkansas
Opinion delivered January 31, 2007

[Rehearing denied March 7, 2007.]

Gray Allen Turner, Arkansas Dep't of Health & Human Servs., Office of Chief Counsel, for appellant.

Linda C. Ward, for appellee.

SAM BIRD, Judge. The Arkansas Department of Health and Human Services (DHHS) appeals from a probable cause and closing order of the Sebastian County Circuit Court placing custody of JTH with his paternal grandparents and closing the case. DHHS argues on appeal that the circuit court abused its discretion (1) by closing the case without conducting an adjudication hearing; (2) by granting custody to the paternal grandparents without requiring that a home study be conducted by a "licensed certified social worker"; (3) by granting permanent custody at a probable-cause hearing; (4) by granting custody to out-of-state relatives without approval from the Oklahoma DHS; and (5) by granting permanent custody to the paternal grandparents. We affirm.

Facts

At 4:48 p.m. on January 14, 2006, the Fort Smith Police Department received a call regarding an unattended child, JTH, left in a locked car at Central Mall. JTH was two years old at the time. The police responded immediately and arrested Jessica Jones,

JTH's mother, for endangering the welfare of a minor when she returned to the car five minutes after the police arrived. The police called a family-services worker at DHHS, who placed a 72-hour hold on JTH at approximately 5:00 p.m.

On January 17, 2006, DHHS filed a petition for emergency custody. The circuit court granted the petition that same day, placing JTH in the custody of DHHS pending further orders of the court. The circuit court scheduled a probable-cause hearing on the matter for January 19, 2006. On January 18, 2006, Jacob Hines, JTH's father, filed a petition to establish paternity and also requested the court to enter an order placing JTH in the temporary or permanent custody of the paternal grandparents, Iva and Thomas Hines.

Testimony at the probable-cause hearing was provided by both of JTH's parents, his paternal grandmother, and his maternal grandmother. All testified that they lived in Sallisaw, Oklahoma. Both parents testified that Jacob Hines was the biological father of JTH and that a paternity order should be entered without DNA testing. They also said that JTH had lived with his paternal grandparents since April 2005, that the grandparents had provided excellent care, that all of the parties got along well for purposes of visitation, and that they wanted custody of JTH to remain with the paternal grandparents. Mrs. Hines testified that she loved JTH and that he had been living with her husband and her since April 2005. She also told the court that JTH was covered under their health-insurance policy, that she and JTH's mother got along well, and that she intended to continue caring for JTH.

The father's attorney introduced a home study performed by Martha L. Wells, a licensed social worker for the State of Arkansas, without objection. Attached to the home study were several letters from members of the community: (1) letters from several neighbors, who stated that the Hineses were good parents and respected in the community; (2) a letter from the Hineses' loan officer, who stated that Mrs. Hines had been the primary caregiver of JTH since he was an infant and that she was a good parent; (3) a letter from a local lawyer, who opined that the Hineses were qualified to accept care and custody of JTH and added that they were hardworking, honest, kind, considerate, and financially able to support JTH; (4) a letter from the Hineses' accountant stating that he knew the Hineses to be of sufficient means to provide support for JTH; (5) two letters from the Oklahoma DHS stating that — other than the incident at the Fort Smith mall — there were no reported incidents

regarding JTH and that there were no reports of abuse or neglect connected with either of the Hineses; and (6) a letter from the local district attorney's office stating that Mrs. Hines had never been convicted of a felony or misdemeanor of any kind.

Ms. Wells reported that the Hineses lived in a recently built, three-bedroom home on a two-thousand acre farm. She noted that the Hineses had lived on the farm for the past twenty-five years. Ms. Wells reported that upkeep and maintenance on the home were very good, that the home was adequately furnished, and that JTH had his own bedroom. The report indicated that Mr. Hines was a self-employed contractor and also sold cattle. He reported gross earnings last year of $450,000. The report also stated that Mrs. Hines did not work outside the home, had been JTH's primary caregiver since he was an infant, and was available to care for JTH most of the time. Ms. Wells stated that, when Mrs. Hines was not available, one of her sisters who lived nearby cared for JTH. Ms. Wells's report indicated that all of the references stated that the Hineses were good parents and well thought of in the community. Ms. Wells reported in her recommendation that the Hineses were "appropriate to be considered as custodial parents for [JTH]."

The attorney ad litem told the court that she considered Mrs. Hines an appropriate person to care for JTH and had no strong objection to placing him with her. The attorney for the father asked the court to place permanent, or at least temporary, custody of JTH with the Hineses. The mother's attorney stated that she had no objection to the child being placed with the Hineses. The attorney for DHHS objected to custody being granted to the Hineses and requested the court to order a home study pursuant to the Interstate Compact on the Placement of Children (ICPC)[1] within thirty days. In answer to the court's question about what services DHHS was proposing to provide for the family, DHHS replied: "at least parenting classes, if nothing else — I mean, the mom left the child alone, the police report says, for twenty minutes in a locked car at the Mall. At this point I can't think of any other services."

The circuit court made the following rulings from the bench: probable cause existed at the time JTH was taken into DHHS custody; the grandparents' home was "totally appropri-

[1] *See* Ark. Code Ann. § 9-29-201 (Supp. 2005).

ate"; Jacob Hines was the legal father of JTH; an approved home study was performed of the Hineses' home; and custody of the child was placed with the grandparents, Thomas and Iva Hines. Finding that no further services were necessary, the circuit court closed the case. After the circuit court announced its decision, DHHS objected to custody being placed with the grandparents and to the case being closed. On February 10, 2006, the circuit court entered an order setting forth its rulings. DHHS brings this appeal.

Our standard of review is de novo, but we will not reverse a circuit court's findings in a dependency-neglect case unless they are clearly erroneous or clearly against the preponderance of the evidence. *Moiser v. Ark. Dep't of Human Servs.*, 95 Ark. App. 32, 233 S.W.3d 172 (2006). 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 committed. *Id.*

Points on Appeal

For its first point on appeal, DHHS contends that the circuit court erred in closing the case at the conclusion of the probable-cause hearing without holding a full adjudication of all of the issues as required by Ark. Code Ann. § 9-27-315 (Supp. 2005). DHHS claims that the issues needing consideration include whether permanent custody was in the child's best interest, visitation, child support, and whether the parents should have been provided reunification services. JTH's father, Jacob Hines, responds, arguing that there was no need for an adjudication hearing in this case.[2] He claims that JTH's mother, father, and grandparents all testified at the probable-cause hearing that custody of JTH was with the grandparents for the nine months before the mall incident, that JTH was receiving excellent care, that all of them wanted custody to remain with the grandparents, and that they were all confident that visitation would continue to work well. Jacob also contends that DHHS had nothing substantial that it would require the parents to do and that neither parent was seeking reunification. Finally, he contends that the overwhelming evidence suggested that child support was neither needed nor requested in this case.

Arkansas Code Annotated section 9-27-315 provides that, following the issuance of an emergency order, the circuit court

[2] JTH's mother, Jessica Jones, did not file a brief in this appeal.

"shall hold a probable cause hearing within five (5) business days of the issuance of the ex parte order to determine if probable cause to issue the emergency order continues to exist." Ark. Code Ann. § 9-27-315(a)(1)(A) (Supp. 2005). While the statute limits the purpose of the probable-cause hearing to "determining whether probable cause existed to protect the juvenile" and to determining "whether probable cause still exists to protect the juvenile[,]" it provides that "issues as to custody and delivery of services may be considered by the court and appropriate orders for that entered by the court." Ark. Code Ann. § 9-27-315(a)(1)(B) (Supp. 2005). The statute then provides that "[a]ll other issues . . . shall be reserved for hearing by the court at the adjudication hearing[.]" Ark. Code Ann. § 9-27-315(a)(2)(A) (Supp. 2005). Subsection (d)(1) states that the court "shall set the time and date of the adjudication hearing" at the probable-cause hearing.

■ We disagree with DHHS that this statute requires the circuit court to hold an adjudication hearing. While an adjudication hearing is generally necessary in a dependency-neglect case in order for the circuit court to consider and determine all of the issues involved, the statute does not require the circuit court to hold such a hearing. Ark. Code Ann. § 9-27-315(a)(1)(B)(ii) specifically authorizes the court to consider and determine custody and delivery-of-services issues at the probable-cause hearing. *See also Miller v. Ark. Dep't Human Servs.*, 86 Ark. App. 172, 177, 167 S.W.3d 153, 156 (2004) (stating that regardless of the typical goal of a particular type of proceeding, the trial court is charged with reaching a decision that promotes the best interest of the child). The circuit court in this case determined that probable cause existed at the time DHHS put a hold on JTH and then considered and entered appropriate orders regarding custody and the delivery of services. If there had been additional issues for the circuit court to consider, it should have "set the time and date of the adjudication hearing" at the probable-cause hearing. The circuit court determined that there were no additional issues to consider. We agree and hold that the circuit court was not required to schedule a hearing in this case because it made a determination regarding custody and services at the probable-cause hearing, and visitation, child support, and reunification were not in issue.

■ As its second point, DHHS argues that a circuit court may not change custody unless a home study is conducted by a "licensed certified social worker" and Ms. Wells, who prepared

the home study in this case, was merely a "licensed social worker." In support of its argument, DHHS cites Ark. Code Ann. § 9-27-335(d) (Supp. 2005), which provides:

> Custody of a juvenile may be transferred to a relative or other individual only after a home study placement is conducted by the department or a licensed certified social worker and submitted to the court in writing and the court determines that the placement is in the best interest of the juvenile.

We reject DHHS's argument. DHHS did not object to Ms. Wells's qualifications, or lack thereof, when the home study was introduced during the hearing. In fact, DHHS did not object to introduction of the home study at all. We have long held that we will not consider arguments raised for the first time on appeal, and we decline to do so here. *See, e.g.*, *Flowers v. State*, 92 Ark. App. 337, 341, 213 S.W.3d 648, 651 (2005); *Farr v. Farr*, 89 Ark. App. 196, 201, 201 S.W.3d 417, 421 (2005).

■ We also reject DHHS's third argument. DHHS claims that a circuit court may not grant permanent custody at a probable-cause hearing. We disagree. Ark. Code Ann. § 9-27-315(a)(1)(B) specifically provides that "issues as to custody and delivery of services may be considered by the court and appropriate orders for that entered by the court."

For its fourth point, DHHS argues that the circuit court abused its discretion by making an out-of-state placement without first receiving written authorization from the Oklahoma DHS as required by the Interstate Compact on the Placement of Children (ICPC). Article III of the ICPC states in pertinent part:

> (a) No sending agency shall send, bring, or cause to be sent or brought into any other party state any child for placement in foster care or as a preliminary to a possible adoption unless the sending agency shall comply with each and every requirement set forth in this article and with the applicable laws of the receiving state governing the placement of children therein.
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> . . .
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> (d) The child shall not be sent, brought, or caused to be sent or brought into the receiving state until the appropriate public au-

> thorities in the receiving state shall notify the sending agency, in writing, to the effect that the proposed placement does not appear to be contrary to the interests of the child.

Ark. Code Ann. § 9-29-201(III) (Supp. 2005).

The Arkansas Supreme Court made it very clear in *Nance v. Arkansas Department of Human Services*, 316 Ark. 43, 870 S.W.2d 721 (1994), and in *Huff v. Arkansas Department of Human Services*, 347 Ark. 553, 65 S.W.3d 880 (2002), that the scope of the ICPC is limited to placement of a child in foster care or dispositions preliminary to an adoption. However, DHHS argues that the supreme court's holdings in *Nance* and *Huff* do not apply to this case because the legislature added a definition of "foster care" to the ICPC in 2003, which, DHHS argues, would include placement of JTH with the Hineses. We disagree.

The newly added definition states as follows:

> (e)(1) "Foster care" means the care of a child on a twenty-four-hour-a-day basis away from the home of the child's parent or parents. The care may be by a relative of the child, by a non-related individual, by a group home, or by a residential facility or any other entity.
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> (2) In addition, if twenty-four-hour-a-day care is provided by the child's parents by reason of a court ordered placement, and not by virtue of the parent-child relationship, the care is foster care.

Ark. Code Ann. § 9-29-201(II) (Supp. 2005). This definition makes it clear that whether a situation is considered foster care depends not upon the relationship of the caregiver with the child but upon the reason for the placement of the child with the caregiver. Even placement with a child's own parents may be considered foster care. *See* Ark. Code Ann. § 9-29-201(II)(e)(2). Moreover, while a grandparent may serve as his grandchild's foster parent, a grandparent may also serve as guardian, custodian, or simply as a grandparent entitled to regular visitation. *See* Ark. Code. Ann. § 9-28-501 to -503 (Repl. 2002) (foster parent); *Freeman v. Rushton*, 360 Ark. 445, 202 S.W.3d 485 (2005) (guardian); *Freshour v. West*, 334 Ark. 100, 971 S.W.2d 263 (1998) (custodian); Ark. Code Ann. §§ 9-13-103, 107 (Supp. 2005) (visitation). The circuit court in this case did not place JTH in foster care with anyone. It simply restored custody of JTH to his paternal grandparents.

Further, DHHS's argument distorts the purpose for and reason behind the ICPC. The purpose and policy behind the ICPC is for "party states to cooperate with each other in the interstate placement of children[.]" Ark. Code Ann. § 9-29-201(I) (Supp. 2005). "The provisions of this compact shall be liberally construed to effectuate the purposes thereof." Ark. Code Ann. § 9-29-201(X) (Supp. 2005). This case is not about "the interstate placement of children"; nor does it involve a territorial dispute between courts in different states regarding whose custody order controls. This case is about an emergency order entered to protect a child who was left in a locked car outside of an Arkansas mall for less than twenty minutes. The child, the parents, and the custodial grandparents all live in Oklahoma. No party is attempting to involve any other state court or custody order. The child's paternal grandparents have custody of the child by agreement of his parents. A home study and numerous letters from community members indicate that the grandparents are good, loving parents and that their home is more than adequate. The circuit court did not "place" the child with "foster parents," but simply ordered that custody of the child remain with his grandparents. We hold that the ICPC is not applicable to the particular facts of this case and that the circuit court's order granting custody to the child's grandparents without first receiving written authorization from the Oklahoma DHS was not clearly erroneous.

Finally, DHHS argues that the circuit court should have declined to issue any permanent orders in this case because Arkansas was not JTH's home state and, therefore, it did not have subject matter jurisdiction to do so under the Uniform Child Custody Jurisdiction and Enforcement Act, codified in Ark. Code Ann. § 9-19-101 (Repl. 2002) (the "Act"). DHHS cites *Murphy v. Danforth*, 323 Ark. 482, 915 S.W.2d 697 (1996), to support its argument that the circuit court's powers were limited and should not have been used to enter a permanent custody order. Jacob claims that the circuit court acted properly under its emergency jurisdiction authorized by Ark. Code Ann. § 9-19-204 (Repl. 2002).

Arkansas Code Annotated § 9-19-204(a) (Repl. 2002) states that "[a] court of this State has temporary emergency jurisdiction if the child is present in this State and the child has been abandoned or it is necessary in an emergency to protect the child because the child . . . is subjected to or threatened with mistreatment or

abuse." "[A] child-custody determination made under this section remains in effect until an order is obtained from a court of a State having jurisdiction" under the Act. Ark. Code Ann. § 9-19-204(b) (Repl. 2002). We agree with Jacob. The circuit court had authority under this statute to enter an order granting custody to the grandparents.

DHHS's reliance upon the supreme court's decision in *Murphy* is misplaced. In *Murphy*, the supreme court said that emergency jurisdiction should not be used "*to modify* a custody order permanently." 323 Ark. at 491, 915 S.W.2d at 700 (emphasis added). The circuit court in this case did not modify a custody order permanently. The court granted custody to the grandparents, who already had custody over JTH. Both parents agreed with the court's decision. If either of JTH's parents decides that he or she disagrees with this custody arrangement, either may pursue an action in an Oklahoma court for a change of custody. We hold that the circuit court did not clearly err in awarding custody to JTH's paternal grandparents under Ark. Code Ann. § 9-19-204 (Repl. 2002).

Affirmed.

GLADWIN and BAKER, JJ., agree.

Michael ALBRIGHT *v.*
ARKANSAS DEPARTMENT of HUMAN SERVICES

CA 06-270 248 S.W.3d 498

Court of Appeals of Arkansas
Opinion delivered January 31, 2007

Glen Hoggard, for appellant.

Office of Chief Counsel, Arkansas Dep't of Health and Human Servs., by: *Gray Allen Turner*.

WENDELL L. GRIFFEN, Judge. On November 18, 2005, the Faulkner County Circuit Court filed an order terminating Michael Albright's parental rights to his three children, H.A. (born December 6, 2001), B.A. (born October 5, 2002), and D.A. (born September 19, 2004), based upon a finding that he sexually

abused H.A. and his girlfriend's daughter, S.M. Appellant appeals from the termination order, arguing that the circuit court erred in entering the order based upon a finding unrelated to the original adjudication order. He also challenges the sufficiency of the evidence supporting the finding that he sexually abused S.M. We find none of appellant's arguments persuasive; therefore, we affirm.

On June 20, 2005, the circuit court entered an order adjudicating H.A., B.A., D.A., and S.M. dependent-neglected, based upon findings of educational neglect for S.M. and of medical neglect for the other three children. On July 22, 2005, the Arkansas Department of Human Services (DHS) filed a petition to terminate appellant's parental rights to H.A., B.A., and D.A., alleging sexual abuse. The termination hearing was held November 15, 2005.

Appellant testified that he wanted his children returned to him because he was their biological father. He stated that he was involved in feeding, bathing, and clothing the children when he lived with Beverly McKee, the children's mother.[1] He stated that he did not want to bathe the girls (S.M. and H.A.) after they turned two because he did not want to be accused of sexually abusing them. Appellant testified that S.M. had rashes in her vaginal area due to diaper rash and that he and McKee would apply ointment. He stated that he stopped applying S.M.'s ointment once she was potty-trained, again to avoid being accused of abusing the children. He recalled telling Detective Melissa Smith of the Conway Police Department that he had never bathed S.M. or applied any medicine to her breasts, buttocks, or vaginal area. Appellant also recalled an interview with Sergeant Jim Barrett, where he told Barrett that he might have inadvertently touched S.M.'s privates while drying her off after a bath. Appellant testified that he was the primary disciplinarian when he lived with McKee and that, on severe infractions, he would spank the children on their bare bottoms. He stated that he did not believe that he would be accused of molesting the children by spanking them.

Sergeant Barrett corroborated much of appellant's testimony regarding their interview. Barrett testified that he interviewed appellant on June 1, 2005, and that appellant was at the police

[1] Beverly McKee voluntarily relinquished her parental rights to the three children. Her involvement in this case is mentioned only to the extent that it is relevant to appellant's case.

station to take a voice-stress test. He stated that, when initially discussing the allegations, appellant "stated categorically and unequivocally" that he never touched S.M.'s breast or vaginal area. However, as the pretest interview continued, appellant changed his story and stated that he might have inadvertently touched S.M. in those areas when he was drying her off. At that point, Sergeant Barrett decided that the voice-stress test was unnecessary.

With only the judge, the ad litem, and the court reporter present, S.M., then six years old, testified that she was afraid of appellant because he touched her "in the wrong spots," referring to her chest and genital area. She stated that appellant was not taking care of her when he touched her. S.M. testified that appellant once told her, "You'd better not tell your mom or I'll call the cops on your mom." She also stated that appellant choked her on one occasion.

Maria Hill testified that S.M. lived with her for a brief period of time. While Hill testified about how she came to have temporary guardianship of S.M., that testimony is not relevant to the issues in this appeal. However, Hill testified that one night while S.M. was saying her prayers, she overheard S.M. say that she wanted to hurt appellant. She also stated that S.M. had acted out sexually one night. According to her testimony, S.M. was spending the night at a teacher's house. The teacher had a daughter, and S.M. and her daughter slept in the same bed. The teacher saw S.M. trying to take the other girl's clothes off. Hill noted a third incident, where S.M. was playing with two dolls. As S.M. was playing with the dolls, Hill heard her say, "Take your clothes off. I want to get on top of you."

Detective Smith testified that she interviewed appellant on March 31, 2005, regarding the allegations. She stated that appellant denied touching S.M.'s breasts, buttocks, or vaginal area. He also denied applying medication to those areas or bathing her. Smith said that appellant explained that he avoided "a thing like that to keep himself from situations like this." She stated that she also interviewed S.M., who told Smith that appellant abused her. Smith concluded that appellant touched S.M. intentionally and inappropriately.

Smith also testified about her interviews with McKee. During her first interview, McKee told Smith that "she had to throw a fit in order to get [appellant] to help her with anything," although appellant was willing to bathe the children. Smith stated

that during a second interview, McKee claimed to remember things that she did not remember before. McKee told Smith about an incident where she heard S.M. crying. McKee stated that she went into the room where S.M. was, and S.M. was on the bed nude from the waist down. Appellant told McKee that he was disciplining S.M. The court also received a copy of the report to the prosecuting attorney, outlining statements made by S.M., H.A., appellant, and McKee.[2]

On November 18, 2005, the circuit court filed an order terminating appellant's parental rights. The court found by clear and convincing evidence that appellant sexually abused S.M. and H.A. and that it would be harmful for the children to have any further contact with him. It also specifically found S.M.'s testimony to be credible and appellant's testimony to be not credible.

Standard of Review

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 that termination is warranted pursuant to one of the grounds outlined in section 9-27-341(b)(3)(B). Here, DHS alleged the following three grounds:

> (vi)(*a*) The court has found the juvenile dependent-neglected as a result of neglect or abuse that could endanger the life of the child, sexual abuse, or sexual exploitation, any of which was perpetrated by the juvenile's parent or parents.
>
> . . . .
>
> (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

[2] We do not recount the specific remarks made by S.M, but suffice it to say that S.M. gave statements regarding the sexual abuse perpetrated by appellant.

> or indifference to remedy the subsequent issues or factors or rehabilitate the parent's circumstances that prevent return of the juvenile to the custody of the parent.
>
> . . . .
>
> (ix)(*a*) The parent is found by a court of competent jurisdiction, including the juvenile division of circuit court, to: . . .
>
> (*3*)(*A*) Have subjected any juvenile to aggravated circumstances.
>
> (*B*) "Aggravated circumstances" means:
>
> (*i*) . . . a determination has been made by a judge that there is little likelihood that services to the family will result in successful reunification[.]

Termination of parental rights is an extreme remedy and in derogation of the natural rights of the parents. *Benedict v. Arkansas Dep't of Human Servs.*, 96 Ark. App. 395, 242 S.W.3d 305 (2006). However, courts are not to enforce parental rights to the detriment or destruction of the health and well-being of a child. *Id.* 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 that will produce in the fact finder a firm conviction regarding the allegation sought to be established. *Id.* This court does not reverse the circuit court's finding of clear and convincing evidence unless that finding is clearly erroneous. *Id.* A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been made. *Id.*

Analysis

Appellant argues that the circuit court erred by not following the dictates of the juvenile code regarding the termination of a parent's rights. He first contends that the circuit court erroneously allowed an adjudication against the mother for educational and medical neglect to suffice as an adjudication against him for charges of sexual abuse. Nothing in the Arkansas juvenile code supports appellant's argument. The code does not refer to "dependent-neglected parents," but "dependent-neglected juveniles." *See* Ark. Code Ann. §§ 9-27-303(18) (Supp. 2005) (defining

"dependent-neglected *juvenile*"); 9-27-327(d) (Supp. 2005) (noting that a court may order studies, evaluations, or predisposition reports following an adjudication in which a *juvenile* is found to be "dependent-neglected"); 9-27-334 (Supp. 2005) (noting the possible dispositions a circuit court may order upon a finding that a *juvenile* is dependent-neglected).

An adjudication of dependency-neglect occurs without reference to which parent committed the acts or omissions leading to the adjudication; the juvenile is simply dependent-neglected. Any objections to the adjudication must be raised at the adjudication hearing. Once a juvenile is adjudicated dependent-neglected, a second adjudication is unnecessary, even if one or both parents failed to appear at the adjudication hearing. Here, appellant did not appear at the adjudication hearing despite the opportunity to do so. Furthermore, the details that produced the allegations of sexual abuse were not discovered until after the adjudication hearing.

We also note that if we were to interpret the juvenile code as appellant urges, several subsections of Ark. Code Ann. § 9-27-341 would be rendered meaningless, as most of the grounds for terminating parental rights listed in subsection (b)(3)(B) could have nothing to do with the reason that the children were adjudicated dependent-neglected. Most notable is subsection (b)(3)(B)(vii), which explicitly allows a termination to be based upon findings that have nothing to do with the original adjudication of dependency-neglect.

Appellant further contends that when a termination is based upon sexual abuse, the juvenile code requires that the abused juvenile be adjudicated dependent-neglected as a result of that sexual abuse. He argues that subsection (b)(3)(B)(vi) of the termination statute provides as one of the grounds for termination of a parent's rights, "The court has found the juvenile dependent-neglected as a result of . . . sexual abuse . . . , any of which was perpetrated by the juvenile's parent or parents."

Appellant focuses on merely one ground for terminating parental rights. DHS alleged three separate grounds for terminating appellant's parental rights. The circuit court's order, however, simply states that appellant sexually abused S.M. and H.A., that it would be harmful for the children to have any further contact with appellant, and that the children were adoptable. The circuit court's order does not specify which grounds DHS satisfied

under subsection (b)(3)(B), and appellant failed to request a specific finding. This court reviews termination proceedings de novo, *Yarbrough v. Arkansas Dep't of Human Servs.*, 96 Ark. App. 247, 240 S.W.3d 626 (2006), and in our de novo review, we have no difficulty holding that DHS established that appellant subjected his children to aggravated circumstances based upon the circuit court's finding that appellant sexually abused S.M. and H.A. "Aggravated circumstances," by definition, includes subjecting a juvenile to sexual abuse. Ark. Code Ann. § 9-27-341(b)(3)(B)(ix)(*a*)(*3*)(*B*). As only one ground is necessary to terminate parental rights, *see Dinkins v. Arkansas Dep't of Human Servs.*, 344 Ark. 207, 40 S.W.3d 286 (2001) (holding that the lower court's error in finding that the appellant willfully failed to provide support was harmless based on alternate grounds to support the termination of parental rights), we need not address appellant's arguments regarding either of the other sections.

Appellant also argues that the circuit court erred by finding that DHS presented clear and convincing evidence to prove the allegations of sexual abuse. He contends that S.M.'s testimony leaves the impression that she was "desperately attempting to please the adults with whom she is conversing." He identifies a number of inconsistencies in S.M.'s testimony and statements to interviewers. Appellant also contends that McKee's statements were "inconsistent, implausible, and controverted by the witness herself."

While appellant devoted fourteen pages of his argument to attack S.M.'s and McKee's credibility, his argument can be addressed succinctly. Our standard of review requires deference to the circuit court's determination's of credibility. *Benedict, supra.* To find any merit in appellant's contentions, this court would have to "act as a 'super factfinder,' substituting its own judgment or second guessing the credibility determinations of the court." *Id.* at 397, 242 S.W.3d at 308; *see also Moore v. Arkansas Dep't of Human Servs.*, 95 Ark. App. 138, 234 S.W.3d 883 (2006). We are bound by the circuit court's explicit finding that S.M.'s statements were credible; accordingly, we hold that S.M.'s statements, along with the other testimony at the hearing, were sufficient to establish that appellant perpetrated sexual abuse.

Affirmed.

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

Desmond D. MILLER, Sr. *v.* STATE of Arkansas

CA CR 06-387 248 S.W.3d 487

Court of Appeals of Arkansas
Opinion delivered January 31, 2007

John F. Gibson, Jr., for appellant.

Mike Beebe, Att'y Gen., by: *Farhan Khan*, Ass't Att'y Gen., for appellee.

DAVID M. GLOVER, Judge. Appellant, Desmond Miller, was tried by a jury and, although charged with rape, was found guilty of the lesser-included offense of sexual assault in the first degree. He was sentenced to thirty years in the Arkansas Department of Correction. For his sole point of appeal, appellant contends that the trial court abused its discretion in refusing to allow the jury to consider alternative punishment. We agree that the trial court abused its discretion because it refused, as a matter of policy rather than as an

exercise of discretion, to allow the jury to consider alternative punishment. However, because we conclude that appellant was not prejudiced by the trial court's action, we affirm the conviction.

Arkansas Code Annotated section 16-97-101 (Repl. 2006) deals with bifurcated sentencing procedures. It provides in pertinent part:

> The following procedure shall govern jury trials which include any felony charges:
>
> (1) The jury shall first hear all evidence relevant to every charge on which a defendant is being tried and shall retire to reach a verdict on each charge;
>
> (2) If the defendant is found guilty of one (1) or more charges, the jury shall then hear additional evidence relevant to sentencing on those charges. Evidence introduced in the guilt phase may be considered, but need not be reintroduced at the sentencing phase;
>
> (3) Following the introduction of additional evidence relevant to sentencing, if any, instruction on the law, and argument, the jury shall again retire and determine a sentence within the statutory range;
>
> (4) *The court, in its discretion, may also instruct the jury that counsel may argue as to alternative sentences for which the defendant may qualify. The jury, in its discretion, may make a recommendation as to an alternative sentence. However, this recommendation shall not be binding on the court*;
>
> (5) After a jury finds guilt, the defendant, with the agreement of the prosecution and the consent of the court, may waive jury sentencing, in which case the court shall impose sentence; and
>
> (6) After a plea of guilty, the defendant, with the agreement of the prosecution and the consent of the court, may be sentenced by a jury impaneled for purposes of sentencing only.

(Emphasis added.)

Here, defense counsel sought to have the jury instructed on alternative punishment. The State objected. The trial court denied the defense request for the instruction, explaining: "[T]his court, ever since the legislature adopted the truth in sentencing statutes,

has declined to give alternative sentence and verdict forms where the offense that is being dealt with is above the transfer eligibility line on the sentencing chart. And I think this one is." Defense counsel then asked the court to consider the issue on a case-by-case basis and at least let the jury make a recommendation to the court. The trial court responded:

> Well, I'm going to stick with my policy. . . . I will listen to it, but I'm not, I'm not going to allow argument to the jury on it. Now, I will listen to it depending on what the jury does. Okay? And I think I still have discretion in that regard. But I'm not going to submit the issue to the jury — because of the level of offense that it is.

Although the case of *Rodgers v. State*, 348 Ark. 106, 71 S.W.3d 579 (2002), is distinguishable from the instant case, the general proposition of *Rodgers* is clear, and it applies here: The mechanical imposition of the jury's recommended sentence, or as is true here, an unwavering court policy refusing to instruct the jury on alternative sentences with respect to certain offenses, is not an exercise of discretion. Arkansas Code Annotated section 16-97-101(4) (Repl. 2006) clearly does not require that the jury be instructed on alternative sentences, but it does call for an exercise of the trial court's discretion. That was not done in this case because the trial court imposed its unvarying policy of declining "to give alternative sentence and verdict forms where the offense that is being dealt with is above the transfer eligibility line on the sentencing chart." Consequently, the court's actions amounted to an abuse of discretion.

However, it is axiomatic that some prejudice must be shown in order to find grounds to reverse a conviction. *Morgan v. State*, 359 Ark. 168, 195 S.W.3d 889 (2004); *see also Berna v. State*, 282 Ark. 563, 670 S.W.2d 434 (1984), *cert. denied*, 470 U.S. 1085 (1985) (announcing the rule that no longer is it presumed that simply because an error is committed it is prejudicial error). Stated differently, we do not reverse a decision by the trial court absent a showing of prejudice. *Morgan, supra.*

■ We have concluded that appellant was not prejudiced by the trial court's action in the instant case. The jury sentenced appellant to the maximum amount of time for the offense of sexual assault in the first degree, making it highly unlikely that the jury would have recommended the alternative punishment of proba-

tion even if they had been presented with the alternative-punishment instruction sought by appellant.

Finally, we note that appellant makes essentially a one-sentence statement that he was denied due process and equal treatment under the law by the trial court's refusal to allow the jury to consider alternative punishment. To the extent that he is making such an argument on appeal, it was not preserved below and cannot now be argued on appeal. We will not consider arguments raised for the first time on appeal. *Ainsworth v. State*, 367 Ark. 353, 240 S.W.3d 105 (2006).

Affirmed.

ROBBINS and MILLER, JJ., agree.

JB WAYNE, INC., Jerry Wayne, Barbara Wayne *v.*
HOT SPRINGS VILLAGE PROPERTY
OWNERS' ASSOCIATION

CA 06-453 248 S.W.3d 503

Court of Appeals of Arkansas
Opinion delivered January 31, 2007

Hartsfield, Almand & Grisham, LLP, by: *William Gregory Almand*, for appellants.

Woods, Smith, Schnipper, Clay & Vines, by: *John Thomas Vines*, for appellee.

D.P. MARSHALL JR., Judge. A failed restaurant raises questions about venue. JB Wayne, Inc., leased the 19th Hole restaurant from the Hot Springs Village Property Owners' Association. The business did not prosper. The parties terminated the lease in October 2002 and the Association re-let the premises. More than a year later, the Association sued JB Wayne, Inc., and Jerry and Barbara Wayne — who had guaranteed their corporation's obligations under the lease — for unpaid utility bills and missing smallwares. (Because Mr. and Mrs. Wayne pleaded no guarantor's defenses, we treat the appellants as one and refer to them as the Waynes unless the context requires specificity.) The Association allowed the Waynes to use what those in the trade call "smallwares" — dishes, glasses, flatware, utensils, ashtrays, and similar items. In their lease, the Waynes promised to pay the Association "all costs to return smallwares reflected on Exhibit 'A' to the same level and same or similar patterns, as the inventories were when received by [the Waynes]." The Association's

complaint sought a money judgment for smallwares shortages, unpaid utility bills, and attorney's fees — relying on the statute allowing fees in contract cases.

The case began in Garland County District Court, where the Waynes challenged venue. When the Association filed suit, Mr. and Mrs. Wayne resided in Saline County, and their corporation, JB Wayne, Inc., had no place of business other than the Waynes' home. After losing on venue, the Waynes defaulted on the merits and then sought de novo review in circuit court. There they again challenged venue, lost, and defaulted. They appeal, renewing their argument that venue was improperly laid in Garland County and seeking reversal of the default judgment in any event. After de novo review of the venue issue, we reverse and remand with these instructions: the circuit court shall dismiss this case without prejudice to all the parties reasserting in a proper venue any potential claim or counterclaim arising out of the lease.

1. The circuit court[1] held that venue was proper in Garland County pursuant to Ark. Code Ann. § 16-60-104 (Repl. 2005). This statute, with immaterial exceptions, allowed suit against a corporation such as JB Wayne, Inc., "in the county in which it is situated or has its principal office or place of business, or in which its chief officer resides." The circuit court gave three reasons for its legal conclusion: JB Wayne, Inc., designated Garland County as its principal office in its articles of incorporation; the corporation had maintained an office in Garland County; and the corporation had not amended its registration with the Secretary of State to show a new principal office before the Association sued.

The Association defends venue under Ark. Code Ann. § 16-60-104 and argues Ark. Code Ann. § 16-60-113(a) (Repl. 2005) as an alternative basis. This second provision states:

> Any action for damages to personal property by wrongful or negligent act, whether arising from contract, tort, or conversion of personal property, may be brought:
>
> (1) In the county where the damage occurred;
>
> (2) In the county where the property was converted; or

[1] The Honorable Tom Smitherman decided the venue issue before he retired from the circuit bench.

(3) In the county of residence of the person who was the owner of the property at the time the cause of action arose.

We give the words of both statutes their plain meaning, as supplemented by the judicial decisions interpreting them. *Premium Aircraft Parts, LLC, v. Circuit Court of Carroll County*, 347 Ark. 977, 981-82, 69 S.W.3d 849, 852 (2002).

2. The circuit court erred by applying the corporate venue statute. The 19th Hole was in Garland County. That location was undoubtedly the wellspring of the parties' dispute. But this lawsuit began more than a year after the parties had terminated the restaurant lease. The Association's complaint did not allege that JB Wayne, Inc., was doing business in Garland County, or was situated there, in 2004 when suit was filed. The parties offered proof on that issue. Mr. Wayne testified by affidavit that, by 2004, the corporation was not doing any business and if it was located anywhere it was at his home in Saline County. The Association did not and does not dispute this fact.

At the time of suit, JB Wayne, Inc., was moribund. It makes no legal difference under § 16-60-104 that the corporation had maintained its office and principal place of business at the 19th Hole in Garland County. The circuit court referred to the corporation's articles of incorporation in its order, but the articles are not in the record. They would not be dispositive anyway; all the facts about JB Wayne, Inc.'s operations that were in the record when the circuit court ruled must be evaluated to answer the venue question. *Belin v. West*, 315 Ark. 61, 64, 864 S.W.2d 838, 840 (1993). The printout from the Secretary of State's office, which is in the record, does not list a principal place of business for the corporation. Though it does list the address of the 19th Hole as the address for the corporation's registered agent (Mrs. Wayne), we do not find that listing controlling either. The Association knew when it filed this case that the Waynes had not been in possession of the restaurant for more than a year. The Association served JB Wayne, Inc., by serving Mr. Wayne (the corporation's president) at his home, not at the 19th Hole.

The statutory alternative to where the corporation is located — the county of the chief officer's residence — does not fix venue in Garland County either. Ark. Code Ann. § 16-60-104. The Waynes lived at 8 Pizarro Drive in Hot Springs Village. They were served at their home. Pizarro Drive runs through both Garland and

Saline Counties, and the complaint alleged that the Waynes lived in Garland County. They did not. The parties now agree the Waynes live in Saline County.

It is a commonsense — but inapplicable — legal rule that allows suit in the county where a substantial part of the events creating the claim occurred or the county where the entity had its principal place of business. This is the new default venue rule of Ark. Code Ann. § 16-55-213 (Repl. 2005). David Newbern & John J. Watkins, *Arkansas Civil Practice and Procedure* § 9:1 (4th ed. 2006). Unlike the corporate venue statute at work in this case, the new statute looks back with words in the past tense — where the critical events "occurred" and where the entity "had" its business. But this provision does not apply to the Association's claim because that claim arose in October 2002, a few months before the March 2003 effective date of the new default venue rule. Civil Justice Reform Act, § 25, 2003 Ark. Acts 2130, 2144 (codified at Ark. Code Ann. § 16-55-220). Applying the law in effect when the Association's claim accrued, we hold that the circuit court erred as a matter of law by fixing venue in Garland County pursuant to § 16-60-104.

3. We may affirm on any basis supported by the record. And the Association argues that venue was also properly laid in Garland County pursuant to Ark. Code Ann. § 16-60-113(a) (Repl. 2005). This statute governs cases alleging damage to personal property by any wrongful act arising from contract, tort, or conversion. This issue presents a closer question. We are persuaded, however, that the Association's complaint did not allege physical damage to tangible personal property sufficient to bring the case within reach of this statute.

The Association pleaded its case as one for breach of the parties' contract. The Waynes did not keep their promises, the Association alleged, to pay all the utility bills and pay for any shortages in smallwares when the lease expired. The Association sought those payments, and its attorney's fees for having to pursue these alleged breaches, pursuant to the parties' lease. The Association did not allege any physical damage to the missing smallwares or any other personal property. The Association did not allege any physical damage to tangible personal property resulting from the Waynes' alleged failure to pay all the utility bills. *Compare Henderson Specialties, Inc. v. Boone County Circuit Court*, 334 Ark. 111,

115-16, 971 S.W.2d 234, 236-37 (1998) (sustaining venue under this statute where the complaint alleged damage to personal property).

We must discern the real character of the Association's action from its complaint. *Atkins Pickle Co., Inc. v. Burrough-Uerling-Brasuell Consulting Eng'rs, Inc.*, 275 Ark. 135, 138-39, 628 S.W.2d 9, 11 (1982). The claim was for breach, with all the attendant obligations of proof: the parties made a contract; the Waynes are in breach; and some damage occurred. As the Association argues, Ark. Code Ann. § 16-60-113(a) speaks of suits for damage arising from many sources, including contracts, to personal property. The right to have utility bills paid is not tangible personal property. Putting those bills to one side, it is possible to say that the Association's smallwares were damaged from the Waynes' alleged breach of contract. The Association makes this point with vigor; loss, it says, is damage. This interpretation, however, would stretch this statute to cover economic losses of almost any kind. The supreme court has been clear and consistent in strictly construing this provision against the reading the Association urges.

Our supreme court has repeatedly rejected venue under § 16-60-113(a) for economic losses in the absence of allegations of physical damage to tangible personal property. In *Wilson-Pugh, Inc. v. Taylor*, 289 Ark. 102, 709 S.W.2d 93 (1986), the court unanimously rejected venue under this statute in a case alleging a conversion of a security interest in crops. That interest is intangible. And it is similar to the Association's right to be reimbursed for missing smallwares. Writing for another unanimous court in *Premium Aircraft Parts*, Justice Imber reviewed the history of this statute, the legislation expanding its reach, and our courts' strict interpretations of it. 347 Ark. at 981-84, 69 S.W.3d at 851-54. There the plaintiff alleged misappropriation of vendor and customer lists by a former employee and sought compensatory damages. 347 Ark. at 985, 69 S.W.3d at 854. Like the Association's smallwares, those lists were tangible things allegedly taken from one party by another party. Yet the supreme court had no difficulty sustaining the objection to venue laid under § 16-60-113.

Here, the Association did not plead any physical damage to its smallwares, but instead simply sought to hold the Waynes to their promise to pay for the shortage when the lease ended. In the old terms, the Association alleged a transitory cause of action, not a local one. *Atkins*, 275 Ark. at 138-39, 628 S.W.2d at 11. This

contract dispute belonged in Saline County where JB Wayne, Inc., and Mr. and Mrs. Wayne, were located at the time of suit and where the Association served all the defendants. We therefore reverse the judgment and remand to the circuit court to dismiss the complaint and the counterclaim without prejudice.

HART and HEFFLEY, JJ., agree.

Samuel Dewayne WARD *v.* STATE of Arkansas

CA CR 06-444 248 S.W.3d 489

Court of Appeals of Arkansas
Opinion delivered January 31, 2007

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

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

LARRY D. VAUGHT, Judge. Appellant Samuel Dewayne Ward was convicted of theft of property and possession of a firearm. He was sentenced as a habitual offender and received ten years' imprisonment for the theft-of-property conviction and fifteen years' imprisonment for the possession-of-a-firearm conviction. Ward raises two points on appeal. The first is that the trial court erred in granting the State's motion to amend the theft-of-property charge in the felony information after both parties had rested. The second is that the fifteen-year sentence for possession of a firearm is illegal. We affirm the theft-of-property conviction and modify the possession-of-a firearm sentence as set forth below.

At trial, Roderick Tatum testified that in the early morning of July 31, 2004, while sitting in his vehicle at an intersection, he was held up at gunpoint by an individual on foot. Tatum testified that his attacker had dreadlocks. The individual took Tatum's cell phone, wallet, and vehicle. Later that day, Tatum saw his vehicle parked at an apartment complex. While being observed by the police, a black man (later identified as Ward), exited the apartment complex, entered Tatum's vehicle, and drove away in the vehicle. The police apprehended Ward and found a gun and a dreadlock wig in the stolen vehicle. The felony information filed against Ward alleged the offenses of aggravated robbery, Class C felony theft of property, and Class D felony possession of a firearm.

Tatum further testified that just two weeks prior to the incident, he paid $5700 for the vehicle. Ward did not cross-examine Tatum on this issue or offer any other evidence concerning the value of the vehicle. After both parties rested, but before the case was submitted to the jury, the State requested that the felony information be amended according to the proof that Tatum paid $5700 for his vehicle. The amendment changed the Class-C theft-of-property charge to a Class-B theft-of-property charge. Ward objected, arguing that he was prejudiced because the State waited to make the request for an amendment until after both parties had rested — preventing him from challenging the testimony of Tatum regarding the value of his vehicle. The trial court allowed the amendment.

The jury found Ward not guilty of aggravated robbery but found him guilty of Class B theft of property and possession of a firearm. It was stipulated that Ward had two prior felony convictions, and the jury was asked to sentence Ward under the habitual-offender statute. The trial court instructed the jury that Ward's sentence range for the Class-B theft-of-property conviction was "not less than 5 years nor more than 30 years," and that the maximum sentence for the possession-of-a-firearm conviction was "up to 15 years." The jury sentenced Ward to ten years' imprisonment for the theft-of-property conviction and fifteen years' imprisonment for the possession-of-a-firearm conviction.

Ward's first point on appeal is that the trial court erred in allowing the State to amend the felony information after both parties rested. We review questions of statutory interpretation de novo. *Buckley v. State*, 349 Ark. 53, 61, 76 S.W.3d 825 (2002). A prosecuting attorney, with leave of the court, may amend an indictment as to matters of form, but not so as to change the nature or degree of the crime charged. Ark. Code Ann. § 16-85-407 (Repl. 2005). The State may amend an information up to a point after the jury has been sworn, but before the case has been submitted to it, as long as the amendment does not change the nature or degree of the crime charged, if there is no surprise. *Kilgore v. State*, 313 Ark. 198, 852 S.W.2d 810 (1993); *Wilson v. State*, 286 Ark. 430, 692 S.W.2d 620 (1985).

The amendment allowed by the trial court violates Ark. Code Ann. § 16-85-407 in that the amendment increased the degree of the offense from a Class C felony to a Class B felony. However, we note that while Ward did claim prejudice, he failed to ask the trial court for a continuance, tender proof of prejudice, or seek other alternative remedies. *See Holloway v. State*, 312 Ark. 306, 313, 849 S.W.2d 473, 477 (1993). Moreover, Ward suffered no prejudice as a result of the amendment. In *Holloway*, our supreme court affirmed an amendment to a felony information that changed the degree of the offenses charged against the defendant because no prejudice was detected. *Id.* In *Buckley v. State*, 349 Ark. 53, 64, 76 S.W.3d 825, 832 (2002), our supreme court further held that a defendant who received a sentence within the statutory range, short of the maximum sentence, cannot show prejudice from the sentence itself.

■ There was no prejudice to Ward in allowing the amendment. Ward's sentence for the Class-B theft-of-property conviction was ten years, which is less than the maximum sentence of thirty years for that offense. Ark. Code Ann.§ 5-4-501(a)(2)(C)

(Repl. 2006). The ten-year sentence is also less than the maximum sentence for the originally charged offense of Class C theft of property, which is twenty years. Ark. Code Ann. § 5-4-501(a)(2)(D). Because Ward suffered no prejudice as a result of the amendment, we affirm on this point.

Ward next argues that the fifteen-year sentence, under the habitual-offender statute, for the felony-possession conviction is illegal. While Ward raises this issue for the first time on appeal, because he is arguing that his sentence is illegal on its face, he may do so. *Bangs v. State*, 310 Ark. 235, 239, 835 S.W.2d 294, 295-96 (1992). Sentencing in Arkansas is entirely a matter of statute, which requires our court to review this question of statutory interpretation de novo. *Buckley, supra*. A sentence is void or illegal when the trial court lacks authority to impose it. *Mayes v. State*, 351 Ark. 26, 89 S.W.3d 926 (2002). The maximum sentence for a Class D felony under the habitual-offender statute is twelve years. Ark. Code Ann. § 5-4-501(a)(2)(E). Therefore, the trial court had no authority to impose a fifteen-year sentence. When an error has nothing to do with the issue of guilt or innocence and relates only to punishment, we may correct it by reducing the sentence in lieu of reversing and remanding for a new trial. *Brown v. State*, 82 Ark. App. 61, 110 S.W.3d 293 (2003). Therefore, Ward's fifteen-year sentence for possession of a firearm is reduced to twelve years, the maximum allowed under the statute, and his sentence is affirmed as modified.

Affirmed as modified.

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

Louanne PARKER *v.* John Matthew PARKER

CA 06-111 248 S.W.3d 523

Court of Appeals of Arkansas
Opinion delivered January 31, 2007

[Rehearing denied March 7, 2007.]

Rieves, Rubens, & Mayton, by: *Kent J. Rubens* and *Lawrence W. Jackson*, for appellant.

Mooney Law Firm, P.A., by: *Clarke Mixon*; and *Barrett & Deacon, A Professional Association*, by: *D.P. Marshall Jr.*, *Brandon J. Harrison*, and *Andrew H. Dallas*, for appellee.

LARRY D. VAUGHT, Judge. Appellant Louanne Parker appeals from an order modifying the amount of child support and alimony to be paid by her former husband, appellee John Matthew (Matt) Parker. We affirm.

In a 1999 divorce decree, Louanne was awarded custody of the parties' three children, and Matt was ordered to pay $2026 per month child support and $1600 per month alimony. During the proceedings, Louanne asked that she be allowed to relocate with the children to Little Rock, but her request was denied. Louanne continued to reside in the marital home, and, under the terms of the decree, the house was to be sold and the proceeds to be divided equally upon her vacating it. The remaining assets were divided equally for the most part, although a business venture that Matt had entered into with his brothers, Jonesboro Investment Company, LLC, was declared to be his non-marital property.

Louanne appealed from the decree, challenging the denial of her request to relocate, the division of marital property, and the calculation of Matt's income for support purposes. In *Parker v. Parker*, 75 Ark. App. 90, 55 S.W.3d 773 (2001) (*Parker I*), we affirmed the property division and support awards but reversed the prohibition on her relocation and declared that she was free to move to Little Rock.

Soon after *Parker I* was handed down, Louanne petitioned the trial court for permission to move to Texas rather than Little Rock. Matt initially opposed the petition, but the matter was settled, with Louanne and the couple's daughters relocating to Texas and the couple's son remaining in Jonesboro with Matt. The parties agreed that neither of them would seek modification of child support or alimony before February 28, 2003. Additionally, Matt agreed to pay Louanne $107,500 for her interest in the marital home.

Upon moving to Texas in 2002, Louanne purchased a home for $185,000. Even though she had recently obtained a post-graduate degree as a specialist in education from Arkansas State University in Jonesboro, she planned to pursue a PhD from the University of North Texas. When she learned that there had been changes in the department at North Texas and that the particular

degree she sought was no longer being offered, she transferred after one semester to Texas Women's University to pursue her PhD in psychology, with a minor in pediatric neuropsychology. She hoped to complete this degree by 2006. While in school, she obtained her Texas license as a specialist in school psychology. She did freelance work in 2003 and 2004, for which she received a small income.

On May 21, 2004, Matt filed a motion to modify his child-support and alimony payments. He asserted, as changed circumstances, that the couple's oldest daughter would graduate from high school on May 29, 2004, resulting in each party having custody of one minor child; that Louanne had completed her education specialist degree and had received assets in the post-decree division of marital property; and that Louanne, despite having obtained her degree, "continues to be enrolled in post-graduate education as a lifestyle choice." Louanne opposed the motion and denied that any downward adjustments in child support or alimony were warranted.

Hearings were held in September and October 2004 to determine both parties' incomes for child-support purposes and Louanne's continuing need for alimony. Particularly at issue was whether Matt's income should include a one-time, $200,000 distribution that he received from Jonesboro Investment Company, LLC, in 2004. In addition, there was evidence that, in September 2004, Louanne obtained two contracts as a licensed specialist in school psychology, which would pay her a total of $52,000 per year.

After the hearings, the trial court issued letter opinions with the following relevant rulings: 1) a change of circumstances warranted modification of child support and alimony; 2) Louanne's net income, as per her new contracts, was $809.73 per week; 3) Matt's net income was $2539.77 per week; 4) based on the parties' incomes and the chart amounts attributable to each of them having custody of one minor child, Matt's net child-support obligation was modified to $244.96 per week; 5) the $200,000 distribution to Matt from the LLC would not be included in calculating Matt's income; 6) even if the $200,000 were included, a deviation from the chart attributable to that amount was justified; 7) Louanne would receive alimony at the reduced rate of $1000 per month from January 1, 2005, through December 31, 2006, when it would cease entirely. These rulings were incorporated into an order entered July 11, 2005, from which Louanne filed a

timely notice of appeal. She now argues that the trial court erred in calculating hers and Matt's incomes for purposes of child support and that the trial court erred in reducing the amount of alimony she was to receive.

Calculation of Income for Child-Support Purposes

We review traditional cases of equity, such as domestic-relations proceedings, de novo. *Hurtt v. Hurtt*, 93 Ark. App. 37, 216 S.W.3d 604 (2005). It is the ultimate task of the trial judge to determine the expendable income of a child-support payor. *Cole v. Cole*, 89 Ark. App. 134, 201 S.W.3d 21 (2005). As a rule, when the amount of child support is at issue, we will not reverse the trial judge absent an abuse of discretion. *Id.*

Under this heading, Louanne makes several sub-arguments, which we will address individually. We first consider her claim that the trial court's temporary child-support order entered in August 2004 incorrectly established the parties' incomes. At the hearing that preceded that order, the trial judge received evidence so that child support could be temporarily adjusted pending completion of trial. At the close of the hearing, the judge declared Matt's yearly income to be $163,448.50, based on an exhibit prepared by Louanne's expert witness, and declared Louanne's yearly income to be $19,423, based on her adjusted gross income from her 2003 tax return. Louanne now states that the trial court erred in "calculating appellant's obligation for the temporary order on her adjusted gross income as opposed to appellee's after-tax income."

Louanne's assertion on this point is made without a developed argument and without a convincing explanation as to how or why a legal error occurred. It is the appellant's burden to demonstrate reversible error. *See Arrow Int'l, Inc. v. Sparks*, 81 Ark. App. 42, 98 S.W.3d 48 (2003). Moreover, no authority, other than a general citation to Administrative Order No. 10, is cited. Points asserted without citation to authority or convincing argument should not be considered. *West v. West*, 364 Ark. 73, 216 S.W.3d 557 (2005). In any event, Matt's income at the temporary hearing was calculated by reference to an exhibit offered by Louanne, and Louanne's income was taken from her 2003 tax return, which she agreed could be used for that purpose. An appellant may not complain on appeal that the trial court erred if she induced, consented to, or acquiesced in the trial court's position. *Keathley v.*

Keathley, 76 Ark. App. 150, 61 S.W.3d 219 (2001). We therefore find no reversible error on this point.

We next address Louanne's statement that "the court used the projected weekly wages that Ms. Parker did not begin receiving until September 30, 2004, and applied them retroactively." By "retroactively," she means, as best we can tell, that the court calculated the income that she was to receive from her September 2004 contracts "as though [she] had received that additional income throughout 2004." Again, Louanne does little more than make an assertion of this point, unsupported by convincing argument or authority. *See West, supra.* Moreover, we do not believe that the trial court's ruling bears out her argument. The final order entered July 11, 2005, retroactively modified Louanne's support payments as of September 2004, which was the month that she began earning money on her contracts. We therefore see no basis for reversal.

Next, in a similarly undeveloped and unsupported argument, Louanne contends that "it was error under Administrative Order No. 10 to fail to calculate Ms. Parker's income by looking at her 2002 and 2003 tax returns." She is apparently contending that she was a self-employed person and that, under Administrative Order No. 10, her child-support obligation should have been calculated based on her prior two years' tax returns and her current year's quarterly estimates. *See In re Administrative Order No. 10: Arkansas Child Support Guidelines*, § III(c) 347 Ark. App'x 1064, 1068 (2002) (per curiam). However, at the beginning of the final hearing in this matter, Louanne's counsel seemingly invited the court to look to her 2004 contracts in determining her income, stating:

> [W]e have provided and the Court will see that a contract that was not available was signed ultimately on September 2nd or 3rd. And I may be off a day. And there are actually two of them. They're for ten months each, and there's a right of renewal in favor of the employer. They each pay 26,000 dollars for ten months. And so she has income and she can — the Court can clearly look to that in terms of the youngest child, the daughter that is in Texas with Mrs. Parker.

This, therefore, seems to be a case in which the trial court did what it was asked to do. An appellant may not complain of an alleged

erroneous action of the trial court if she has consented to or acquiesced in that action. *See Keathley, supra*; *Harness v. Ark. Pub. Serv. Comm'n*, 60 Ark. App. 265, 962 S.W.2d 374 (1998).

We turn now to Louanne's assertion that, in calculating Matt's income, the trial court failed to consider certain matters, including interest-free loans that Matt received from the LLC and five-percent fees or commissions that he was to receive as part of his LLC income.[1] We find no error here. There was evidence that the amount that Matt stood to gain from the fees and commissions was de minimis. As for the interest-free loans, they were, in part, a device for protection of the LLC's money. Matt (and his brothers, who also received such loans) used approximately $355,000 in loan proceeds to buy individual CDs in smaller amounts in order to obtain the FDIC's $100,000 limit; then, when the CDs matured, they placed the interest back into the LLC account — a practice that even Louanne's counsel called "good business." Other loans at issue were obtained by Matt in 2002 and 2003 for the purpose of paying off the mortgage and buying out Louanne's interest in the marital home and for the purpose of buying some stock. However, Louanne makes no convincing argument nor does she cite any authority for the proposition that the interest that Matt saved as a result of these loans should be considered income for child-support purposes. Therefore, her burden of demonstrating reversible error has not been met.

Finally, we address Louanne's argument that Matt's income should have included a $200,000 distribution from the LLC that was reported and taxed as income in 2000 but was not actually distributed until 2004. We conclude that Louanne is procedurally barred from raising this issue. The trial court gave two alternative bases for its ruling on this point: 1) the $200,000 distribution should not be included in Matt's 2004 income because it was reported and taxed in 2000, and, alternatively 2) if it were included, a deviation from the chart for the amount of support attributable to the $200,000 would be justified. On appeal, Louanne attacks the trial court's refusal to consider the $200,000 as

[1] Louanne also mentions, in cataloguing the matters that the trial court did not consider, Matt's failure to list any liabilities owed to the LLC on his affidavit of financial means and the LLC's failure to keep records of its investors' capital accounts. It is not explained how the trial court's failure to consider these matters impacted the calculation of Matt's income.

part of Matt's income but not the trial court's alternative ruling that a deviation from the support chart was justified. Thus, even if we were to agree that the $200,000 should have been included in calculating Matt's income, we still would not reverse in light of the failure to attack the trial court's independent, alternative basis for its ruling. *See Morehouse v. Lawson*, 90 Ark. App. 379, 206 S.W.3d 295 (2005); *Pugh v. State*, 351 Ark. 5, 89 S.W.3d 909 (2002); *Pearrow v. Feagin*, 300 Ark. 274, 778 S.W.2d 941 (1989); *Camp v. State*, 66 Ark. App. 134, 991 S.W.2d 611 (1999).

To conclude on this point, we affirm the trial court's calculation of the parties' incomes for child-support purposes.

Modification of Alimony

The primary factors to be considered in changing an award of alimony are the needs of one party and the ability of the other party to pay. *Bracken v. Bracken*, 302 Ark. 103, 787 S.W.2d 678 (1990). Each case is to be judged upon its own facts. *Id.* Discretion is vested in the trial judge, and we will not reverse absent an abuse of discretion. *Id.*

From 1999 through 2004, Matt paid Louanne $1600 per month as alimony. Under the trial court's current order, that amount was modified to $1000 per month from January 1, 2005, through December 31, 2006. Thereafter, the alimony obligation ceased. We cannot say that the trial court abused its discretion in making this modification.

Louanne argues that Matt's income increased following entry of the 1999 decree; however, there was evidence that her income increased as well. The court found in 1999 that Louanne earned a salary of $700 per month, but by the time the 2005 order was entered in the present case, the court found her income to be $809.73 per week. Further, Louanne earned one post-graduate degree after the 1999 alimony was established and was expected to earn a doctoral degree by the time the alimony obligation ceased in 2006. Additionally, there was evidence that Louanne was able to afford a nice residence and new automobiles and that she received at least $400,000 in assets from the property division following entry of the 1999 decree. Moreover, she is currently supporting one minor child rather than three.

While Louanne mentions other matters to support her claim for continued, unmodified alimony, we conclude, based on

the above factors and our de novo review, that the trial court did not abuse its discretion in modifying the alimony as it did. We therefore affirm on this point.

Affirmed.

PITTMAN, C.J., agrees.

GRIFFEN, J., concurs.

WENDELL L. GRIFFEN, Judge, concurring.

Science and technology multiply around us. To an increasing extent they dictate the languages in which we speak and think. Either we use those languages, or we remain mute.

— J.G. Ballard, British novelist

I write separately to address the glaring briefing deficiencies in this appeal and to again call for electronic filing of the record and briefs in our state. Appellant's brief consists of four volumes, including a 277-page abstract and a 684-page addendum. Substantial portions of appellant's abstract are merely a verbatim copy of the transcript rather than the impartial, first-person condensation of the testimony in this case that is required by Ark. Sup. Ct. R. 4-2(a)(5). A word-for-word transcription of the record is not an abstract under our rules. *See Muldrow v. Douglass*, 316 Ark. 86, 870 S.W.2d 736 (1994).

Our rules state that the addendum should contain those documents that are necessary for the understanding of the case and this court's jurisdiction. *See* Ark. Sup. Ct. R. 4-2(a)(8). However, appellant's addendum contains a number of records that are unnecessary in this appeal. Several documents are included in the addendum multiple times. The addendum contains correspondence between counsel and between the parties and the circuit court; that correspondence serves no useful purpose for understanding any issue raised or argument advanced in the appeal.

It is true that this case requires consideration of the financial records of the parties. Nevertheless, I see no reason why almost every financial record introduced at trial was included in the addendum. Our rules state, "In the case of lengthy pleadings or documents, only relevant excerpts in context need to be included in the Addendum." *Id.* While I recognize that attorneys often

include extra material in an exercise of caution, both parties should be reminded that "excessive abstracting is as violative of our rules as omissions of material pleadings, exhibits, and testimony." *Forrest City Mach. Works v. Mosbacher*, 312 Ark. 578, 587, 851 S.W.2d 443, 448 (1993).

The record and the briefs in this case illustrate the need to modernize appellate practice in Arkansas in light of the advantages presented by information technology. The appellate record in this case was ten volumes, totaling 1959 pages. Appellant submitted a 980-page brief. Appellee's brief, which included an unnecessary supplemental addendum, numbered 174 pages. Appellant filed an eighteen-page reply brief. If each party made twenty copies of the briefs (seventeen for filing with the clerk, one for opposing counsel, one for the circuit court, and one for that party), then the briefs and record on appeal consisted of 25,399 pieces of paper. According to an environmental company based in San Francisco, California, one tree makes 16.67 reams (one ream = 500 sheets) of paper. Conservatree, *How Much Paper Can Be Made From A Tree?*, http://www.conservatree.com/learn/EnviroIssues/TreeStats.shtml (last visited Jan. 18, 2007). Based on these calculations, the paper filed by the parties on this appeal alone has consumed almost three trees. Of course, all the voluminous paper briefs and record must be stored someplace once they are delivered to the Justice Building in Little Rock, so some method for physically storing and retrieving them must be selected, implemented, and financed. The cost of storing and retrieving paper records and briefs must be paid from state revenue.

The costs associated with our paper method of appellate practice does not end when the record and briefs are assembled. There is the additional cost associated with transporting paper to Little Rock for filing. In the instant case, the office of counsel for appellant is in West Memphis. Appellee's counsel's office is in Jonesboro. Those offices are each approximately 120 miles from Little Rock. Our current method of appellate practice required that appellant's counsel, or someone on his behalf, travel 120 miles to pick up the voluminous record, drive 120 miles back to West Memphis to prepare the briefs, drive 120 miles to file the briefs and return the record, then drive 120 miles back home. At that point, appellee's counsel, or someone on his behalf, was forced to repeat this process. The combined approximate distance driven by or on

behalf of both attorneys to process the appeal totals 960 miles. The vehicles used for that travel may have easily consumed at least $100 worth of gasoline.

The exercise that our current system of appellate practice imposed on the parties in this appeal is repeated for every appeal taken in Arkansas. Thus, our court rules compel people to run up and down the highways, when gasoline prices are a constant concern for everyone, simply to file papers associated with appeals. We are doing this in the age of the Internet, E-Bay, electronic filing of tax returns, and electronic banking. We are requiring litigants to pack paper across Arkansas highways even as state and federal courts across the nation are increasingly using the Internet by electronic filing (called "e-filing").

E-filing will undoubtedly reduce costs to parties. E-filing eliminates the costs associated with hand delivery, messenger services, printing, photocopying, mailing, and the fuel costs associated with shipping or driving paper records and briefs from throughout Arkansas to Little Rock.

E-filing also will provide savings to our courts. Judges and their staffs will be able to retrieve electronic documents quickly and easily. Under our current paper system, the paper record is accessible only to one user at a time and in one location. Thus, anytime a lawyer, law clerk, member of the clerk's staff, or judge desires to examine the record, he or she must physically locate it, retrieve it, search it, and return it, all to the exclusion of any other potential user of the record. If Arkansas adopted an e-filing system, the record could be lodged electronically on a secure server that could be password protected so that users could access it instantly, simultaneously, and economically. Thus, Arkansas lawyers and the appellate courts would reduce paper storage costs.

I am merely advocating that we undertake reasonable steps consistent with what has already been published in legal periodicals available locally. The William H. Bowen School of Law at the University of Arkansas at Little Rock publishes *The Journal of Appellate Practice and Process* twice a year. The Fall 2005 issue includes an article by Roger Hanson of Williamsburg, Virginia that discusses the growing use of e-filing by American state appellate courts.

Arkansas is already far behind other states concerning e-filing. Since 1998, Division Two of the Arizona Court of Appeals has been involved in a clear move toward e-filing as

lawyers from the Pima County Public Defender's office and the Tucson office of the Arizona Attorney General were permitted to electronically file motions and briefs that were maintained on a server. In 2001, trial court records from Pima County Superior Court were electronically transmitted. In 2004, Division Two started accepting transcripts from court reporters electronically.

The North Carolina Supreme Court and Court of Appeals currently use e-filing. All records and briefs filed since 1999 are available on the Internet at no cost. About twenty-five percent of all briefs are filed electronically, and the figures are growing. Fourteen states and the District of Columbia use some type of e-filing. Arkansas should be among them. The Summer 2000 issue of *The Journal of Appellate Practice and Process* includes articles that review e-filing in the United States and in Alberta, Canada. I recommend taking a few minutes to read the article by Deborah Leonard Parker titled *Electronic Filing in North Carolina: Using the Internet instead of the Interstate.*

Appeals such as we have before us provide clear evidence why Arkansas appellate courts should abandon our archaic appellate practices. As Judge George Nicholson of the California Court of Appeals once observed:

> The modern appellate courthouse is haunted by anachronism. At one moment, a judge engages in electronic legal research, links with a computer in another state as easily as to one in the next office, then to a computer perhaps even in another country in search of just the right legal precedent. With just a few key strokes or mouse clicks, vast databases of stored knowledge and wisdom can be searched while the judge composes a legal opinion. The judge then slides the chair over to the other side of the desk where lies the record on appeal, a collection of bound pages of trial court transcripts and filings. The only way to search through the record for specific trial testimony, for example, is to manually locate the testimony of the appropriate witness and then read page by page until the desired testimony is found. It is as if, by sliding the chair, the judge has gone back in time to a different era. The appellate judge has one foot in the nineteenth century and the other in the twenty-first.

George Nicholson, *A Vision of the Future of Appellate Practice and Process*, 2 J. App. Prac. & Process, 231-32 (2000) (footnotes and citations omitted).

Rather than transporting or shipping a multi-volume record to Little Rock, a court reporter could simply prepare an electronic

copy of the record and lodge it on a secure server under the control of the supreme court clerk. The parties could then access that electronic record to file electronic briefs, and could do so conveniently and safely from the offices of their legal counsel without wasting time, gasoline, and money as required by our current paper process. For those attorneys and judges who somehow remain wedded to the notion that they must have paper documents at hand to function, their recourse would simply be to click on the print icon on their computer word-processing screens. Whatever the initial and ongoing costs for an e-filing system may be, one can safely predict that our state and litigants will experience substantial savings.

Since 2001, I have been advocating that Arkansas modernize appellate practice by implementing an electronic system for filing and briefing appeals. I do not understand why it makes sense for our appellate process, in which lawyers and judges no longer rely upon carbon paper, manual typewriters, and liquid paper for preparing briefs and opinions, to operate as if the Internet does not exist and word processing was science fiction. Until some type of electronic filing system is instituted, our appellate courts will continue to lag behind the rest of the country and be a living anachronism. Meanwhile, the cost that Arkansans pay to pursue paper appeals will be quite unnecessary. No matter how much time or money one may have, wisdom always counsels employing technology to save time and money when doing so will achieve the same result as employing more costly and time-consuming measures. It remains to be seen whether we will be wise or foolish in this regard.

Barry WARD *v.*
HICKORY SPRINGS MANUFACTURING CO.
and Liberty Mutual Insurance Co.

CA 06-515 248 S.W.3d 482

Court of Appeals of Arkansas
Opinion delivered January 31, 2007

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

Ledbetter, Cogbill, Arnold & Harrison, LLP, by: *James A. Arnold, II*, and *Jeffrey D. Rickard*, for appellees.

BRIAN S. MILLER, Judge. On March 22, 2006, the Arkansas Workers' Compensation Commission found that Barry Ward sustained a compensable degloving injury to his genitalia and

scrotum while working for Hickory Springs Manufacturing Company on February 4, 2003. The Commission further held that back injuries and gastrointestinal difficulties claimed by Ward were not causally related to the February 4 work-related accident. Ward now brings this appeal, claiming that the preponderance of the evidence showed that his back injuries and gastrointestinal difficulties were caused by the February 4 accident. Hickory Springs also cross-appeals, claiming that Ward's February 4 injury was substantially occasioned by the use of illicit drugs and that the Commission's award of benefits was not supported by substantial evidence. We affirm both the direct appeal and cross appeal.

Ward, a machine operator for Hickory Springs, arrived for work at 5:30 a.m. on February 4, 2003. He took a thirty minute lunch break at 12:00 p.m. and then worked until 2 p.m., when he suffered a degloving injury to his genitalia and scrotum when his clothing became entangled in the teeth of the machine he was operating. As a result of the injury, Ward was hospitalized and underwent reconstructive surgery. A urine sample was taken from Ward's catheter for drug testing at the hospital approximately seventy-two hours after the accident. The sample tested positive for morphine and marijuana metabolites.

Approximately two months later, Ward began complaining of back problems and gastrointestinal problems. He filed for workers' compensation benefits claiming compensable injuries to his genitalia and groin area, his spine, and his gastrointestinal system. Ward asserted that, as a result of his injuries, he was entitled to payment of his medical expenses and temporary total disability benefits. Hickory Springs controverted Ward's claim in its entirety due to the positive drug test.

At the hearing before the administrative law judge, Ward testified that he was prescribed morphine while hospitalized. He stated that he started noticing back pain when the hospital began weaning him from the morphine. Ward admitted to seeing a chiropractor for back pain following a boating accident several years before the February 4 accident. He stated, however, that he was not experiencing back pain prior to the February 4 accident. Ward also admitted that he smoked marijuana nine to eleven days prior to his accident, but he denied smoking marijuana while hospitalized. He explained that he had smoked marijuana for several years but did not smoke marijuana on a regular basis.

Vern Hanna, Ward's co-worker, testified that he had incidental contact with Ward on the job. He said that he never had any reason to suspect Ward of being under the influence of any type of illegal drug and that Ward never appeared intoxicated.

Bruce Rowe testified that he was Ward's supervisor. He stated that he trained Ward on how to operate the machine in question and that Ward failed to operate the machine according to standard operating procedure. He explained that the machine's kill switch was located about two feet from where Ward was entangled in the machine and that Ward could have reached the kill switch. Rowe testified that the injury would not have occurred had Ward hit the kill switch. Rowe also testified that he had been "around people under the influence of marijuana" and that he saw Ward immediately after the accident. He said that he never suspected Ward of being under the influence of drugs or alcohol and that he would have sent Ward home if he had any suspicion that Ward was under the influence.

Mark Bryant, the plant manager, testified that he spoke with Ward immediately following the accident and then transported Ward to the hospital. Over the years, he had come into contact with several people whom he suspected of being under the influence, but he never suspected Ward of being under the influence at any time, including on the day of the accident.

The medical evidence revealed that Ward complained of numbness radiating down his legs during an April 28, 2003, visit to Dr. James Kelly. Dr. Kelly noted that Ward may have sustained a back injury during the February 4 accident. The following day, Ward made a similar complaint to Dr. John Lange. X-rays revealed moderate degenerative changes in Ward's lower thoracic region and mild degenerative changes in the remainder of the thoracic spine. A subsequent MRI revealed a "left paracentral disc herniation at the L5-S1 level" and a "mild diffuse disc bulge" at the L5-S1 level. On May 22, 2003, Ward reported gastrointestinal problems and on July 2, 2003, he was treated in the emergency room of St. Edward Mercy Medical Center for chronic constipation.

The ALJ found that Ward's injuries were not compensable because they were substantially occasioned by the use of intoxicants. The Commission, however, found that the degloving injury was not substantially occasioned by the use of intoxicants, and it reversed the ALJ. The Commission also found that Ward failed to

prove that his back injury and gastrointestinal problems were causally related to his February 4 accident. The parties now appeal and cross-appeal.

In workers' compensation appeals, we view the evidence in a light most favorable to the Commission's decision and affirm the decision if it is supported by substantial evidence. *See Moncus v. Billingsley Logging*, 366 Ark. 383, 235 S.W.3d 877 (2006). Substantial evidence exists if reasonable minds could reach the Commission's conclusion. *Holland Group, Inc. v. Hughes*, 95 Ark. App. 369, 237 S.W.3d 120 (2006). We affirm if reasonable minds could reach the results of the Commission. *See Smith-Blair, Inc. v. Jones*, 77 Ark. App. 273, 72 S.W.3d 560 (2002).

The Commission may deny a claim in which the claimant fails to meet his burden of proof. *See Holland, supra.* In these cases, the substantial evidence standard of review requires that we affirm the Commission's decision if its opinion displays a substantial basis for the denial. *Id.* Moreover, the Commission is not required to believe any witness, and it may accept and translate into findings of fact only those portions of the testimony that it deems worthy of belief. *Id.*

On direct appeal, Ward argues that the Commission erred in finding that he failed to prove that his back and gastrointestinal difficulties were causally related to his work-related injury. Ward had the burden of proving a compensable injury. *Watson v. Tayco, Inc.*, 79 Ark. App. 250, 86 S.W.3d 18 (2002). A compensable injury is one arising out of and in the course of employment. Ark. Code Ann. § 11-9-102(4)(A)(i) (Supp. 2005). To prove a compensable injury, the burden is on the claimant to show, among other things, that a causal connection exists between the injury and employment. *Dixon v. Salvation Army*, 360 Ark. 309, 201 S.W.3d 386 (2005); *Horticare Landscape Mgmt. v. McDonald*, 80 Ark. App. 45, 89 S.W.3d 375 (2002). Objective medical evidence is necessary to establish the existence and extent of an injury but not essential to establish the causal relationship between the injury and a work-related accident. *Horticare Landscape Mgmt. v. McDonald, supra.* Objective medical evidence is not essential to establish the causal relationship between the injury and a work-related accident where objective medical evidence establishes the existence and extent of the injury, and a preponderance of other nonmedical evidence establishes a causal relationship between the injury and the work-related accident. *Id.*

The Commission found that Ward failed to prove an accidental injury to his back and gastrointestinal area. Viewing the evidence in a light most favorable to the Commission's findings, we agree. Although there is objective medical evidence establishing that Ward was experiencing back problems and gastrointestinal problems, there was absolutely no evidence, medical or nonmedical, establishing that Ward's problems were causally related to his February 4 accident. Reasonable minds, therefore, could reach the results reached by the Commission. For this reason, we affirm the Commission's decision from which Ward appeals.

On cross appeal, Hickory Springs argues that Ward failed to rebut the presumption that his injury was substantially occasioned by the use of illicit drugs. Hickory Springs asserts that the Commission's finding to the contrary is not supported by substantial evidence. Arkansas Code Annotated section 11-9-102(4)(B)(iv)(a) (Supp. 2005) provides that an injury is not compensable where the accident was substantially occasioned by the use of alcohol, illegal drugs, or prescription drugs used in contravention of physician's orders. "The presence of alcohol, illegal drugs, or prescription drugs used in contravention of a physician's orders shall create a rebuttable presumption that the injury or accident was substantially occasioned by the use of alcohol, illegal drugs, or prescription drugs used in contravention of physician's orders." Ark. Code Ann. § 11-9-102(4)(B)(iv)(b). Whether the rebuttable presumption is overcome by the evidence is a question of fact for the Commission to determine. *Apple Tree Serv., Inc. v. Grimes*, 94 Ark. App. 190, 228 S.W.3d 515 (2006); *Ark. Elec. Coop. v. Ramsey*, 87 Ark. App. 254, 190 S.W.3d 287 (2004).

The Commission found that a presumption arose that Ward's degloving injury was substantially occasioned by the use of illegal drugs, but it also found that Ward rebutted the presumption. The Commission gave significant weight to the testimony of Ward's co-workers who testified that they never had reason to suspect Ward of using illegal drugs. In fact, Ward's supervisor and his plant manager testified that they saw Ward immediately after the accident and that nothing indicated that he was under the influence.

Although Hickory Springs takes issue with the Commission relying so heavily on the testimony of Ward's co-workers, it is the function of the Commission to determine the credibility of witnesses and the weight to be given their testimony. *Patterson v.*

Frito Lay, Inc., 66 Ark. App. 159, 992 S.W.2d 130 (1999). When we view the evidence in a light most favorable to the Commission's decision, we conclude that reasonable minds can find that the testimony of Ward's co-workers rebuts the presumption that Ward's accident was substantially occasioned by the use of illegal drugs. We, therefore, affirm the cross appeal.

Affirmed on direct appeal and cross appeal.

ROBBINS and GLOVER, JJ., agree.

Carl CROSBY *v.* Carmen CROSBY

CA 06-756 249 S.W.3d 144

Court of Appeals of Arkansas
Opinion delivered February 7, 2007

Worsham Law Firm, P.A., by: *Richard E. Worsham*, for appellant.

John C. Throesch, for appellee.

JOSEPHINE LINKER HART, Judge. Carl Crosby appeals from a Randolph County Circuit Court order prohibiting his stepsons from having contact with his twin four-year-old daughters when he exercises his visitation with his daughters. On appeal, he argues that the trial court erred in finding that it was in the best interest of the minor children to limit his visitation rights. We affirm.

Carl Crosby and appellee Carmen Crosby divorced on December 27, 2004, and pursuant to a settlement agreement, Carmen was awarded custody of the parties' two children and Carl

received visitation. The two children, As. and Al., are twin girls, born January 25, 2002. Almost immediately, problems with visitation ensued.

Carl remarried in August 2005. His new wife, Jennifer, brought with her two sons, J. and A.[1] In October 2005, As. and Al. allegedly told their maternal grandmother that their new stepbrothers had sexually assaulted them. After this revelation, Carmen restricted Carl's access to the twins, and on November 18, 2005, she filed a petition to modify Carl's visitation. Carl answered, and on December 6, 2005, he filed a motion asking the trial court to find Carmen in contempt for obstructing his visitation.

At the ensuing February 6, 2006 hearing, Stan Rogers, an investigator for the Arkansas State Police Crimes Against Children Division, testified that on October 11, 2005, a complaint was filed on the child-abuse hotline. Acting on the complaint, he conducted separate interviews of As. and Al. Each of the girls stated that while they were staying at their father's house, J. and A. pulled down their pants, touched them on their vaginas, and poked them in their pubic area with a purple stick. They both also stated that their father had spanked the boys "really hard." Rogers believed that the twins' stories were consistent. Rogers also interviewed Carmen and obtained statements from Carmen's mother, Frances Rose, and Dr. Howell Beret, who had examined the girls at Carmen's and Rose's request. After completing his initial inquiry, Rogers passed the information to investigators in Little Rock. Ultimately, however, the case was referred to Sgt. Curtis Wood of the Benton Police Department, who found insufficient evidence to pursue a sexual-abuse case.

Teresa Sain, a licensed clinical social worker for Life Strategies Counseling, testified that she began counseling As. and Al. on December 28, 2005. Sain stated that Carmen had contacted her about counseling the girls because the twins had disclosed that they had been sexually molested by their stepbrothers. Sain further testified that, after she established a rapport with the children in her counseling sessions, the twins made similar disclosures to her. She opined that there was no indication that the girls had been coached

[1] No direct evidence of the boys' ages appear in the record, however, we surmise from a question on cross-examination of Stan Rogers that they were eleven and seven years old at the time that of the investigation.

in their statements. Carmen testified that she had taken the twins to Stan Rogers after she had made a complaint through the child-abuse hotline. She stated she was directed to take the girls to Hot Springs for further investigation of the sexual-abuse allegations. Carmen described how As. and Al. were apparently traumatized by the physical examination that they were subjected to at the child advocacy center at St. Joseph's Mercy Hospital. She described how she had to hold the children down and how they screamed and cried during the physical examination. She then noted that the twins were interviewed shortly after their physical exam and that the interviews each lasted less than twenty minutes. Carmen was then approached by Sgt. Wood, who suggested to her that he believed that she had made up the allegations.

Carmen asserted that As. and Al. had been consistent in their allegations of sexual abuse. Carmen stated that prior to the disclosures that the girls had made to Frances Rose, she had noticed significant changes in the girls' behavior. Carmen claimed that she had disciplined the girls for sexually acting out. She also noted that the girls had complained about "their bottoms hurting a lot" after visits at their father's house, which she at first ascribed to problems with toilet training.

On cross-examination she testified that she was aware that Carl had an extramarital affair with his current wife Jennifer. She admitted that she referred to the woman as "a whore and a bitch." However, she denied harboring resentment against her ex-husband for having married his paramour. Carmen stated that she had not allowed Carl to have overnight visits with the twins at his home in Benton since October because that was where the stepchildren resided and she was protecting her children.

Dr. Howell Beret, a retired but still-licensed physician, testified that he examined As. and Al. He insisted on seeing the twins individually. According to Dr. Beret, they each stated that their stepbrothers had been "poking and touching" them. He stated that "this information just flowed out of them." He examined their perineum and did not find any evidence of scratches or abrasions, but he contended that lack of obvious physical findings "did not cause [him] to discount what they were telling [him]." Dr. Beret stated unequivocally that neither the State Police nor the Benton Police Department contacted him directly concerning his findings.

Sgt. Wood testified that he was in charge of the criminal investigation division of the Benton Police Department. Although he conceded that he did not have any special expertise in investigating child sexual-abuse cases, he investigated the allegations after he received a report from the Crimes Against Children Division of the Arkansas State Police. After reviewing the report that he received from the State Police, Wood concluded that the twins needed to be interviewed again because, in his opinion, some of Rogers's questions "could be interpreted as being leading and may have prompted some of the answers."

According to Wood, the boys were interviewed first, but he only observed the interview with the younger boy, J. Wood claimed that he saw "no signs of deception." He also interviewed Carl Crosby, who stated that he was only interested in finding the truth. Wood claimed that he called Dr. Beret from the child advocacy center and spoke to him about his findings that there was no physical evidence suggesting sexual abuse.

Wood stated that neither twin "passed" the portion of the interview where it was sought to establish whether they understood what was true and not true. He also noted that As.'s interview was terminated "early" because she was "moving around." Wood conceded that if he had been conducting the interview, he probably would have taken a break and tried to complete the interview. Wood admitted that he did not believe the girls' stories were credible. He did, however, note that both of the girls told him without being able to provide details that their father was "mean" to their mother.

According to Wood, he also spoke with Carmen and told her that the allegations of sexual abuse could not be substantiated. He found it remarkable that Carmen was not relieved to hear that it would be the disposition of the case. He also recalled that "she could not believe that Carl Crosby would spend time with them, his new wife and her two sons, J. and A., and not with his two daughters."

Lee Ann Vannaman, the supervisor of the Arkansas State Police Crime Against Children Division in Saline and Pulaski Counties, testified that she reviewed the finding that the evidence did not support the allegations and agreed with the finding. She admitted, however, that she "never ran across Sergeant Wood in one of these kind of cases." She also admitted that she never talked to the girls and was relying on Wood's determination that their

story was not credible. Vannaman had known Stan Rogers for "nine or ten years probably"and stated that he had a reputation for doing a good job.

Carl Crosby stated that when the allegations came to light, he and Jennifer "talked to the boys," and after "lengthy discussions" he concluded that "we had nothing to hide." He stated that Carmen had made visitation with his daughters extremely difficult — at one point "unilaterally" halting visitation — and had disparaged him in front of the twins. She also discouraged telephone contact between him and his daughters. Carmen denied that she was being unreasonable in restricting visitation because Carl never agreed to keep the boys away from the twins. She also denied that she made disparaging remarks about him. Carmen did, however, assert that Carl made several "harassing and threatening" phone calls to her. She also conceded that she found Jennifer being around her children "very bothering."

The trial judge stated from the bench that he was "deeply troubled" about how the investigation was conducted. He expressed particular concern about the fact that one child's interview was cut short. The trial judge found that Carmen did not "put this in the children's mind." However, based on what he learned about the investigation, he was "not satisfied" that it was conclusive and stated that it "seems like this investigation was given a short shift." He also specifically found that he did not trust Wood's determination that the accusations were unsubstantiated because other professionals had expressed a different opinion and the interview that Wood sponsored was too incomplete to support his conclusions. The trial judge decided that under these circumstances the best interest of the children dictated that they be protected. He reinstated Carl's visitation according to the court's visitation schedule but ruled that Carl's stepsons were not to be present.

On appeal, Carl argues that the trial court erred in limiting his visitation rights without finding that the allegations of sexual abuse were true. He contends that by not making a "factual ruling" of his own and refusing to accept the findings by a State agency charged with investigating "such matters," the trial court "left the matter in limbo." While he concedes that he was allowed to continue to visit his daughters, he complains that he was prejudiced by the ruling because "he cannot have them as part of his new family since they cannot be around their stepbrothers." He claims that the trial court limited his visitation rights "solely upon the unproven allegation of abuse." Without citation of authority,

Carl asserts that the trial court should have accepted Ms. Vannaman's "professional judgment" that there was not a "preponderance of evidence to support the allegation of sexual abuse," because her "role in the process is similar to that of a judge." We disagree.

Setting visitation rights is a matter that lies within the sound discretion of the trial court. *Hudson v. Kyle*, 365 Ark. 341, 229 S.W.3d 890 (2006). The main consideration in making judicial determinations concerning visitation is the best interest of the child. *Id.* We review traditional equity cases on both factual and legal questions de novo on the record, but we will not reverse a finding by a trial court unless it was clearly erroneous. *Id.* A finding of fact by a trial court sitting in an equity case is clearly erroneous when, despite supporting evidence in the record, the appellate court viewing all of the evidence is left with a definite and firm conviction that a mistake has been committed. *Id.* In resolving the clearly erroneous question, we must give due regard to the opportunity of the trial judge to evaluate the credibility of witnesses, and we give great weight to the trial judge's personal observations because there are no cases in which the superior position, ability, and opportunity of the judge to observe the parties carries a greater weight. *Id.*

In the first place, we cannot subscribe to Carl's major premise that the trial court was obligated to make a conclusive finding as to whether the twins were sexually abused or not. While that would be the job of a trier of fact sitting in a criminal or juvenile court, it was not specifically required in this situation. Here, the trial court was tasked merely with deciding the nature of Carl's visitation. Secondly, the trial court expressly determined that after what it believed to be "partial investigations" there was significant uncertainty as to what, if anything, had actually happened to the girls. Implicit in this finding was a credibility determination that the conclusions of several experienced professionals, who had considerably more contact with the children than Wood, should not be discounted. Given the deference that we give to the trial judge in these situations, we cannot conclude that this finding was clearly erroneous. *See id.* Under these circumstances, we believe that the trial court was justified in ordering that J. and A. not be present when Carl exercised his visitation. It is beyond question that the best interest of the children lies in their not being subject to sexual abuse. Likewise, we do not subscribe to

Carl's assertion that visitation can be altered with impunity. Making a false allegation exposes the perpetrator to prosecution for filing a false police report, and if the perpetrator is a parent, to possibly losing custody of her children.

Finally, we also reject Carl's argument that the trial court—and this court on review—should just accept Ms. Vannaman's "professional judgment" because her role is similar to that of a judge. Such an approach would not only be repugnant to the doctrine of separation of powers, it would also violate the parties' rights to due process. We have no intention of abdicating our responsibility.

Affirmed.

HEFFLEY and MARSHALL, JJ., agree.

Nina DELT & Clarence Delt *v.* Grant Paddock BOWERS, David Bowers, Minta Jane Bowers, United Automobile Aerospace & Agricultural Implement Workers of America & UAW Local 716

CA 06-759 249 S.W.3d 162

Court of Appeals of Arkansas
Opinion delivered February 7, 2007

Christian & Byars, by: *Joe D. Byars, Jr.*, for appellants.

Godwin, Morris, Laurenzi & Bloomfield, P.C., by: *Samuel Morris* and *Timothy Taylor*, and *Hardin, Jesson & Terry*, by: *J. Leslie Evitts, III*, for appellees.

JOHN B. ROBBINS, Judge. Appellants Nina and Clarence Delt appeal, for the second time, the entry of a summary judgment against them in their lawsuit seeking recompense for personal injuries and related damages that Nina and her husband Clarence suffered. On the night of March 25, 2002, Nina was injured as she walked from the strike area of her employer's plant across the street. Nina was struck by a vehicle driven by appellee Grant Paddock Bowers as he drove along South Zero Street in Fort Smith, Arkansas. Appellants filed suit against seventeen-year-old Bowers and his parents (David and Minta Bowers) for his negligence. Appellants also named the national and local union organizations[1] as defendants in the lawsuit, alleging that they were negligent in failing in their duty to ensure her safety as a member of the union participating in the organized strike at the local Trane Corporation plant. The national and local union organizations moved for summary judgment on the basis that they owed no duty to Nina, or alternatively a minimal duty owed to licensees that was not breached. Appellants argued that Nina was an invitee, with a commensurate higher duty owed to her that was breached, or in a special relationship with the unions that had a commensurate duty of reasonable care for her safety. After a hearing on the motion, the trial judge entered summary judgment on behalf of the unions. The trial judge concluded that based upon the undisputed facts, Nina held the status of a licensee, that the unions owed her only a duty not to willfully or wantonly cause harm to her, that there was no allegation of willful or wanton conduct, and that there was no evidence of such conduct whatsoever. The claims against the unions were dismissed, but the pending claims against the driver and his parents remained.

Appellants appealed to our court, and in a per curiam opinion dated April 12, 2006, we dismissed the appeal because the summary judgment did not dismiss all the parties, and it contained a non-compliant Ark. R. Civ. P. 54(b) certificate. *See Delt v.*

[1] United Automobile, Aerospace and Agricultural Implement Workers of America (UAW America) and United Automobile, Aerospace, and Agricultural Implement Workers Local 716 (UAW Local).

Bowers, et al., CA05-1048 (April 12, 2006). Upon remand, the trial court issued an amended summary judgment order that contained a sufficient Rule 54(b) certificate. The certificate made an express determination that although there remained claims relevant to the Bowers family members, it would serve judicial economy to allow an immediate interlocutory appeal regarding judgment entered in favor of the national and local unions. Particular facts were recited in support of allowing an immediate appeal. A timely notice of appeal followed, and the appeal has returned to our court.

The issue for consideration on appeal is whether the trial court's entry of summary judgment was appropriate. Summary judgment is to be granted by a trial court only when it is clear that there are no genuine issues of material fact to be litigated, and the party is entitled to judgment as a matter of law. *Dodson v. Taylor*, 346 Ark. 443, 57 S.W.3d 710 (2001). The parties agree that there are no disputed facts with regard to the events leading to the accident. Accordingly, our review must focus on the trial court's application of the law to those undisputed facts. *See Youngman v. State Farm Mut. Auto. Ins. Co.*, 334 Ark. 73, 971 S.W.2d 248 (1998).

In order to prove negligence, there must be a failure to exercise proper care in the performance of a legal duty that the defendant owed the plaintiff under the circumstances surrounding them. *Costner v. Adams*, 82 Ark. App. 148, 121 S.W.3d 164 (2003). Proof of an accident, with nothing more, is not sufficient to make out a claim for negligence. *Coca-Cola Bottling Co. v. Gill*, 352 Ark. 240, 100 S.W.3d 715 (2003).

The supreme court has defined "invitee" as "one induced to come onto property for the business benefit of the possessor." *Bader v. Lawson*, 320 Ark. 561, 564, 898 S.W.2d 40, 42 (1995) (citing *Lively v. Libbey Mem'l Physical Med. Ctr., Inc.*, 311 Ark. 41, 841 S.W.2d 609 (1992); *Kay v. Kay*, 306 Ark. 322, 812 S.W.2d 685 (1991); *Coleman v. United Fence Co.*, 282 Ark. 344, 668 S.W.2d 536 (1984)). A "licensee" is one who goes upon the premises of another with the consent of the owner for one's own purposes and not for the mutual benefit of oneself and the owner. *Id.*

A property owner has a duty to exercise ordinary care to maintain his premises in a reasonably safe condition for the benefit of an invitee. *Conagra v. Strother*, 68 Ark. App. 120, 5 S.W.3d 69 (1999). The property owner is liable if he has superior knowledge of an unreasonable risk of harm of which the invitee, in the

exercise of ordinary care, does not or should not know. *Slavin v. Plumbers & Steamfitters Local 29*, 91 Ark. App. 43, 207 S.W.3d 586 (2005). However, one is not liable to an invitee for physical harm caused by any activity or condition on the land whose danger is known or obvious to the invitee, unless the landowner should anticipate the harm despite such knowledge or obviousness. *Van DeVeer v. RTJ, Inc.*, 81 Ark. App. 379, 101 S.W.3d 881 (2003). The property owner's duty to a licensee is to refrain from injuring the licensee through willful or wanton conduct and, if the licensee is in peril, to warn of hidden dangers if the licensee does not know or has no reason to know of such dangers. *Lively*, 311 Ark. at 47, 841 S.W.2d at 612. The duty owed to invitees is much broader and encompasses a property owner's liability if he has superior knowledge of an unreasonable risk of harm of which the invitee, in the exercise of ordinary care, does not or should not know. *See AutoZone v. Horton*, 87 Ark. App. 349, 192 S.W.3d 291 (2004); *see also Restatement (Second) of Torts*, § 343A(1) (1965). We conclude that Nina was, at best, a licensee. Therefore, summary judgment was proper.

The facts leading up to the accident are as follows. Nina worked at the Trane facility. She was a member of the local union, which decided to strike at an impasse during a collective bargaining agreement negotiation. The employee-members who elected to participate in the strike activities appeared for such duties during their regular work schedule. Nina worked the night shift. Participation in the strike activities was not required of all the membership, but such participation rendered members eligible for economic strike benefits. Members would sign in at the union hall, and there they would receive strike duties. The strikers picketed at the front entrances of the plant along Zero Street, a five-lane highway with a fifty-mile-per-hour speed limit. Due to limited parking, many members parked their vehicles across Zero Street. In the midst of her picketing shift, Nina decided to walk back to her vehicle. She was wearing a hooded poncho; it was raining and cold that night. Nina was hit by the car driven by Bowers and suffered serious physical injuries.

Appellants contend that the trial court erred in finding as a matter of law that UAW Local did not owe a duty of reasonable care to its member, Nina. Appellants argue that their special relationship was akin to master and servant such that UAW Local should have taken reasonable precautions to protect her from foreseeable risks of harm. Appellants suggest that UAW Local

should have provided better lighting, marked a crosswalk and provided assistance in crossing the busy roadway, posted warning signs of pedestrian activity along the roadway, or afforded other such reasonable safety measures. Failing that, they argue that UAW Local was negligent in its duty to their members who participated in picketing.

In our review of what, if any, duty was owed to Nina, we are guided by our recent case, *Slavin v. Plumbers & Steamfitters Local 29, supra.* Slavin appeared upon a specific request of union members to volunteer during the renovation project of the union building. Slavin was injured as he helped install insulation. Slavin and his wife filed a negligence lawsuit against the union claiming that he was an invitee. The union moved for summary judgment, arguing that Slavin was a licensee. The trial court agreed with the union, and Slavin appealed. We affirmed the entry of summary judgment. In discussing the relationship between a union and one of its members, we held that a union exists only as a group of members and that the business purpose of a union is to advance the interest of its members. *See id.* Any benefit conferred on the union by members providing labor is in actuality conferred on its membership. *See id.* Under that rationale, any work provided by a member of a union translates into presence for the member's own benefit. *See id.* We upheld the entry of summary judgment in favor of the union on Slavin's negligence action.

Similarly, Nina presented herself for strike duty in exchange for the benefits she received for participating during her regular work shift. She was furthering the goals of the union membership in contract negotiations. She acted, as a member of the union, for her own benefit. Under the rationale we expressed in *Slavin, supra,* we hold that the trial court correctly determined Nina to be a licensee given the undisputed facts. Thus, because the duty owed to a licensee is to refrain from willful and wanton conduct that causes harm, and there was no evidence or allegation of such conduct, the entry of summary judgment was appropriate.

Because we conclude that appellant Nina Delt was at most a licensee and not a public or business invitee, we need not address whether any precautions taken for picketing safety were reasonable in relation to the foreseeable harm. This point is moot. For the same reasons, any discussion regarding comparative negligence and proximate cause is moot. Lastly, because appellants make no

meaningful distinction between the national versus the local unions in their arguments regarding duty, we do not discuss any possible differentiation in duty.

For the foregoing reasons, we affirm the entry of summary judgment in favor of the unions.

Affirmed.

GLOVER and MILLER, JJ., agree.

Wilma V. ADAMS & Leonard E. Adams *v.* Jerry ATKINS, Robert P. Vickers, & Gloria Vickers

CA 06-466 249 S.W.3d 166

Court of Appeals of Arkansas
Opinion delivered February 7, 2007

Stanley Law Firm, P.A., by: *James W. Stanley, Jr.*, for appellants.

Woolsey & Wilson, by: *Bruce R. Wilson*, for appellees.

DAVID M. GLOVER, Judge. Wilma and Leonard Adams appeal the Johnson County Circuit Court's determination of the boundary line between their property and the properties of appellees, Jerry Atkins and Gloria and Robert Vickers. The appellees cross-appeal, arguing that the trial court erred in denying their motion for attorney's fees pursuant to Arkansas Code Annotated section 16-22-309 (Repl. 1999). We affirm on direct appeal and reverse and remand on cross-appeal.

Appellants own land that is adjacent to lands owned by the appellees. Appellants' land is west of appellees' lands; appellees Vickerses land is north of appellee Atkins's land. A road known as

Low Gap Road separates appellees' lands in an east-west direction, and then turns in a southerly direction and runs between appellants' land and appellee Atkins's land. Appellees filed a complaint against appellants after appellant Leonard Adams erected a fence that appellees claimed was on their properties. After a hearing, the trial court determined that the boundary lines submitted by appellees and referred to in the Higby survey were the correct boundary lines between the parties' respective properties. In that same order, the trial court also denied appellees' motion for attorney's fees. All parties appealed.

Appellant Leonard Adams offered convoluted testimony at the hearing. Adams testified that his 160-acre tract was adjacent to and west of appellees' properties. He said that Low Gap Road separated appellees' properties and then turned south, that there was a fence on the east side of that road, and that he had a barbed-wire fence on the west side of the road. He said that the line in question before the trial court was between his east line and appellees' west lines. Adams said that he acquired his land in 1956 and had lived on it since that time, and that he knew that the Vickers had purchased their property around June 1973 but did not know when Atkins had purchased his property, although he knew that it was after he had purchased his land.

Regarding the common boundary line, Adams said that he helped survey his property lines three different times, the first time being in 1944. Adams testified that the Kings had the property surveyed in 1944 and established the boundary of his property further east from where he ultimately put the fence. Adams said that the boundary line had not moved; that it was always there. Adams said that Mr. Jim Woods did a survey in 1983-84 and that he accompanied Woods when that survey was performed, but he did not help him do that survey. Adams also said that a survey was performed in 1948 that involved the same lines that were later surveyed by Mr. Woods. Adams further testified that he assisted Mr. J.M. Tate with a survey in 1950 and the survey established the line where Adams believed it to be. According to Adams, the line was exactly where Jim Woods placed it when he performed his survey. Adams said that the line surveyed in 1944, 1948, and 1950 was in the same location, and he said that in relation to the fence that he erected in 2003, the survey line "ran at an angle that came to the northeast corner of the property, and the fence went south

in front of the survey line towards the east and the survey line went straight." Adams contended that the above survey line was east of the fence that he erected.

Adams testified that he contacted Mr. James Higby to perform a survey in 2003, that the survey was never made by Mr. Higby, and that the survey was cancelled; however, Adams also admitted that Higby sent him the survey. A copy of the "Survey For Leonard Adams by James Higby" is contained in the appellees' addendum to their brief. Adams, again avowing that the survey was never made, said that Higby wanted to make the county road the property line. Adams testified that Higby set a piece of rebar in the middle of the county road and that Higby's survey set the boundary line down the middle of the county road. Adams testified that he put up the fence after Higby had been out there; that he put the fence up thirty or forty feet over from the road; and that at the same time he also put up a fence back to the north on the boundary line between the Vickers's property and his property. Adams stated that even though he had owned his property since 1956, he did not put up a fence until 2003. He stated that there had been previous fences there before he erected his fence, and that the line Higby established was well to the west of where he claimed the fence to be, although he again reiterated that Higby did not make a survey. Adams said that when he put up his fence in 2003 it was west of the survey line and that the fence line was "not real close" to Atkins's west line.

Regarding his south corner adjacent to the Vickerses, Adams said that when he purchased his property, there was a corner rock about six inches square that had remained on the property until Mr. Tate, the Vickerses' predecessor in title, bought the property and moved it. Adams said that the corner marker was moved over onto his driveway eighty-one feet west of where it had been, and that it remained there until the gas line was placed there. Adams said that when the main gas line was placed, he advised the gas company's engineer surveyor as to where the corners were and showed him the aluminum pipe with a cap on it that had been set by Woods when he performed the survey.

James Higby testified that he was the county surveyor and was also a self-employed surveyor. He said that Adams requested that he run a line between two existing monuments. Higby said that Adams told him that both of the corners had been clearly marked and he could walk him to each of the corners. Higby said that he was unable to find the corners that day, so he could not do

anything at that time. He said that Adams stopped his employees while they were shooting the lines because Adams did not like the location. Higby testified that he marked the north half of the line with orange flags and marked the line all the way from the corner he established all the way to the four surface corners at Adams's northeast corner, and that that was the extent of his work. Higby said that he was able to locate the two corners and tried to shoot the line between them. He also said that he did some research at the Forest Service Office and checked out the plat that had been surveyed by James Woods, as well as the monuments and the reference distances. He said that the Forest Service corner cards and the plat checked out correctly, and that he found the monuments that had Mr. Woods's license and registration number stamped on the cap. Higby testified that he believed the line was where it had always been. He said that the two corners he found on the monuments were already the southeast corner of Atkins's property and the northwest corner of the Vickerses' property and that those points were correct. Higby said that the line ran from the southeast corner of Adams's property to the northeast corner of Adams's property.

Higby said that Adams never pointed out any corners established by Mr. Woods, and that Adams did not show him a car axle driven into the ground near the county road. Higby said that after Adams maintained that he did not perform the survey correctly, he took his plat and compared it to all of the azimuths and distances that were on the plat Adams had, which was the Forest Service plat prepared by Jim Woods. Higby testified it "all checked out real good," and that his line was consistent with the line shown on the Forest Service plat. Higby further testified that, after Adams said that his survey was not accurate, he met with Adams because he wanted to show Adams that his survey was the same as the one Adams had. Higby said that the dotted lines on the Woods' instrument indicated a reference point, not the property line, which was indicated by the solid line. Higby testified that Adams erected the fence after Higby had gone out to the property. Higby also stated that there were no markers between the southeast corner and the northeast corner of Adams's property. He reiterated specifically that Adams had never said anything to him about an axle. Higby's testimony concluded with the statement that the east line shown on the Woods' survey was the same line depicted on his survey.

Appellee Robert Vickers testified that he obtained his property around June 1973 and that Adams owned his property prior to that time. Vickers said that the northwest corner of his property was set by the United States Forest Service, and that it was a two-and-a-half foot high rock. Vickers said that there was also a mark on the southwest corner on a large cherry tree, and there was an old fence running down the side of the road to the corner. Vickers said that when the gas line came in and a gas line right-of-way was established, the southwest corner of his property was pushed out and that two posts were set with blue paint on top of them. He testified that Adams had had a fence tied from post-to-post for years. Vickers said that was the marking of the boundary line; that it was just east of the road about three or four feet; and that it would have been west of the Higby line about seventeen feet on the south and about ten feet on the northwest side. Vickers said that if they went by the Higby survey, he would be giving up about an average of a fifteen-foot strip on his east side and that it was cutting into his deed line.

Vickers said that Adams put up a fence that went across the gas line right-of-way about fifty or sixty feet going north from the road and west of the Higby line that was "pretty well where the John Harbison and Roy Tate line was established in the 40s and 50s." Vickers said that Adams came to him to tell Vickers that he had contacted James Higby to come out and establish the property boundaries between the Adamses', the Vickerses', and Atkins's properties. Vickers said he told Adams that was good and that a survey would stand up in court. Vickers said that, when Higby completed the survey, Higby made Vickers aware of the line established between Vickers and Adams. Vickers testified that the property line ran right up the ditch line parallel to the Atkins's fence, which would be just west of Low Gap Road after it turned south and west of Atkins's fence along the ditch line, approximately six feet. Vickers said that either on February 29, 2004, or the morning after, he noticed a line of fence posts running across Atkins's field. Vickers said that his dogs had "raised cane" that night for two or three hours. Vickers said that the fence was constructed at the southern boundary of his property, starting where the old fence was located, and that it fenced up the east side of Low Gap Road, approximately fifty to sixty feet and then turned back north across his property for one hundred feet. Vickers said that Adams later completed the fence and that the fence ended up at his northwest corner where Jim Woods and Bill Lane established

the corner. Vickers testified that the fence was forty to fifty feet east of where the boundary line should be.

Vickers said that the Forest Service had a "traveler's point" just south of the Adamses' right-of-way. Vickers testified that he and Adams measured from the traveler's point where the line would be, and it came within a foot of where Higby had run the line. Vickers said that the fence Adams constructed gradually fed over onto his property and that when it got to the south side of the Adamses' property, it was more than forty to fifty feet onto the Vickerses' property that was under the Adamses' fence. Vickers said that the fence Adams put up was approximately seventeen or eighteen feet from where Higby had established the line. Vickers said that he accepted the Higby line, and he agreed that according to the Higby line his line was twenty-two feet east of the private roadway off Low Gap Road.

Appellee Jerry Atkins testified that he purchased his property in 1994; that at that time, it was fenced; and that the fencing was still the same fencing that was there when he purchased the property. Atkins said that, as far as he knew, the fence has always been in the same place, except that a locust post was moved on the corner of the road so that the bus could get around the corner. Atkins said that Adams had never made any use of the property. He testified that Adams had put his fence up in 2004.

Harold Humerickhouse testified that he had been employed by the United States Forest Service as a boundary manager and that he was familiar with the property involved in the boundary dispute. He said that he found all of the original corners in place that were set by the Forest Service in 1982 and 1984, and that they had not been moved. He said that in relationship to the property owned by the Adamses, corner H-16 was in the general vicinity of the southeast corner of the Adamses' 160 acres and the F-16 marker was at the northeast corner. Humerickhouse said that the records from the Forest Service for corner H-16 showed "north nineteen and a half west, twenty-four point nine feet, a twenty-two inch red oak snag with the Forest Service bearing tree tag; number two at the south fifty-three and a half east fifteen point two feet the six inch maple tree," with the tags on all of the trees; that the corner monument was in place; and that "everything checked out."

Humerickhouse said that, at his request, Higby was with him when he went to the property; he had hired Higby so that he could testify that it was the same corner that Higby had used in the

survey. He said that he took Higby to each of the corners to make sure that they were exactly the same and had not been moved. He testified that the northeast corner and the southeast corner were connected by solid lines. He said that the drawing showed two things — the dotted line depicted Adams's claim and the solid line depicted the actual position of the corners when the section was properly divided per the survey. Humerickhouse explained that the survey did not give Adams more land, it just described where his line was located and that there was property he was not using to the east and to the west. He testified that the Woods and the Higby surveys established the line consistently.

After Humerickhouse's testimony, Adams testified again, stating that he never told Jim Woods that his line was what he had depicted by the dotted line. Though Adams agreed that the line should be the solid line, he stated that he did not believe that the corners were exactly set in place. Adams confirmed that the northeast corner was located where Humerickhouse located it, but he asserted that the southeast corner had been moved and that the corner marker could not be found. Adams reiterated that it was his position that the corners shown had been moved, at least the southeast corner. He again said that the northeast corner was okay, but then he said that the northeast corner had been moved to the west. Adams concluded by testifying that he erected the fence so that he could determine where the property line was located.

Although equity cases are reviewed de novo on appeal, a trial court's finding of fact concerning the location of a boundary line will not be reversed unless it is clearly erroneous, meaning that although there may be evidence to support the finding of fact, the court is left with the definite and firm conviction that a mistake has been committed. *Hattabaugh v. Housley*, 93 Ark. App. 167, 217 S.W.3d 132 (2005) (citing *Hedger Bros. Cement & Material, Inc. v. Stump*, 69 Ark. App. 219, 10 S.W.3d 926 (2000)).

Higby's survey was not at odds with the Forest Service survey — in fact, it was completely consistent with the Forest Service survey. No other survey was presented that refuted either the Higby or the Forest Service survey. Humerickhouse's testimony corroborated both surveys. The only evidence that conflicted with the surveys was Adams's testimony, in which he asserted that at least one of the corners, and maybe both of them, had been moved. This court defers to the trial court's assessment of the credibility of witnesses, and it is apparent that the trial court

found the survey evidence to be more credible. We affirm the trial court's finding with regard to the boundary line, as its finding was not clearly erroneous.

On cross-appeal, appellees/cross-appellants argue that the trial court erred in denying their motion for attorney's fees pursuant to Arkansas Code Annotated section 16-22-309 (Repl. 1999). Subsection (a)(1) provides:

> In any civil action in which the court having jurisdiction finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party or his attorney, the court shall award an attorney's fee in an amount not to exceed five thousand dollars ($5,000), or ten percent (10%) of the amount in controversy, whichever is less, to the prevailing party unless a voluntary dismissal is filed or the pleadings are amended as to any nonjusticiable issue within a reasonable time after the attorney or party filing the dismissal or the amended pleadings knew, or reasonably should have known, that he would not prevail.

Subsection (b) of this statute sets forth what is required to find that an issue is nonjusticiable:

> In order to find an action, claim, setoff, counterclaim, or defense to be lacking a justiciable issue of law or fact, the court must find that the action, claim, setoff, counterclaim, or defense was commenced, used, or continued in bad faith solely for purposes of harassing or maliciously injuring another or delaying adjudication without just cause or that the party or the party's attorney knew, or should have known, that the action, claim, setoff, counterclaim, or defense was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification, or reversal of existing law.

Subsection (d) provides, "On appeal, the question as to whether there was a complete absence of a justiciable issue shall be determined de novo on the record of the trial court alone." See also *Drummond v. Shepherd*, 97 Ark. App. 244, 247 S.W.3d 526 (2007).

Here, it was Adams's confirmed actions that motivated appellees to file their lawsuit. For no apparent reason, Adams told Vickers that he was going to have a survey performed, and it was ostensibly agreed that the parties would be bound by the survey. When Leonard Adams did not agree with the property line

established by the Higby survey, he erected fenceposts at night on what he asserted to be the property line, knowing that two earlier surveys, together with the Higby survey that Adams himself commissioned, all confirmed that where he placed the fenceposts was not the property line. There is no evidence in the record, other than Adams's bare, unfounded assertion, that the boundary line established and confirmed by all of the surveys was not in fact the boundary line. Section 16-22-309 applies with equal force against the losing party whether it is an "action, claim, setoff, counterclaim, or defense." From this record, on de novo review, we hold that there was a complete absence of a justiciable issue on Adams's part in his defense. We reverse and remand this issue to the trial court for determination of the appropriate award of attorney's fees.

Although none of the parties mention it, there is a remaining issue in that the order did not establish the boundary line by specific description. In *Jennings v. Burford*, 60 Ark. App. 27, 958 S.W.2d 12 (1997), when the trial court's decree described the boundary line as "the meandering fence reflected by the Askew survey," this court granted leave to the trial court to amend the decree by adding a more specific legal description of the boundary line reflected by the Askew survey and affirmed the case as modified. In the present case, the trial court found that the boundary line of the Higby survey was the true and correct boundary between the parties' respective properties. We therefore grant the trial court leave to amend the decree by adding the specific legal description contained in the Higby survey so that the boundary line is established by specific description.

Affirmed in part; reversed and remanded in part; leave granted to the trial court to amend the decree so that the boundary is established by specific description.

ROBBINS and MILLER, JJ., agree.

John COLEMAN *v.* PRO TRANSPORTATION, INC.
& Commerce & Industry Ins. Co.

CA 06-525 249 S.W.3d 149

Court of Appeals of Arkansas
Opinion delivered February 7, 2007

[Rehearing denied March 14, 2007.*]

* GLADWIN and VAUGHT, JJ., would grant.

Whetstone & Spears, by: *Kevin Mark Odum*, for appellant.

Huckaby, Munson, Rowlett, & Moore, P.A., by: *Carol Lockard Worhly*, and *Jarrod S. Parrish*, for appellee.

BRIAN S. MILLER, Judge. John Coleman appeals the Arkansas Workers' Compensation Commission's-ruling (1) denying him temporary-total-disability (TTD) compensation; (2) awarding him only four-and-a-half percent anatomical-impairment rating and ten percent wage-loss disability; and (3) admitting the surveillance evidence of Pro Transportation, Inc., and Commerce & Industry Insurance Company (collectively Pro Transportation). We affirm the Commission's denial of temporary-total disability benefits and its decision regarding the admittance of the surveillance evidence. However, we reverse and remand the Commission's decisions regarding anatomical-impairment rating and wage-loss disability.

Coleman is fifty-two years of age and has a GED and two years of post-secondary education. He began working for Pro Transportation as a long-haul truck driver in 1999. The accident giving rise to this claim occurred on September 19, 2002, when the load Coleman was hauling shifted, causing his truck to overturn. Coleman was initially treated for injuries sustained in the accident in the emergency room at Baptist Medical Center. He was later treated by his family physician until he was directed by Pro Transportation to visit its designated medical provider, Dr. Scott Carle, on November 26, 2002.

Jim White, Pro Transportation's director of safety, notified Coleman in a certified letter dated November 27, 2002, that Dr. Carle had released Coleman to light duty effective November 26, 2002. The letter advised Coleman of a light-duty position open at Pro Transportation and directed him to report for his assignment on December 2, 2002. Coleman, however, failed to appear for light-duty work. He later testified that he received the certified letter and that he made an effort to go in, but could not make it because of difficulty driving. White testified that, according to the release, Coleman was still under medical care but could come back to work in some capacity.

Dr. Andrew Prychodko became Coleman's treating physician in February 2003. He diagnosed Coleman with lumbar back pain with radiculopathy, cervical strain, neck pain, and shoulder impingement. Dr. Prychodko issued an "off work" slip reflecting that Coleman was unable to work from September 19, 2002,

through March 7, 2003. Regarding the basis for the "off work" slip, Dr. Prychodko testified that Coleman was not ready to be released to "any kind of higher level of activity" at that time. Dr. Prychodko later extended the off-work date through July 3, 2003.

Dr. Prychodko testified that a functional capacity evaluation (FCE) was inappropriate as of May 23, 2003, because Coleman had begun physical therapy, which was progressing well, and because Coleman had been referred to a pain-management specialist for his lower back pain. Approximately three months later, Coleman's case manager arranged an FCE, which was performed on August 27, 2003. The results of the FCE suggested that Coleman's efforts were less than maximal and did not represent his true maximal tolerances. The evaluator concluded that Coleman had the ability to work at least at a medium level during an eight-hour work day.

In a letter dated October 8, 2003, Dr. Prychodko certified Coleman as having reached maximum medical improvement (MMI). The letter also stated that:

> [Coleman's] lumbar impairment is DRE Category II (Guides to the Evaluation of Permanent Impairment, 4th Edition, Ch 3, p 102) giving 5% to the whole person. The cervical impairment is also DRE Category II (Guides, Ch 3, p 104) at 5%. The other injuries have healed and are rated a 0%. The combined whole person impairment rating is 10%.

Dr. Jim J. Moore, a neurologist, evaluated Coleman on one occasion at the request of Pro Transportation. In his September 24, 2003, evaluation of Coleman, he found that Coleman could not return to trucking; however, Coleman could return to working activities. In a letter dated November 11, 2003, Dr. Moore agreed with Dr. Prychodko's October 8, 2003 letter. In the November 11 letter, Dr. Moore wrote: "I have also received a report from Dr. Prychodko dated 10-08-03 in which he describes suggesting an impairment rating based upon DRE Category II both cervical and lumbar at 5% each or a total of 10%. I have no quarrel with this rating."

On February 6, 2004, counsel for Pro Transportation wrote a letter to Dr. Moore stating that Dr. Moore's November 11, 2003 ten-percent impairment rating for Coleman did not address the impairment rating pursuant to Table 75 of the AMA Guides to Evaluation of Permanent Impairment, 4th Edition. In the margins of counsel's letter appear the following hand written notes:

5%	Cx	
5%	L	10%
		PPD

These notes, along with illegible words that preceded them, were scratched through and below these notes appeared:

Table 75 AMA 4th Ed.

II	A	
	Cx	0%
	L	0%
	B Cx	4%
	L	5%
Average	Cx	2%
	L	2½% PPD
		/s J. Moore M.D.

The record is devoid of any explanation for either the scratched through, illegible words, the scratched through notes indicating ten percent ppd, or the second set of notes indicating "Average Cx 2%, L 2 ½ % PPD." Further, nothing appearing on counsel's February 6 letter indicates that the notations made by Dr. Moore were written with any medical certainty.

In September 2004, Dr. Prychodko testified in a deposition. On direct examination, he testified that he "assigned a 5% for the lumbar and 5% for the cervical. I stand by those." He further stated that the five-percent impairment rating on the lumbar spine was based upon an annular tear. Dr. Prychodko testified that the AMA Guides assign a five-percent permanent-impairment rating for an annular tear. He testified that the five-percent impairment rating to the cervical spine was based upon "uncinate hypertrophy and muscle spasms." He said that the uncinate hypertrophy was "an objective change" and that a muscle spasm is an objective finding.

On re-direct examination, Dr. Prychodko testified that spondylosis was identified by the MRI performed on Coleman's back and therefore Category III, Section A, of the Guides applied to Coleman's case. Although he based his prior rating on Category II, Section B, he stated that Category III, Section A was a closer match. Category III, Section A provides for a permanent impairment rating of six percent. Therefore, Coleman's permanent impairment rating was six percent to the cervical spine and five percent to the lumbar spine, totaling eleven percent. He testified that Coleman also suffered from "back, neck and chest pains."

Pro Transportation terminated Coleman for abandoning his job. At the time of his injury, Coleman was earning $47,000 per year as a long-haul truck driver for Pro Transportation. After termination, he began working at Lowe's in November 2003, where he earned approximately $17,000 per year.

Coleman sought workers' compensation benefits based upon the eleven-percent permanent-impairment rating to the body as a whole; wage-loss disability based upon the reduction in his income caused by his inability to perform his previous work; additional medical care; and temporary total disability. The Administrative Law Judge (ALJ) found that the injury to Coleman's lumbar spine and cervical spine resulted in a permanent impairment of eleven percent to the body as a whole and that he had sustained a wage-loss of forty-five percent. The ALJ also ordered Pro Transportation to pay for Coleman's future medical treatment and awarded Coleman temporary-total-disability benefits for the time period beginning on September 20, 2002, and ending September 29, 2003. Finally, the ALJ ruled that a surveillance tape that Pro-Transportation sought to introduce was inadmissable because it was obtained after the discovery cut-off date.

On appeal, the Commission found that Coleman failed to prove he was entitled to temporary-total-disability compensation. The Commission found that he was entitled to only a four-and-one-half percent anatomical rating and only ten percent for wage-loss disability. The Commission overturned the ALJ's award of additional medical expenses. In doing so, it found that both Drs. Moore and Prychodko determined that Coleman reached MMI on November 11, 2003, and therefore, he was not entitled to any additional medical treatment after that date. The Commission also found that the surveillance tape was admissible.

This court reviews a decision of the Workers' Compensation Commission to determine whether there is substantial evidence to support it. *Rice v. Georgia-Pac. Corp.*, 72 Ark. App. 149, 35 S.W.3d 328 (2000). Substantial evidence is that relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *Wheeler Constr. Co. v. Armstrong*, 73 Ark. App. 146, 41 S.W.3d 822 (2001). We review the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings and we affirm if its findings are supported by substantial evidence. *Geo Specialty Chem., Inc. v. Clingan*, 69 Ark. App. 369, 13 S.W.3d 218 (2000). We do not review the decision of the administrative law judge but rather we determine whether

the Commission's decision upon its de novo review is supported by substantial evidence. *See, e.g., Jones v. Scheduled Skyways, Inc.*, 1 Ark. App. 44, 612 S.W.2d 333 (1981). 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 if its decision displays a substantial basis for the denial of relief. *Rice, supra.*

We first address Coleman's evidentiary issue. The ALJ issued a pre-hearing order on August 5, 2004, stating "All medical reports and document evidence . . . shall be identified and furnished to opposing party within seven (7) days of authorship [the date reflected on the document]. Failure to comply with this provision of the pre-hearing order shall result in the exclusion of the document(s)." Pro Transportation had surveillance conducted on Coleman from September 20, 2004, through September 24, 2004. The surveillance conducted on September 23 and 24 was after the seven-day deadline. The ALJ excluded the surveillance evidence but the Commission reversed the ALJ and admitted the evidence.

Coleman claims that the seven-day deadline was September 22, 2004, because the hearing was set for September 29, 2004. He states that the introduction of the surveillance evidence is in direct disobedience of the pre-hearing order. He also asserts that his counsel was unable to depose Pro Transportation's investigator because the evidence was not provided until the day before the hearing and that the investigator was not present at the hearing to authenticate the report or testify about the video. Coleman argues that the Commission made the ALJ's pre-hearing order worthless by reversing the ALJ's ruling and that the Commission effectively wiped out the seven-day rule.

The Commission relied on *Bryant v. Staffmark, Inc.*, 76 Ark. App. 64, 61 S.W.3d 856 (2001), in overturning the ALJ's decision to exclude the surveillance evidence. In *Bryant*, this court wrote:

> The Workers' Compensation Commission has broad discretion with reference to admission of evidence, and its decision will not be reversed absent a showing of abuse of discretion. *Brown v. Alabama Elec. Co.*, 60 Ark. App. 138, 959 S.W.2d 753 (1998). The Commission is given a great deal of latitude in evidentiary matters; specifically, Arkansas Code Annotated section 11-9-705(a) (Repl. 1997) states that the Commission "shall not be bound by technical or statutory rules of evidence or by technical or formal rules of procedure." Additionally, the Commission is directed to "conduct

> the hearing in a manner as will best ascertain the rights of the parties." Ark. Code Ann. § 11-9-705(a); *Clark v. Peabody Testing Service*, 265 Ark. 489, 579 S.W.2d 360 (1979).
>
> . . .
>
> In our view, it is clear that the Commission should be more liberal with the admission of evidence, rather than more stringent. It is neither fair no logical to summarily disallow rebuttal testimony, nor is it appropriate to require (as stated in the pre-hearing order) that all possible rebuttal witnesses be revealed seven days prior to the hearing. Such an order is inconsistent with a large body of law that does not require notice for rebuttal witnesses. *See Parker v. State*, 268 Ark. 441, 597 S.W.2d 586 (1980) (citing *Perkins v. State*, 258 Ark. 201, 523 S.W.2d 191 (1975)).

76 Ark. App. at 69, 61 S.W.3d at 859. Coleman argues that *Bryant* can be distinguished from this case because *Bryant* dealt with rebuttal evidence and this case involves substantive evidence in Pro Transportation's case in chief.

In ruling that the surveillance evidence was admissible, the Commission also referenced Ark. Code Ann. § 11-9-705(c) in its opinion. Section 11-9-705(c)(2)(A) (Repl. 2002) provides in pertinent part:

> Any party proposing to introduce medical reports or testimony of physicians at the hearing of a controverted claim shall, as a condition precedent to the right to do so, furnish to the opposing party and to the commission copies of the written reports of the physicians of their findings and opinions at least seven (7) days prior to the date of the hearing. However, if no written reports are available to a party, then the party shall, in lieu of furnishing the report, notify in writing the opposing party and the commission of the name and address of the physicians proposed to be used as witnesses at least seven (7) days prior to the hearing.

The Commission found that the statute does not apply to non-medical evidence. Coleman relies on this statute in his argument and claims that the ALJ required that *all* exhibits were to be exchanged seven days prior to the hearing.

In response to Coleman's arguments, Pro Transportation contends that section 11-9-705(c)(2)(A) deals with medical reports or testimony of physicians and not surveillance reports. It also

argues that the surveillance reports and videos at issue were not available seven days before the hearing and that the rule itself facilitates flexibility in such situations.

Arkansas Code Annotated section 11-9-705(a) states that the Commission "shall not be bound by technical or statutory rules of evidence or by technical or formal rules of procedure." Furthermore, the Commission is directed to "conduct the hearing in a manner as will best ascertain the rights of the parties." Ark. Code Ann. § 11-9-705(a). Pro Transportation further contends that the admission of the surveillance evidence serves the interest of ascertaining the rights of the parties because it is probative of the issue of Coleman's physical limitations and the credibility of his witnesses.

Because the Commission complied with the statutory directive to conduct the hearing in a manner that would best ascertain the rights of the parties, we affirm the Commission's decision to admit the surveillance evidence. Moreover, even if the seven-day provision found in section 11-9-705(c)(2)(A) applies to non-medical surveillance evidence, as argued by Coleman, the rule does not mandate the exclusion of all such evidence. Section 11-9-705(c) provides further, in pertinent part:

> (2)(B) If the opposing party desires to cross-examine the physician, he or she should notify the party who submits a medical report to him or her as soon as practicable, in order that he or she may make every effort to have the physician present for the hearing.
>
> (3) A party failing to observe the requirements of this subsection may not be allowed to introduce medical reports or testimony of physicians at a hearing, except in the discretion of the hearing officer or the commission.
>
> (4) The time periods may be waived by the consent of the parties.

Section 11-9-705(c)(3) provides that the ALJ and the Commission have discretion in determining whether to admit or exclude this evidence, and we hold that the Commission here did not abuse its discretion in admitting the surveillance evidence.

We next address the Commission's decision regarding Coleman's claim for additional medical care. The Commission 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). Additionally, the Commission cannot arbitrarily disregard any witness's testimony. *Freeman v. Con-Agra Frozen Foods*, 344 Ark. 296, 40 S.W.3d 760 (2001).

The Commission reversed the ALJ's ruling requiring Pro Transportation to pay all of Coleman's reasonable and necessary medical expenses from the date of the compensable injury. The Commission ruled that Coleman was not entitled to any further medical treatment after November 11, 2003. Coleman argues that additional medical care was warranted because Dr. Prychodko was the only doctor familiar with his condition and because Pro Transportation's independent medical examiner failed to say whether additional medical care was necessary.

Coleman submits that, while it is the province of the Commission to weigh conflicting medical evidence, the Commission may not arbitrarily disregard medical evidence or the testimony of any witness. Because the only medical evidence in the record about his need for additional medical care comes from Dr. Prychodko, Coleman argues that the Commission simply ignored Dr. Prychodko's testimony. Coleman claims that, based upon the facts in the record, fair-minded persons could not have reached the same conclusion as the Commission concerning his entitlement to continued medical care.

We hold that the Commission's determination regarding additional medical treatment is supported by substantial evidence. Dr. Prychodko stated only that Coleman could "possibly" need physical therapy and that there "could be a possibility" he may need lumbar epidural steroid injections at some point. The medical evidence also included the opinions of Drs. Moore and Carle, who both placed Coleman at MMI on November 11, 2003. Indeed, Dr. Prychodko later agreed with the opinions of Drs. Moore and Carle. Therefore, we find that there is substantial evidence supporting the Commission's denial of additional medical care.

Coleman also argues that he is entitled to temporary total disability (TTD) through September 29, 2003. A claimant is entitled to TTD for that period within the healing period during which he suffers a total incapacity to earn wages. *Ark. State Highway Dep't v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). The ALJ found that Coleman was temporarily and totally disabled beginning on September 20, 2002, and continuing through the end of his healing period, which Dr. Prychodko determined to be September 29, 2003. The Commission reversed the ALJ because the Commission found that there was a lack of credible evidence supporting the ALJ's decision. Coleman argues that the Commission's finding is totally contrary to the medical records, which clearly indicate that all of his doctors were of the opinion that he should not work during the healing period, that ended on September 29, 2003.

Pro Transportation contends that the Commission's decision was supported by substantial evidence. Pro Transportation points out that Coleman was offered modified-duty employment via certified letter dated November 27, 2002, and that he never reported for work and never provided any medical justification for his refusal.

Arkansas Code Annotated section 11-9-526 (Repl. 2002) makes it clear that:

> If any injured employee refuses employment suitable to his capacity offered to or procured for him, he shall not be entitled to any compensation during the continuance of his refusal, unless in the eyes of the Workers' Compensation Commission, the refusal is justifiable.

Coleman offered no persuasive evidence or argument regarding his refusal to return to light-duty employment in November 2002. Moreover, Dr. Carle's report contains the following entry:

> Post-physical therapy encountered today, the patient was adamant upon refusing employment with restrictions. At that time, he appeared to be overtly uncooperative with recommending participation and temporary appropriate work activity. The patient's main concern was not going back to work because he would get half pay. He also stated that "my company did this to me, and I want to be back to normal before I go back to work."

Coleman was released to return to work on at least two occasions. He failed to return to work both times. Therefore, we affirm the Com-

mission's denial of temporary-total-disability compensation because it is supported by substantial evidence.

We next consider whether the Commission erred in reducing Coleman's permanent impairment rating from eleven percent to four-and-a-half percent. Coleman argues that the ALJ assigned him an eleven-percent impairment rating primarily based upon the deposition testimony of his treating physician, Dr. Prychodko, and that Dr. Moore initially agreed with this rating. Coleman asserts that, when Dr. Moore was directed by counsel for Pro Transportation by letter to rate Coleman "according to Table 75" of the AMA Guides, he simply wrote numbers in the margin of the letter which can be added to total four-and-one-half percent.

Coleman claims that nowhere in the record does Dr. Moore express his opinion of a four-and-one-half-percent permanent-impairment rating to a reasonable degree of medical certainty or otherwise. He also states that the Commission resorted to speculation and conjecture in reducing the impairment rating to four-and-one-half percent and that this is something the Commission is not allowed to do in reaching a conclusion. *See Smith-Blair, Inc. v. Jones*, 77 Ark. App. 273, 72 S.W.3d 560 (2002) (stating that speculation and conjecture cannot substitute for credible evidence).

Pro Transportation contends that Dr. Prychodko based the impairment rating of eleven percent upon improper subjective criteria including pre-existing degenerative problems, muscle guarding, and range of motion testing. Pro Transportation also contends that Dr. Prychodko used a method of assigning an impairment rating that allows consideration of non-verifiable, subjective complaints when assessing permanent-partial impairment.

The record indicates that the Commission based its decision to reduce Coleman's disability rating from eleven percent to four-and-one-half percent on the February 6, 2004 correspondence between counsel from Pro Transportation and Dr. Moore. This is not disputed, although the correspondence is unclear and nothing in the record explains the correspondence.

The Commission rejected the ten-percent impairment rating assigned by Dr. Prychodko in his October 8, 2003 letter and it rejected the eleven-percent impairment rating assigned by Dr. Prychodko in his September 2004 deposition testimony. In doing so, the Commission recognized that the March 2003 lumbar MRI

revealed that Coleman had "degenerative bulging" and an "annular tear." The Commission, however, stated that nothing in the *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993) allowed a permanent-impairment rating to be assigned based upon an annular tear. The Commission cited its own case precedent for this proposition.

There is no dispute that Dr. Prychodko became Coleman's treating physician in February 2003 and that Dr. Moore saw Coleman on one occasion on September 24, 2003. Dr. Prychodko assigned a ten-percent permanent impairment rating to Coleman on October 8, 2003, and Dr. Moore agreed with that rating in a letter that he penned on November 11, 2003. Counsel for Pro Transportation wrote a letter to Dr. Moore two months later asking Dr. Moore to re-evaluate his opinion regarding the ten-percent impairment rating and Dr. Moore wrote unexplained notes in the margin.

Dr. Prychodko testified under oath that he assigned a five-percent impairment rating to Coleman's cervical spine based upon uncinate hypertrophy and muscle spasms. Dr. Prychodko further testified that he assigned this rating according to the AMA Guides to permanent impairment. Dr. Prychodko testified that he assigned a six-percent impairment rating to Coleman's lumbar spine based upon an annular tear and spondylosis. He testified that the six-percent rating was assigned according to the AMA Guides to permanent impairment. Dr. Prychodko also listed a number of other findings such as back pain, neck pain and soreness, and chest pain.

Dr. Prychodko's deposition testimony is substantial evidence supporting Coleman's claim for five-percent permanent impairment to the cervical spine and six-percent permanent impairment to the lumbar spine. This is true because Ark. Code Ann. § 11-9-704(c)(1)(B) (Repl. 2002) provides that "[a]ny determination of the existence or extent of physical impairment shall be supported by objective and measurable physical or mental findings." Further, this court has recently held that "there is no requirement that medical testimony be based solely or expressly on objective findings, only that the record contain supporting objective findings." *Singleton v. City of Pine Bluff*, 97 Ark. App. 59, 244 S.W.3d 709 (2006). Dr. Prychodko's opinions were supported by both objective and subjective findings. Although the subjective findings would be insufficient by themselves to support Coleman's

claims, these findings are undergirded by objective findings. Therefore Coleman presented sufficient evidence to support his claim for an impairment rating of eleven-percent permanent-partial disability.

We would not overturn the Commission's ruling if this were simply a case of dueling doctors' opinions. In this case, however, there is no reliable evidence rebutting the substantial evidence showing that Coleman should be assigned a five-percent permanent-impairment rating to the cervical spine and a six-percent permanent-impairment rating to the lumbar spine. The only item in the record supporting Pro Transportation's assertion that Coleman should be assigned a four-and-one-half percent impairment rating is the letter from Pro Transportation's counsel containing the notes in the margin. This is simply insufficient evidence.

Moreover, it is undisputed that Dr. Moore saw Coleman one time and penned a letter agreeing with Dr. Prychodko's initial ten-percent rating. Pro Transportation's counsel later asked Dr. Moore to re-evaluate his opinion in light of Table 75 of the AMA Guides and Dr. Moore made notes in the margins of the letter written to him. Although those notes can perhaps be read as averaging impairment ratings which resulted in a four-and-one-half percent rating, Dr. Moore offered no further comment or even a statement that it was in fact his opinion. On the other hand, when Dr. Prychodko was asked to reassess Coleman using Table 75, Dr. Prychodko explained that it would be inappropriate to use Table 75 in the fashion directed by Pro Transportation's counsel because it was designed to be used with range-of-motion testing. Dr. Prychodko further stated that range-of-motion testing is impermissible in assessing anatomical impairment. Dr. Prychodko also stated that if Table 75 were used appropriately, it would still result in a total eleven-percent anatomical rating.

Other than Dr. Moore's November 11, 2003 letter finding that Coleman should be assigned a ten-percent permanent-impairment rating, Pro Transportation has failed to put on any other evidence satisfying Ark. Code Ann. § 11-9-704(c)(1)(B). Here, the scribbled notes of Dr. Moore failed to give any indication of the meaning of or basis for his notes. Dr. Moore's notes, in this instance, not only fail to meet the requirements of the statute but they also seem to indicate that legal counsel was dictating how Dr. Moore was to use the AMA guides. The Commission then speculated as to the meaning of Dr. Moore's scribbles and accepted

them without any evidence to support a rating as is required by Ark. Code Ann. § 11-9-704(c)(1)(B).

The Commission disregarded the evidence that conformed to Ark. Code Ann. § 11-9-704(c)(1)(B) and accepted the evidence that failed to comply with the statute. Dr. Prychodko's statements and sworn testimony, as well as Dr. Moore's November 11, 2003 letter, all complied with the statute while Dr. Moore's margin notes did not. In short, while the Commission is free to weigh the medical evidence, it cannot arbitrarily disregard medical evidence. *See Patchell v. Wal-Mart Stores*, 86 Ark. App. 230, 184 S.W.3d 31 (2004). Here, the Commission's decision to disregard the considerable evidence of the eleven-percent impairment rating goes beyond a mere weighing of the evidence, and is not supported by substantial evidence.

We have often said that, while the substantial evidence standard of review serves to insulate the Commission from judicial review, a total insulation would render our function in these cases meaningless. *See, e.g., Boyd v. Dana Corp.* 62 Ark. App. 78, 966 S.W.2d 946 (1998). Accordingly, we reverse and remand to the Commission to assign the impairment rating consistent with the AMA Guides and the clear and substantial evidence in this case.

Coleman also claims that he is entitled to wage-loss benefits of at least forty-five percent. He cites Ark. Code Ann. § 11-9-522 (Repl. 2002), which provides in pertinent part:

> (b)(1) In considering claims for permanent partial disability benefits in excess of the employee's percentage of permanent physical impairment, the Workers' Compensation Commission may take into account, in addition to the percentage of permanent physical impairment, such factors as the employee's age, education, work experience, and other matters reasonably expected to affect his or her future earning capacity.
>
> (2) However, so long as an employee, subsequent to his or her injury, has returned to work, has obtained other employment, or has a bona fide and reasonably obtainable offer to be employed at wages equal to or greater than his or her average weekly wage at the time of the accident, he or she shall not be entitled to permanent partial disability benefits in excess of the percentage of permanent physical impairment established by a preponderance of the medical testimony and evidence.

> (c)(1) The employer or his or her workers' compensation insurance carrier shall have the burden of proving the employee's employment, or the employee's receipt of a bona fide offer to be employed, at wages equal to or greater than his or her average weekly wage at the time of the accident.

Coleman argues that the record shows he will never work again as an over-the-road driver earning $47,000 per year. He now works at Lowe's earning $17,000 per year, which amounts to a sixty-percent wage loss. Therefore, he argues that he proved at least the forty-five percent wage loss found by the ALJ.

Pro Transportation counters that the wage-loss disability analysis is not limited to a determination of the extent to which Coleman can return to his previous employment, and that the Commission must examine his employability as a whole. It argues that Coleman's FCE indicated that he made less than maximum effort during the testing, that Coleman was able to perform medium-duty employment, and that Dr. Prychodko conceded that he expected Coleman to have at least reached the medium level of functioning given the strides he had been making in the spring and summer of 2003. Pro Transportation further argues that Coleman's education and experience are significant factors in finding that the Commission relied on substantial evidence when it determined his entitlement to wage-loss disability.

In light of our reversal of the Commission's four-and-one-half percent anatomical rating, we reverse and remand the Commission's decision awarding ten percent wage-loss disability. We direct the Commission to consider the wage-loss award in light of the increase in Coleman's anatomical rating.

Finally, Coleman argues that the Commission erred in reversing the ALJ, citing *Kimbell v. Ass'n of Rehab Industry & Business Companion*, 366 Ark. 297, 235 SW.3d 499 (2006). In *Kimbell*, Chief Justice Hannah expressed in a footnote to the majority opinion his willingness to address the issue of whether a consitutional violation may result when the Commission and a reviewing court are permitted to ignore the findings of an ALJ, the only adjudicator to see and hear the witnesses. In that case, Justice Glaze further suggested in his concurring opinion that this issue should be raised, noting that previous opinions have pointed out the logical fallacy of permitting the Commission to make credibility determinations without having observed the witnesses and their demeanor.

In the present case, however, Dr. Prychodko testified via deposition and did not appear live before the ALJ. Therefore, the Commission had the same opportunity as the ALJ to review his testimony and assess his credibility. Moreover, we need not consider this issue because we are reversing the Commission's decision to reduce Coleman's anatomical rating on the basis that the Commission's decision is not supported by substantial evidence.

Affirmed in part; reversed and remanded in part.

HART, BIRD, and BAKER, JJ., agree.

GLADWIN and VAUGHT, JJ., dissent.

ROBERT J. GLADWIN, Judge, dissenting. The majority has determined that it is in a better position to weigh the conflicting evidence in this case than the Workers' Compensation Commission. This is not the function of this court; therefore, I dissent.

I agree with the majority on the four points in which they affirm the Commission, but I would also affirm on appellant's permanent-impairment rating and wage-loss benefits. There is no dispute that appellant, John Coleman, was entitled to a permanent-impairment rating. Dr. Prychodko, in his report of October 8, 2003, stated that appellant had reached maximum-medical improvement. He also found that his lumbar impairment is DRE Category II (Guides to the Evaluation of Permanent Impairment, 4th Ed., Chpt. 3, p. 102) giving five percent to the whole person. The cervical impairment is also DRE Category II (Guides, Ch. 3, p. 104) at five percent. The other injuries have healed and are rated at zero percent. The combined whole-person impairment rating was ten percent. Later, during his deposition testimony, Dr. Prychodko raised appellant's whole-person impairment rating to eleven percent. On November 11, 2003, Dr. Moore wrote that he had no quarrel with Dr. Prychodko's findings. Subsequently, appellees' attorney sent a letter to Dr. Moore, which stated:

> Thank you for your file notes on Mr. Coleman dated November 11, 2003. However, this report does not answer the question regarding Mr. Coleman's impairment rating according to Table 75. Please address this impairment rating pursuant to Table 75. Thank you. Dr. Moore.

In the margin of this letter is found the following handwritten note:

Table 75 AMA 4th Ed.

II	A	
	Cx	0%
	L	0%
	B Cx	4%
	L	5%
Average Cx		2%
	L	2½ ___ PPD
		J. Moore M.D.

The Commission weighed these notes along with the report of Dr. Prychodko and awarded appellant a permanent-impairment rating of four-and-a-half percent.

The majority concedes that "*the medical evidence bearing on the issue of Coleman's entitlement to the 11% rating is to some extent conflicting.*" (Emphasis added.) The majority further states that an attorney for one party dictated how Dr. Moore should use the AMA guides. That is simply not supported by the record. Dr. Moore was asked to consider appellant's impairment rating in light of Table 75. The majority seems to suggest that it is impermissible for the Commission to consider an answer given in response to a direct question from an attorney. Of course, this is how virtually all evidence is submitted to a finder of fact.

The majority next states that Dr. Moore's handwritten notes, were "scribbled numbers[,] which can perhaps be read as an averaging of the impairment ratings resulting in a 4½% rating." The majority further states that Dr. Moore provides no further comment. These notes can be read in no other way than to find that Dr. Moore utilized Table 75 of the AMA guidelines, 4th edition, in assessing appellant's impairment. Under subheading II A, he found cervical impairment of zero percent and lumbar impairment of zero percent, and under part B, he found cervical impairment of four percent and lumbar impairment at five percent. This equated to an average cervical impairment of two percent and average lumbar impairment of two-and-a-half percent.

The Commission is free to weigh this conflicting evidence and reach the decision it did, and we should not reverse if it is supported by substantial evidence. This court reviews a decision of the Workers' Compensation Commission to determine if there is

substantial evidence to support it. *Rice v. Georgia Pac. Corp.*, 72 Ark. App. 148, 35 S.W.3d 328 (2000). Substantial evidence is that relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *Wheeler Constr. Co. v. Armstrong*, 73 Ark. App. 146, 41 S.W.3d 822 (2001). We review the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings and we affirm if its findings are supportable by substantial evidence. *Geo Specialty Chem., Inc. v. Clingan*, 69 Ark. App. 369, 13 S.W.3d 218 (2000). This issue is not whether we might have reached a different decision or whether the evidence would have supported a contrary finding; instead, we affirm if reasonable minds could have reached the conclusion rendered by the Commission. *Sharp Co. Sheriff's Dep't v. Ozark Acres Improvem't Dist.*, 75 Ark. App. 250, 57 S.W.3d 764 (2001).

In this case it is undisputed that the appellant is entitled to a permanent-impairment rating. However, the majority admits that "the medical evidence bearing on the issue of Coleman's entitlement to the 11% rating is to some extent conflicting." I would defer to the Commission's findings as to the weight to be afforded this conflicting evidence. As I would affirm the Commission's finding as to the anatomical-impairment rating, I would also affirm on appellant's wage-loss benefits.

VAUGHT, J., joins.

IN THE MATTER of THE UNTIMELY PASSING of JUDGE TERRY CRABTREE

Court of Appeals of Arkansas
Opinion delivered January 10, 2007

PER CURIAM. From January 1, 1997, until his death on January 6, 2007, Judge Terry Crabtree faithfully served the State of Arkansas as a member of the Arkansas Court of Appeals. Upon the occasion of his death, the court wishes to express its sincere condolences to Judge Crabtree's family and takes this moment to recognize the dignity and civility that he displayed during his service on the court.

Following a distinguished career as a soldier, police officer, professor, and circuit/chancery/juvenile judge, Judge Crabtree was appointed to this court by Governor Mike Huckabee. Thereafter he was elected to two consecutive terms. During his decade as an appellate judge, he maintained a commitment to justice and fairness and stood as a positive example for other judges with whom he served. Judge Crabtree's record of public service cannot be overestimated. He will be sorely missed on both a professional and personal level by his many friends and colleagues.

[redacted]

[redacted]