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John H. LAXTON, Jr. *v.* STATE of Arkansas

CA CR 06-1228 256 S.W.3d 518

Court of Appeals of Arkansas
Opinion delivered May 9, 2007

C. Brian Williams, for appellant.

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

JOSEPHINE LINKER HART, Judge. John H. Laxton, Jr., had two charges filed against him in Crittenden County. On

January 4, 2004, in exchange for his cases being transferred to Crittenden County Drug Court, Laxton pled guilty to theft of property, a Class B felony, in CR-2003-966 and second-degree forgery, a Class C felony, in CR-2003-979. As part of the plea, Laxton agreed that if he did not successfully complete drug court, he would face commitment to the Arkansas Department of Correction for six years in the forgery case and ten years' suspended imposition of sentence in the theft case.

Laxton's cases were transferred to drug court on January 8, 2004. He failed to complete the requirements of drug court, and on July 3, 2006, he was sentenced in accordance with his plea agreement. On appeal, Laxton argues that the trial court committed reversible error by denying his motion for jail-time credit. We affirm as modified.

Although the record in this case is sketchy,[1] it is undisputed that Laxton did not successfully complete drug court. On July 3, 2006, a judgment and commitment order was entered reflecting that Laxton received the sentences that were contemplated by his plea agreement. It also awarded Laxton 59 days' jail-time credit for the time following his May 11, 2006, arrest on a drug court warrant when he remained in the county jail awaiting his July 3, 2006, commitment to the Arkansas Department of Correction.

On July 12, 2006, Laxton filed a motion seeking additional jail-time credit. The motion prayed for a total of 505 days. In addition to the 59 days credit that he had already received, Laxton claimed entitlement to 53 days for November 17, 2003 through January 8, 2004, which encompassed the time from his arrest until his transfer to drug court; 26 days for April 2, 2004

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[1] We know from Laxton's brief that a court reporter was not present for the proceedings in Drug Court. We are mindful that in *Williams v. State*, 362 Ark. 416, 208 S.W.3d 761 (2005), the supreme court explicitly stated that the trial court's failure to make a verbatim record of the proceedings violated Administrative Order No. 4, and that practice would not be tolerated. The *Williams* court stated:

> Our Administrative Order No. 4 provides: "Unless waived on the record by the parties, it shall be the duty of any circuit court to require that a verbatim record be made of all proceedings pertaining to any contested matter before it." This court recently put the bench and bar on notice that it would henceforth strictly construe and apply Administrative Order No. 4.

However, because we need not examine the nature of the so-called "sanctions" in drug court, we conclude that the failure to make a record does not preclude our review in this case.

through April 27, 2004, for a drug court "sanction"; 28 days for May 5, 2004 through June 1, 2004, while he was awaiting commitment to a regional-punishment facility; and 339 days for June 1, 2004 through May 5, 2005, when he was actually committed to the regional-punishment facility. We decline to hold that Laxton is entitled to any jail-time credit during the time that his case was assigned to drug court; however, we modify the judgment to give Laxton credit for the time he spent in jail prior to his transfer to drug court.

Laxton argues that because our drug court statute is silent on the issue of jail-time credit and drug court is essentially a type of probation, he is entitled to all of the jail time that he seeks pursuant to Arkansas Code Annotated section 5-4-404 (Repl. 2006). We disagree.

A defendant who has volunteered for drug court is not on probation; rather, he or she is being given the opportunity to avoid punishment in the criminal-justice system. Ark. Code Ann. § 16-98-201 (Repl. 2006). The statute mandates that judicial districts establishing a drug court must create a "*treatment* program [that] is at least one (1) year in length." *Id.* (Emphasis added.) Furthermore, the statute requires as a condition for participation in drug court that the defendant "waives his or her rights to a speedy trial and other rights as are agreed to by the parties." *Id.* In the instant case, Laxton agreed in advance that, if he failed to complete drug court, he would be subject to definite sentences. Nowhere in the agreement is there a provision that he would be given credit for his failure to complete drug court. Moreover, even adding in the time spent incarcerated due to drug court "sanctions," the sentences that Laxton received were well short of the statutory maximums. It is settled law that a defendant who has received a sentence within the statutory range short of the maximum sentence cannot show prejudice from the sentence itself. *Buckley v. State*, 349 Ark. 53, 76 S.W.3d 825 (2002). In short, Laxton is receiving exactly the amount of incarceration that he bargained for when he agreed to enter drug court. It is not our role to relieve Laxton of the consequences of his failing to complete the program.

We note, however, that the 53 days from November 17, 2003 through January 8, 2004, which encompassed the time from his arrest until his transfer to drug court, must be considered differently. We agree with Laxton that those days are controlled by Arkansas Code Annotated section 5-4-404, which states:

> If a defendant is held in custody for conduct that results in a sentence to imprisonment or confinement as a condition of suspension or probation, the court, the Department of Correction, or the Department of Community Correction shall credit the time spent in custody against the sentence, including time spent in a local jail facility awaiting transfer to the Department of Correction or the Department of Community Correction.

It is not disputed that Laxton ultimately received a prison sentence. Therefore under the plain wording of the statute, we hold that Laxton is entitled to jail-time credit for the time he spent in jail before he entered drug court. Accordingly, we order that the judgment and commitment order be amended to give Laxton additional jail-time credit of 53 days.

Affirmed as modified.

GLADWIN and ROBBINS, JJ., agree.

Gary YOUREE, Cynthia Youree, et al. *v.*
Raymond ESHAGHOFF

CA 06-883 256 S.W.3d 551

Court of Appeals of Arkansas
Opinion delivered May 9, 2007

Ralph C. Williams, for appellants.

Boyer, Schrantz, Rhodes & Teague, P.A., by: *R. Douglas Schrantz*, for appellee.

JOSEPHINE LINKER HART, Judge. Appellee Raymond Eshaghoff sued appellants Gary and Cynthia Youree and their two revocable trusts for specific performance of a contract to sell real property. The trial court granted specific performance, and appellants appealed. We reverse the trial court's decision.

In 2004, appellee agreed to buy fifteen acres of appellants' property (where they operated a business, Ace Pallets) at $70,000 per acre, for a total price of $1,050,000. Closing was to occur by February 17, 2005, and the contract was contingent upon a "feasibility study."[1] It also provided:

> Seller to remove everything off of property other than concrete docks. Buyer will have two access road [sic] from West & East of front 5 AC. Seller would have 12 months after closing to clean and remove everything from property.
>
> Seller to put 150,000 of proceeds from sale at time of closing into Escrow account until everything is removed. After the one-year period, buyer will receive proceeds if property has not been cleared. What is to remain would be re-estimated for clean-up.

Appellants agreed to sell an additional five-acre tract, on which their house is located, in a general addendum to the contract, which stated:

> Sellers agree to sell front-half of 20 AC tract with house with the back 15 AC. 5723 Stoneybrook & 5 AC will be included in the

[1] The parties also call this an environmental study.

> back 15 AC for 750,000. The sale of the front-half is contingent on closing of back 15 AC. The same terms with the one-year occupancy would apply to the house and front 5 AC. Seller would also have option to rent house back @ $[1]2000.00 month and lease back the land of $10,000 a month.

Appellants' trusts own nineteen of the twenty acres to be conveyed, and appellants own the remaining acre. Appellants signed this addendum on February 2, 2005. Appellee signed it on February 4, 2005, at 6:00 p.m.

A second addendum to the contract was signed by Gary on February 7, 2005. According to both appellants, Gary signed Cynthia's name to this document without her knowledge. This addendum provided:

> Buyer and Seller agree to reduce the time the Seller has possession on property from one year to six-months. Buyer will take possession six-months after closing, and if the Seller need [sic] more time the [sic] he can lease back the property a maximum of three months for $18,000 a month.

Appellee also signed this addendum at 6:00 p.m. on February 4, 2005.

A third addendum extending the closing date to March 8, 2005, was signed by Gary on February 7, 2005. According to appellants, he also signed Cynthia's name to this document. Like the other two addenda, appellee signed this addendum on February 4, 2005, at 6:00 p.m.

Although appellee was ready to close on March 8, 2005, appellants refused to do so. Two days later, appellee sued appellants, individually and as co-trustees of the trusts, for specific performance of the contract. In response, appellants asserted that the legal description of the property was inadequate to satisfy the statute of frauds; that appellants did not sign the documents as co-trustees of the trusts; and that no consideration was given for the second and third addenda.

At trial, appellee described the consideration for the extension of the closing date as follows: "[T]here was a promise for a promise. That promise was we agreed to close on March 8th and they agreed to give a deed on that date." He also said that appellants' benefit would be the "remuneration for the sale of the property." Appellants first learned at trial that appellee had signed all three addenda at the same time.

Three days later, appellants moved to amend the pleadings to conform to the proof showing fraud and unclean hands on appellee's part. The trial court denied appellants' motion, making the following findings:

> 3. Plaintiff was aware on February 4, 2005 that he would not be able to close the transaction on February 17, 2005 due to the inability to obtain a feasibility/environmental study. It is unclear from the testimony whether Plaintiff knew on February 2, 2005 that he was not able to close the transaction on February 17, 2005. The Court declines to enter a finding that the withholding of such information, even if the Plaintiff was aware on February 2, 2005 constituted a material representation or withholding of material fact.
>
> 4. It is the further finding of the Court that the Defendants received consideration for the signing of Addendums Two and Three based upon mutual promises given by Plaintiff and Defendants as a result of the signing of Addendum One by both parties.
>
> 5. It is further the finding of the Court that from the credible evidence presented, Gary D. Youree had full authority to sign Cynthia Youree's name to Addendums Two and Three, and her interest in the property is ordered sold.

In the judgment filed April 18, 2006, the trial court found that appellants, as trustees, had apparent authority to act for the trusts; ordered specific performance; and awarded appellee $6,487.40 in attorney's fees, plus $606 in costs. On April 27, 2006, the trial court entered an amended judgment, finding that Gary had apparent authority to sign Cynthia's name to the last two addenda; that appellants had apparent authority to act for the trusts; that appellee did not have unclean hands or commit fraud; and that appellee gave consideration — a promise for a promise — for the addenda. This appeal followed.

Whether specific performance should be awarded in a particular case is a question of fact for the trial court; on appeal, the question before the appellate court is whether the decision to grant specific performance was clearly erroneous. *Dossey v. Hanover, Inc.*, 48 Ark. App. 108, 891 S.W.2d 67 (1995).

Although appellants have raised several arguments on appeal, we need only address the issue of consideration, which we believe is controlling. Appellants contend that the trial court erred

in denying their motion for directed verdict because appellee gave no consideration for the second and third addenda. A motion for a directed verdict is a challenge to the sufficiency of the evidence. *Calvary Christian Sch., Inc. v. Huffstuttler*, 367 Ark. 117, 238 S.W.3d 58 (2006). Appellate review of a denial of a motion for a directed verdict entails determining whether the nonmovant's proof was so insubstantial as to require a jury verdict, if entered in his behalf, to be set aside. *St. Edward Mercy Med. Ctr. v. Ellison*, 58 Ark. App. 100, 946 S.W.2d 726 (1997). The general rule is that a trial court may set a jury's verdict aside only if there is no substantial evidence to support it and the moving party is entitled to judgment as a matter of law. *Id.* In considering the sufficiency of the evidence, the appellate court will only consider evidence favorable to the appellee, together with all its reasonable inferences. *Id.*

In a separate point, appellants argue that the trial court erred in finding, in its April 18, 2006 order, that they received consideration for the signing of the second and third addenda by the signing of the first addendum. In another point, they contend that the trial court erred in finding, in its April 27, 2006 judgment, that the mutual promises were adequate consideration for the second and third addenda. Appellants assert that the second and third addenda did not require appellee to do any more than he was already required to do, although he received value from appellants, who took nothing in return. Appellants point out that the original contract and the first addendum gave appellants one year to surrender the property and provided that they could lease it for $12,000 per month for an unlimited time after that. The second addendum, however, reduced the time for appellants' possession after closing to six months and provided that they could remain in possession for a maximum of three months at $18,000 per month. The third addendum extended the time for closing from February 17, 2005, to March 8, 2005. As appellants argue, there was evidence that appellee was dilatory in preparing to close on time. For example, he did not have an environmental study done until February 17, 2005, the original closing date, and he admitted that he could not close at that time. Additionally, the loan officer did not know that closing was originally set for February 17, 2005, or that, originally, only fifteen acres were to be conveyed. Also, the loan commitment was dated March 4, 2005.

Appellants state that, when they signed the first addendum, they did not even know about the second and third addenda. Gary testified that he would not have signed the first addendum if he had

known that the sale would not close on February 17, 2005, and that he had counted on closing on that date so he could afford to get his grinder repaired in time for spring, when 75% of mulch sales occur. He said that the agent told him that the deal was dead if appellants did not sign the second and third addenda. Appellee admitted that the agent, who represented appellee and appellants, had indicated to him that appellants were counting on closing on February 17 because they needed money to repair their mulch grinder. David George, an attorney who operates a title company and who issued a title commitment for appellee's purchase, testified that, in his opinion, the second and third addenda reflected no consideration.

The essential elements of a contract are (1) competent parties, (2) subject matter, (3) legal consideration, (4) mutual agreement, and (5) mutual obligations. *Found. Telecoms. v. Moe Studio, Inc.*, 341 Ark. 231, 16 S.W.3d 531 (2000). Consideration is any benefit conferred or agreed to be conferred upon the promisor to which he is not lawfully entitled, or any prejudice suffered or agreed to be suffered by the promisor, other than such as he is lawfully bound to suffer. *Berry v. Cherokee Village Sewer, Inc.*, 85 Ark. App. 357, 155 S.W.3d 35 (2004).

Under Arkansas law, there must be additional consideration when the parties to a contract enter into an additional contract. *Crookham & Vessels, Inc. v. Larry Moyer Trucking, Inc.*, 16 Ark. App. 214, 699 S.W.2d 414 (1985). Although mutual promises may be adequate consideration to uphold a contract, the promise must have value to the party agreeing to the change; if no benefit is received by the obligee except what he was entitled to under the original contract, and the other party to the contract parts with nothing except what he was already bound for, there is no consideration for the additional contract. *Feldman v. Fox*, 112 Ark. 223, 164 S.W. 766 (1914); *Capel v. Allstate Ins. Co.*, 78 Ark. App. 27, 77 S.W.3d 533 (2002). If, without legal justification, one party to a contract breaks it, or threatens to break it, and to induce performance on his part the adversary party promises to give more than was originally agreed upon, no consideration is given for the promise; when the party who threatens to break the contract finally performs, he does no more than he was bound in law to do. *Crookham & Vessels, Inc. v. Larry Moyer Trucking, Inc., supra.*

A finding is clearly erroneous 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. *City of Van Buren*

v. Smith, 345 Ark. 313, 46 S.W.3d 527 (2001). We believe that this is such a case and that the evidence does not support the trial court's finding that there was consideration for the second and third addenda. Although appellants gave concessions to appellee in the second and third addenda, appellee promised to do no more than he was already obligated to do. It is apparent that appellee gained concessions in the addenda, without promising anything further, by threatening to break the contract, while at the same time, he was not making a good-faith effort to close on February 17, 2005. We hold that the trial court should have directed a verdict for appellants on this issue and that its findings in both judgments that consideration was given were clearly erroneous. The trial court, therefore, clearly erred in awarding specific performance to appellee.

Reversed.

GLADWIN and ROBBINS, JJ., agree.

Beth RIDDLE, Joseph Riddle, and Julia Riddle *v.* Richard UDOUJ, Special Administrator of the Estate of Olivia Udouj, Deceased, and Michael Udouj and Richard Odouj, Trustees of the Olivia Udouj Trust

CA 06-865 256 S.W.3d 556

Court of Appeals of Arkansas
Opinion delivered May 9, 2007

[Rehearing denied June 20, 2007.*]

* GLOVER and HEFFLEY, JJ., would grant rehearing.

Sam Sexton, III, for appellants.

Warner, Smith & Harris, PLC, by: *Douglas O. Smith, Jr.*, *Stephanie Harper Easterling*, and *Robert A. Frazier*, for appellees.

JOHN B. ROBBINS, Judge. The Sebastian County Circuit Court dismissed appellants' claims for breach of warranty and constructive fraud on the ground that they were barred by the statute of limitations. We affirm.

In 1996, appellants Julia and Joseph Riddle purchased a residential lot from appellees Michael and Richard Udouj, trustees of the Olivia Udouj Trust. A survey showed two fences on the lot, one running along and just inside the northern border and the other running along and just inside the eastern border. The deed conveyed property on both sides of the fences. Appellees warranted that they were:

> lawfully seized in fee of the aforegranted premises; that We are free from all encumbrances; that We have good right to sell and convey the same to the said Grantees as aforesaid and that We will . . . forever warrant and defend the title to said real estate against all lawful claims and demands whatsoever.

Appellants' neighbors to the north were the Knights, who had lived there for approximately fifty years, and their neighbors to the east were the Kaelins, who had lived there for approximately twenty years. In 1998, appellant Joseph Riddle cut some hedges along the fence adjacent to the Kaelins' property. The Kaelins' attorney wrote to Mr. Riddle, demanding that he not come behind the fence because "Dr. and Mrs. Kaelin tell me that the fence that divides your yards has been in place for over thirty years, and therefore in my opinion, the fence now establishes the property line between your property and Dr. Kaelin's property." Mr. Riddle apparently did not abide by this request because, in 2000, the Kaelins' attorney wrote a second letter, complaining that appellants "went into the Kaelins' yard and removed plants." The attorney again warned that the fence established the property line.

On June 18, 2001, appellants sued the Kaelins to quiet title to the strip of land between the eastern fence and the surveyed property line.[1] The Kaelins counterclaimed, and the Knights

[1] By that time, Joseph and Julia Riddle had sold their lot to their daughter, appellant Beth Riddle, who was also named as a plaintiff in the action. However, Joseph and Julia continued to live on the premises.

intervened, both asserting that the fence lines had become boundaries by acquiescence. The issues were thus joined, and, following a trial, Judge Harry Foltz issued an order on October 15, 2002, finding that the fence lines had been recognized for many years as the boundaries by acquiescence. Title to the disputed strips was quieted in the Kaelins and the Knights. Appellants appealed to this court, where Judge Foltz's order was affirmed in an unpublished opinion. *Riddle v. Kaelin*, CA03-167 (Ark. App. Sept. 3, 2003).

Approximately a year and a half later, on January 13, 2005, appellants sued appellees in the present action. They alleged that appellees breached the covenant of warranty because they had not been the owners of all of the property conveyed in the deed and asserted that appellee Olivia Udouj, who had signed a property disclosure form in connection with the sale, committed constructive fraud by representing that there were "no encroachments . . . adverse possession claims or similar matters that may affect title to the Property" and that there were no fences or other features "shared in common with adjoining landowners." Appellees answered by pleading the statute of limitations as a defense, and they subsequently filed a motion for summary judgment on that ground. The trial judge agreed that appellants' causes of action were time barred and granted summary judgment. Appellants now bring this appeal.

Breach-of-Warranty Action

All parties agree that the statute of limitations for breach of a covenant of warranty is five years. The disagreement concerns when that cause of action arose. Appellants argue that the cause of action arose when Judge Foltz entered his order on October 15, 2002, in which case their 2005 filing would be timely. Appellees contend that appellants' claim arose in 1996 when the property was sold or in 1998 when appellants received the first letter from the Kaelins' attorney, either of which would result in appellants' complaint being filed outside the statute of limitations.

Generally, the running of a statute of limitations commences when the plaintiff has a complete and present cause of action. *See Oaklawn Bank v. Alford*, 40 Ark. App. 200, 845 S.W.2d 22 (1993). An action for breach of a covenant of warranty requires that the covenant be broken and that an actual or constructive eviction occur. *See Bosnick v. Hill*, 292 Ark. 505, 731 S.W.2d 204 (1987); *Belleville Land & Timber Co. v. Griffith*, 177 Ark. 170, 6 S.W.2d 36 (1928). A grantor's covenant of seisin, which implies that he is in possession of all of the land conveyed, is broken as soon as it is

made if the grantor does not have possession, the right of possession, and complete title. *See Bosnick, supra.* The breaking of such a covenant may also result in the immediate, constructive eviction of the grantee. *See Timmons v. City of Morrilton*, 227 Ark. 421, 299 S.W.2d 647 (1957).

Applying these precedents, appellants' cause of action arose, as a matter of law, in 1996, when the property was conveyed to them. In that year, appellees deeded land on both sides of the fences to appellants. Yet, as Judge Foltz would later determine, those fences had for many years been recognized and consented to as the property lines.[2] That being the case, appellees conveyed land that they did not possess, have the right to possess, or have title to. This amounted to an immediate breach of the covenant. *See Timmons, supra* (holding that, when the land conveyed is at that time in possession of a stranger, the covenant is broken on the date the deed is made, and limitations commences immediately).

Moreover, appellees' 1996 conveyance resulted in the immediate, constructive eviction of appellants from the property on the other side of the fences. *Timmons, supra.* Constructive eviction has been defined as the inability of a land purchaser to obtain possession because of a paramount outstanding title. *Black's Law Dictionary* 576 (7th ed. 1999). On the date of the conveyance, paramount title to the property on the other side of the fences lay in the Kaelins and the Knights, as per Judge Foltz's order. Appellees, therefore, did not possess those strips of land and could not convey them. Appellants likewise could not obtain possession of those strips and were, on the date of the deed that conveyed them, constructively evicted from them. To hold otherwise would be to accord no conclusive effect to Judge Foltz's determination that the property's boundaries had long been established.[3]

Appellants cite *Turner v. Eubanks*, 26 Ark. App. 22, 759 S.W.2d 37 (1988), for the proposition that an eviction does not occur until entry of the order quieting title in another. Whatever

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[2] Judge Foltz's finding was based in large part on the testimony of Mr. Cecil Knight, who said that a previous owner of appellants' property, Mr. Udouj, built one of the fences in 1955, which Mr. Knight and Mr. Udouj treated as the property line. *See Riddle v. Kaelin, supra.*

[3] The existence of Judge Foltz's findings, which compel the conclusion that the covenant of warranty was breached and appellants were evicted on the date of the deed, distinguish this case from *Smiley v. Thomas*, 220 Ark. 116, 246 S.W.2d 419 (1952), relied on by the dissent.

statements made by the *Turner* court to that effect were, as recognized in the opinion, a merely academic discussion and are therefore *obiter dictum*, which we need not follow. *See Ward v. Williams*, 354 Ark. 168, 118 S.W.3d 513 (2003).

Appellants further emphasize — and the dissent appears to agree with this view — that, after purchasing the land in 1996, they continued to exercise possessory rights over the land beyond the fences and thus were not evicted until the 2002 court order. But, whatever entry onto the disputed areas appellants may have exercised, it was not by virtue of their own rights or title. As Judge Foltz ruled, the boundaries between the properties had been established by acquiescence many years before; thus, at the time of conveyance, paramount title to the disputed areas lay in the Kaelins and the Knights. The fact that appellants did not incur the expense of asserting their rights in the property until long after the property had been conveyed, as they also argue, is not availing. A timely-filed action would have produced timely-incurred expenses.

The dissent also advances the idea that appellants had no reason to sue appellees prior to 2002 because, until that time, they believed that the Knights' and Kaelins' claims were illegitimate. However, the running of the statute of limitations commenced when the appellants had a complete and present cause of action. *See Oaklawn Bank, supra. Bosnick, supra,* is authority that appellants had a complete and present cause of action in 1996, when the property was conveyed to them. In *Bosnick*, the Metzlers conveyed land to the Bosnicks by a deed containing a covenant. The Bosnicks later discovered that a Mr. Hill claimed to adversely possess 2.72 acres of the land conveyed to them, which he had fenced and run cattle upon. When the Metzlers refused to take action to place the Bosnicks in possession of the 2.72 acres, the Bosnicks sued the Metzlers for breach of warranty. The supreme court recognized that Hill's possession of the 2.72 acres was a breach of the covenant of warranty, that such a breach occurs as soon as the covenant is made, and that:

> [w]hile the chancellor held Hill had not fully satisfied the time requirements to support his adverse claim, the chancellor determined that, at the time the Metzlers conveyed the property to the Bosnicks, Hill had fenced 2.7 acres of the property and had run cattle on it for at least three years prior to when this suit was commenced. The Bosnicks were compelled to bring this action to gain possession of the disputed parcel claimed by Hill. Accord-

> ingly, the Metzlers are therefore obligated to pay the costs and expenses reasonably incurred by the Bosnicks for their successful efforts in vindicating their rights under the covenant of seisin given them by the Metzlers.

Bosnick, 292 Ark. at 509, 731 S.W.2d at 207. Thus, the Bosnicks had a cause of action against their grantors for breach of warranty as of the date of the conveyance, even though the person who claimed to own part of the property was later determined to have had an invalid claim.

Based on the above, we conclude that the trial court was correct in ruling that appellants' claim for breach of warranty was barred by the statute of limitations. This aspect of the trial court's order is therefore affirmed.

Constructive Fraud Action

Again, the parties agree on the applicable statute of limitations — three years in the case of fraud — but disagree as to when the cause of action arose.

A cause of action for fraud begins to run when the wrong occurs. *Hampton v. Taylor*, 318 Ark. 771, 887 S.W.2d 535 (1994); *Wilson v. Gen. Elec. Cap. Auto Lease, Inc.*, 311 Ark. 84, 841 S.W.2d 619 (1992). Once that date is established, the question then becomes whether the defendant committed some affirmative act of concealment to hide his fraud. *See, e.g., Hampton, supra; see also Tech. Partners, Inc. v. Regions Bank*, 97 Ark. App. 229, 245 S.W.3d 687 (2006); *Gibson v. Herring*, 63 Ark. App. 155, 975 S.W.2d 860 (1998). Fraudulent concealment consists of some positive act of fraud, something so furtively planned and secretly executed as to keep the plaintiff's cause of action concealed, or perpetrated in a way that it conceals itself. *Chalmers v. Toyota Motor Sales, USA, Inc.*, 326 Ark. 895, 935 S.W.2d 258 (1996). A continuation of the prior non-disclosure is not enough to toll the statute. *See Tech. Partners, supra.*[4]

[redacted] In the case at bar, Olivia Udouj allegedly made a misrepresentation in the 1996 property disclosure form. Therefore, the statute of limitations expired in 1999 unless tolled by her

[4] We rely on these authorities rather than appellants' citation to *Scollard v. Scollard*, 329 Ark. 83, 947 S.W.2d 345 (1997), and *Hyde v. Quinn*, 298 Ark. 569, 769 S.W.2d 24 (1989), which are either inapplicable or do not fully state the law regarding fraudulent concealment.

fraudulent concealment. There is no evidence that Mrs. Udouj engaged in any positive acts of concealment or any furtive planning to hide her alleged misrepresentation. Therefore, the trial court was correct that appellants' 2005 complaint for fraud was untimely. Although this line of reasoning was not used by the trial court, we may affirm the trial court if it is correct for any reason. *Fritzinger v. Beene*, 80 Ark. App. 416, 97 S.W.3d 440 (2003).

Affirmed.

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

GLOVER and HEFFLEY, JJ., dissent.

DAVID M. GLOVER, Judge, dissenting. I agree that appellants' claim for fraud is barred by the statute of limitations, but I disagree that the same is true of appellants' breach-of-warranty action. Appellants' claim for breach of warranty did not accrue until the entry of Judge Foltz's 2002 order, meaning that their 2005 complaint was filed within the limitations period.

Appellants purchased a lot that, by all indications, extended beyond the fences in question. A survey showed the fences well within appellants' property lines, and representations on the property disclosure form indicated that no fences were shared with adjoining landowners. Approximately two years after the purchase, appellants were told by the neighbors' attorney that, in his opinion, the fence line had become the boundary line. Appellants did not accede to this opinion or give it any credence whatsoever. In fact, about two years later, they conducted other activity in the area beyond the fence. Ultimately, appellants and their neighbors found it necessary to file legal action to settle the question of where the boundary lines lay. Until the day that Judge Foltz entered his order in 2002, that question remained unsettled. How then can it be said that, prior to entry of the order, appellants were evicted from a portion of their property?

The mistake that the majority makes is in using Judge Foltz's 2002 findings to leap backward in time and effect an eviction of appellants six years earlier. While this approach may have a certain legalistic appeal, given Judge Foltz's determination that the boundary lines had been recognized for "many years," it is wholly inconsistent with what occurred in the actual passage of time before the entry of the Foltz order. During that time, appellants possessed and went upon the land beyond the fences, treated it as

their own, were not deprived of the enjoyment of it, and did not yield to what they obviously considered their neighbors' unfounded claims. Nothing equivalent to an eviction occurred until Judge Foltz informed the parties in 2002 where the boundary lines lay — a finding of fact that, I submit, could have gone either way or been overturned on appeal, in which case appellants would never have been evicted at all. Clearly, the fact of eviction did not exist until entry of Judge Foltz's order.

I also believe that the majority's reliance on *Bosnick v. Hill*, 292 Ark. 505, 731 S.W.2d 204 (1987), and *Timmons v. City of Morrilton*, 227 Ark. 421, 299 S.W.2d 647 (1957), is misplaced. In *Bosnick*, the third party asserting an interest in the grantee's land was in actual, fenced possession of a portion of the property, and the grantee was forced to file suit to *regain* possession. Here, appellants did not have to regain possession because they acquired possession, continued it, and did not relinquish it until required to do so. In *Timmons*, the grantee claimed that his grantor had constructed obstacles that prevented him from full possession of the property. The supreme court held that the grantee was constructively evicted on the date of the deed because the obstacles were "visible and obvious." By contrast, the appellants in this case had no visible and obvious means of realizing that they might not be entitled to full possession of the property conveyed to them. While the fences themselves were obvious, that they represented a boundary line was not. A boundary by acquiescence is established through silence. *See McWilliams v. Schmidt*, 76 Ark. App. 173, 61 S.W.3d 898 (2001). Who can say in the present case, without benefit of the trial court's factual finding, whether the fences were boundaries by acquiescence? This is especially true when, as stated earlier, all indications were that appellants were entitled to possession beyond the fence lines and they in fact exercised that possession.

This case is more akin to *Smiley v. Thomas*, 220 Ark. 116, 246 S.W.2d 419 (1952). There, Smiley's predecessors conveyed land to Thomas in 1929. Thomas later discovered that there was an outstanding, one-half mineral interest in the land in O'Brien Bros., Inc. In 1950, he sued O'Brien to quiet title and sued Smiley for breach of warranty. The trial court ruled that O'Brien had title to the one-half mineral interest and that Smiley was liable for breach of warranty. Smiley apparently defended on the basis of the statute of limitations, which our supreme court addressed as follows:

> All of [Smiley's] defenses of the Statute of Limitations, Laches and Statute of Nonclaims against the Thomases are without merit. *There had been no constructive eviction, in effect, until the present suit was filed in December, 1950, wherein Mrs. Smiley was a party and the court held, as indicated, that O'Brien Bros. owned the ½ mineral interest* in the land involved here and that the covenant of warranty in the above deed had been breached.

Id. at 121, 246 S.W.2d at 421 (emphasis added). Under *Smiley*, the grantees were not evicted until suit was filed and the court held that the third party owned the disputed interest. That should be the result in this case, and, contrary to the majority's effort to distinguish *Smiley*, I do not believe that the "retroactive" application of Judge Foltz's findings should change that.

I would reverse and remand to allow appellants to pursue their claim for breach of warranty. I am authorized to state that Judge Heffley joins in this dissent.

Lori A. STUTZMAN *v.*
BAXTER HEALTHCARE CORPORATION
and Old Republic Insurance Company

CA 06-1159 256 S.W.3d 524

Court of Appeals of Arkansas
Opinion delivered May 9, 2007

Frederick S. Spencer, for appellant.

Jones & Harper, by: *Tom Harper, Jr.*, for appellees.

SAM BIRD, Judge. Lori Stutzman appeals a July 11, 2006 decision of the Workers' Compensation Commission that reversed the administrative law judge's award of benefits and denied her claim for bilateral carpal-tunnel injuries. Stutzman contends that substantial evidence does not support the Commission's finding that she failed to prove the elements necessary to establish her claim, and that the Commission's reversal of the law judge's decision violated her due-process rights under our state and federal constitutions. We affirm.

As the claimant, appellee had the burden of proving a compensable injury by a preponderance of the evidence. Ark. Code Ann. § 11-9-102(4)(E) (Supp. 2005). A "compensable injury" is one "arising out of and in the course of employment."

Ark. Code Ann. § 11-9-102(4)(A). In order to prove a compensable injury the claimant must prove, among other things, a causal relationship between his employment and the injury. *Wal-Mart Stores, Inc. v. Westbrook*, 77 Ark. App. 167, 171, 72 S.W.3d 889, 892 (2002). It is the Commission's function to determine the weight to be afforded to the testimony and medical evidence. *Searcy Indus. Laundry, Inc. v. Ferren*, 82 Ark. App. 69, 110 S.W.3d 306 (2003).

At a hearing conducted before the administrative law judge in November 2005, the parties stipulated that Stutzman had been employed by Baxter Healthcare since April 2004. The evidence that was presented included testimony by Jeff Rowbothen, who was one of Stutzman's supervisors; testimony by Stutzman; and medical records. Rowbothen testified that Stutzman's work involved rapid repetitive motions and that she worked under quotas.

Stutzman testified about her ten years of assembly work at Baxter, the trouble that developed with her hands, and her activities of crocheting and playing computer games. She testified that she also worked "off and on" as a certified nursing assistant, but she denied that her work at a nursing home involved rapid, repetitive, or continuous motion. She admitted, "On paper work that I filled out, I did lie. I said that I was not gainfully employed anywhere else." Under cross-examination Stutzman testified that, for part of the time while she worked at the nursing home, she was drawing short-term disability benefits from Baxter. She stated that she smoked a pack of cigarettes a day and in 1985 had complained to a doctor about her right hand going numb.

Medical evidence introduced at the hearing included a nurse's memo and medical reports from Drs. Richard Burnett, Rick Walker, and J. K. Smelz. The nurse's note stated that Stutzman had an appointment with Dr. Sward on May 11, 1995, that he "splinted her right hand/arm" because she preferred a conservative approach instead of the surgery that he wanted to do, and that she was scheduled for a return visit. A report by Dr. Burnett in January 2002 stated that Stutzman, a patient since 1985, suffered from an ongoing anxiety condition for which medication had been prescribed. In August 2002 Dr. Burnett assessed her with severe depression and chronic obstructive pulmonary disease and tobacco abuse.

In a report of October 2004, Dr. Walker stated with a reasonable degree of medical certainty that "assembly line work at Baxter Healthcare" did not contribute more than fifty percent to

the causation or any aggravation of Stutzman's carpal-tunnel-syndrome symptoms. Dr. Walker wrote:

> Epidemiology studies indicate that age-related factors, female gender, smoking and body mass index as well as cross-sectional area of the carpal tunnel all contribute primarily to carpal tunnel syndrome symptoms. Many studies are now viewing work as being only peripherally related to the causative factor of carpal tunnel syndrome.

Dr. Smelz evaluated Stutzman on August 19, 2005 for her hand and arm complaints, including a "chief complaint" of swelling and numbness in her hands especially when using the computer or telephone. His report stated that the problem was first noted several years after Stutzman began her job at Baxter, where she no longer was working; it related a medical history of chronic obstructive pulmonary disease, smoking, and severe depression; and it noted that she had smoked one-and-one-half packs a day for more than thirty years. Dr. Smelz wrote that electrodiagnostic testing had revealed minimal evidence of distal median neuropathy and that Stutzman's "significant subjective symptoms," which she ascribed to carpal tunnel syndrome, were not usually associated with clinical carpal tunnel syndrome. He reported her statement that her symptoms abated only minimally after she left Baxter and discontinued the repetitive activity she described there. Noting that etiology was a difficult question in carpal-tunnel cases, Dr. Smelz concluded:

> Ms. Stutzman has multiple factors which are known to increase her risk, including increased body mass index, increased wrist ratio bilaterally, right more than left, female gender, post menopausal status, age over 41 years, hand arthritis, and smoking.
>
> She described her work at Baxter as involving repetitive activity, however, this activity as she demonstrated today, involved fine motor coordination and grasping, and not significant and/or prolonged torquing with extreme flexion and extension of the wrist.
>
> Given her multiple inherent risk factors, and reviewing her work history, I do not feel with a greater than 50% certainty, that the previous type of work she described performing would have caused or exacerbated a carpal tunnel syndrome.

The administrative law judge found that Stutzman's carpal tunnel syndrome arose out of and in the course of her employment with appellee Baxter Healthcare Corporation. The Commission,

reversing the decision, determined that Stutzman was not a credible witness and found that her history of numbness and tingling in her hands was "completely inconsistent."

Assessing the evidence, the Commission stated:

> She gave a medical history and initially testified that she began having problems with her hands about a year and a half into her employment with the respondent. However, on cross-examination, the claimant admitted that if company records indicate that she began complaining of hand numbness and related symptoms about six months into her employment with the respondent, this is probably correct. Dr. Walker and Dr. Smelz have both opined that the claimant's job activity with the respondent was not the cause of her hand problems. There is also other evidence to suggest that the claimant's bilateral carpal tunnel syndrome may have resulted from some other source, such as playing computer games, surfing the net, and long-term crocheting, as she has admitted to experiencing hand numbness and related symptoms with her hands during these activities. In addition to this, Dr. Walker and Dr. Smelz have also cited several intrinsic patient factors, which are known to increase the claimant's risk for bilateral carpal tunnel syndrome, which include, her tobacco abuse, hand arthritis, body mass index, post menopausal status, and other age-related factors.

Citing *Dena Construction Co. v. Herndon*, 264 Ark. 791, 575 S.W.2d 155 (1979), the Commission noted that conjecture and speculation cannot be permitted to supply the place of proof. The Commission concluded that speculation and conjecture would be required to causally link Stutzman's carpal tunnel syndrome to her work activity.

Compensability of Stutzman's Claim

In her first point on appeal, Stutzman asserts that "the only evidence in the record" establishes that her carpal tunnel syndrome was caused by her employment activities with Baxter. She points to the administrative law judge's determination that the credible evidence preponderated in her favor, and she disputes Baxter's allegations that her injury was caused by other activities and factors.

When reviewing a decision of the Arkansas Workers' Compensation Commission, the appellate court views the evidence and all reasonable inferences deducible therefrom in the light most

favorable to the Commission's findings and affirms that decision if it is supported by substantial evidence. *Parker v. Atlantic Research Corp.*, 87 Ark. App. 145, 151, 189 S.W.3d 449, 452–53 (2004). Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *Id.* The issue is not whether this court might have reached a different result from the Commission; the Commission's decision will not be reversed unless it is clear that fair-minded persons could not have reached the same conclusions if presented with the same facts. *Horticare Landscape Mgmt. v. McDonald,* 80 Ark. App. 45, 89 S.W.3d 375 (2002); *Wheeler Constr. Co. v. Armstrong*, 73 Ark. App. 146, 41 S.W.3d 822 (2001). When a claim is denied because a claimant failed to show entitlement to compensation by a preponderance of the evidence, the substantial-evidence standard of review requires that we affirm if the Commission's opinion displays a substantial basis for the denial. *Marshall v. Madison County*, 81 Ark. App. 57, 98 S.W.3d 452 (2003).

Here, the Commission determined that Stutzman was not a credible witness, and it noted the medical opinions of Drs. Walker and Smelz that her work activity at Baxter did not cause or aggravate her carpal tunnel syndrome. Because it is the Commission's function to determine the credibility of witnesses and the weight of the evidence, we hold that its decision displays a substantial basis to deny this claim.

Constitutional Arguments of Due Process

Stutzman contends as her second point on appeal that, because the Commission did not have the opportunity to personally observe her testimony or that of her supervisor, her due-process rights were violated by the Commission's reversal of the administrative law judge's determinations. This issue is not developed in her brief, nor has she abstracted any arguments raised to the Commission. Her entire argument consists of a footnote quoted from *Kimbell v. Association of Rehab Industry*, 366 Ark. 297, 235 S.W.3d 499 (2006), in which our supreme court expressed a willingness to address the issue of whether a constitutional violation occurs when the Commission and reviewing court are permitted to ignore the findings of the law judge, the only adjudicator who sees and hears witnesses.

Where an appellant fails to make a convincing argument or to cite convincing authority in support of it, we will not address the argument on appeal. *Jones Truck Lines v. Pendergrass*, 90

Ark. App. 402, 206 S.W.3d 272 (2005). We also note that we thoroughly addressed this argument in *Stiger v. State Line Tire Service*, 72 Ark. App. 250, 35 S.W.3d 335 (2000), and we concluded that the Commission's substitution of its own credibility determinations for those made by the administrative law judge does not deny due process.

Affirmed.

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

Daniel LATHAM *v.* ARKANSAS DEPARTMENT of HEALTH and HUMAN SERVICES

CA 06-969 256 S.W.3d 543

Court of Appeals of Arkansas
Opinion delivered May 9, 2007

Dale Casto, for appellant.

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

Teresa McLemore, attorney ad litem.

WENDELL L. GRIFFEN, Judge. Daniel Latham appeals from an order terminating his parental rights with regard to his son, B.L., d.o.b., 06/01/95. Latham's three children were removed from his custody after he became intoxicated and struck his pregnant, teenaged daughter (B.L.'s sister).[1] Latham, who was on parole, was returned to jail due to that incident. Latham was released from jail prior to the termination hearing; however, the trial court terminated his parental rights, finding that he had not remedied the conditions that necessitated removal, that he had subjected B.L. to aggravated circumstances in that there was little likelihood of successful reunification, and that termination was in B.L.'s best interests. *See* Ark. Code Ann. § 9-27-341(b)(3)(B)(vii)(a) (Supp. 2005); § 9-27-341(b)(3)(B)(ix)(3)(B)(i); § 9-27-341(b)(3)(A). We affirm the termination order.

Latham has admittedly been in and out of prison "a bunch" of times and has admittedly used drugs, as has his wife, Christine Latham (B.L.'s mother). The record reflects that Latham and

[1] Latham's parental rights to B.L.'s older siblings, D.L. and O.L., were not terminated. Each remained in state custody with the ultimate goal of independence. The mother's rights to each child were also terminated; her rights are not the subject of this appeal.

Christine had a volatile, twenty-year relationship and that whenever Latham returned to prison the children were prone to truancy and other delinquent behavior. The record also reflects that when Latham was not in prison, the children fared better, at least with regard to school attendance — they did not miss school as often when Latham was at home. However, due to the parents' volatile relationship, their drug usage, and Latham's repeated prison stays, the children have experienced considerable instability.

Appellee Arkansas Department of Health and Human Services (ADHHS) first became involved with the Lathams in 2000, due to Christine's drug usage, and later became involved due to medical neglect. On June 1, 2005, B.L.'s tenth birthday, the children were removed from Christine's custody, due to substance abuse, and were placed with Latham. On June 7, 2005, six days later, appellee learned that the children were staying with Glenneva Hunt, a cousin. The investigation revealed that on June 6, 2005, Latham apparently got into an argument with D.L., who was nearly sixteen, and pregnant. D.L. told the investigator that Latham was drunk, that he hit her and pushed her against the wall, and that the altercation caused her nose to bleed. Latham, who was out of prison on parole, was returned to prison due to the incident.

Appellee placed an emergency hold on all three children to remove them from immediate danger of severe maltreatment. The trial court subsequently found probable cause to continue the children in foster care; the children remained with Hunt. Latham was not awarded visitation. He was ordered to maintain stable housing and employment; to remain drug-free; to pay child support of $30 per week; to cooperate with appellee; and to follow the case plan and court orders.

After the August 3, 2005 adjudication hearing, the trial court determined that the children were dependent-neglected due to Latham's incarceration and Christine's use of illegal drugs and failure to properly supervise the children. In addition to prior orders, Latham was ordered to submit to and pass random drug screens. On August 24, 2005, appellee resumed physical custody of the children because Hunt left them with appellee. B.L. was placed in another foster-care home.

A review hearing was held on November 16, 2005. This order did not impose any additional conditions on Latham. The case goal continued to be reunification, but the court scheduled the no-reunification permanency-planning hearing for January 19,

2006. After being notified of the date of the January 19 hearing, Latham sent a letter to the trial court requesting a continuance. He explained that he had been granted parole but wanted to remain in prison until he completed the anger-management and substance-abuse courses in which he had enrolled. The hearing was held as scheduled and Latham attended by telephone.

The testimony regarding B.L. generally established that he was improving in foster care and that Latham regularly wrote letters to B.L. to which B.L. did not respond. After the permanency-planning hearing, the case goal was changed to termination. In the no-reunification order, the trial court found that both parents had subjected the children to aggravated circumstances in that there was little likelihood that services to the family would result in successful reunification. With regard to Latham, the court noted that over the last six years appellee had been involved with the family, the children "do okay" when Latham is "out of prison and sets the rules" but that the children suffer and do not have their needs met due to the "chaotic and volatile" relationship between Latham and Christine. In the permanency planning order, the trial court noted that Latham was incarcerated and had made only minimal progress toward complying with the court orders and case plan.

Appellee subsequently filed a petition to terminate Latham's parental rights. The termination hearing was held on April 20, 2006. At that point, Latham had been released from prison for two months. Although he had worked steadily since his release, he did not have an appropriate home because he lived with friends.

B.L. was nearly eleven years old at the time of the termination hearing. The testimony established that B.L. was improving in foster care and had not expressed a desire to live with Latham. The court was "amazed" at the progress that B.L. had made. It noted that for the first time in B.L.'s life, he had a "stable place where people aren't fighting, and daddies aren't going to prison and mommies aren't doing meth." The court acknowledged that Latham was employed, had filed for divorce from Christine, and had completed anger-management and substance-abuse courses while in prison.

Nonetheless, the trial court believed that returning B.L. to Latham's care would not be in B.L.'s best interest because it would be

> ripping [B.L.] out and putting him basically back in a situation that has always been volatile with the hopes that Mr. and Ms. Latham

> will stay apart, with the hopes that dad will maintain his sobriety when he's only been out of prison for a month, I don't think that's in [B.L.'s] best interest and I believe that would be harmful. I also find with respect to [B.L.] that he's very adoptable . . . [and that] both parents subjected him to aggravated circumstances . . . And I find that both parents have not remedied the conditions that caused B.L.'s removal, that the testimony is that even though dad filed for divorce that he and Ms. Latham are still married. . . . So it's not just a problem between mom and dad that caused these children to come into [foster] care. It's anger issues. It's abuse of illegal drugs. It's just not even meeting their basic needs of getting the kids to school. So I find that with respect to [B.L.] it's in his best interest that both mother's and father's rights be terminated.

The trial court orally noted its previous finding that both parents had subjected the children to aggravated circumstances and determined that Latham failed to correct the conditions that caused B.L.'s removal from Latham's custody. It terminated Latham's parental interests with regard to B.L. only, continuing the case goal of independence for B.L.'s older siblings. It found that termination was in the best interest of B.L., considering the likelihood that he would be adopted if the termination petition was granted and the potential harm, including the effect on the health and safety of the child, caused by returning him to the custody of his parents. *See* Ark. Code Ann. § 9-27-341(b)(3)(A). Additionally, the trial court found that other factors or issues arose subsequent to the filing of the original petition for dependency-neglect that demonstrate that return of B.L. to Latham's custody is contrary to B.L.'s health, safety, or welfare and that, despite the offer of appropriate family services, Latham manifested the incapacity or indifference to remedy the subsequent issues or factors or rehabilitate his circumstances that prevent return of the B.L. to his custody. *See* Ark. Code Ann. § 9-27-341(b)(3)(B)(vii)(a). Finally, the court found that termination was proper because Latham had subjected B.L. to aggravated circumstances in that there was little likelihood that services to the family will result in successful reunification. *See* Ark. Code Ann. § 9-27-341(b)(3)(B)(ix)(3)(B)(i).[2] In so doing, the court specifically incorporated its previous findings regarding aggravated cir-

[2] The court also cited to portions of the termination statute that are applicable only where a child has been out of the home for more than twelve months. Clearly, B.L. had not been out of Latham's custody for more than twelve months, because he was removed from

cumstances. It also incorporated all of the pleadings and testimony in the case in its subsequent written order.

A circuit court may terminate parental rights if the court finds that there is an appropriate permanency-placement plan for the juvenile; finds by clear and convincing evidence that termination is in the best interest of the children considering the likelihood that the child will be adopted and the potential harm the child would suffer if returned to the parent's custody; and finds that at least one statutory ground for termination exists. *See* Ark. Code Ann. § 9-27-341(b)(3). Clear and convincing evidence is that degree of proof that will produce in the fact-finder a firm conviction as to the allegation sought to be established. *See Camarillo-Cox v. Arkansas Dep't of Human Servs.*, 360 Ark. 340, 201 S.W.3d 391 (2005).

When the burden of proving a disputed fact is by clear and convincing evidence, the inquiry on appeal is whether the trial court's finding is clearly erroneous. *See Linker-Flores v. Arkansas Dep't of Human Servs.*, 359 Ark. 131, 194 S.W.3d 739 (2004) (*Linker-Flores I*). 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. *See Camarillo-Cox, supra.* In resolving the clearly erroneous question, we give due regard to the opportunity of the trial court to judge the credibility of witnesses. *See Camarillo-Cox, supra.* We review such cases de novo on appeal. *See Camarillo-Cox, supra.*

Latham argues that the trial court erred in terminating his parental rights because there was no evidence that he was an unfit parent or that termination would be in B.L.'s best interests. He also argues that the trial court ignored his efforts to comply with the court's orders.[3] We disagree.

Latham's custody in June 2005 and the termination order was entered in May 2006. Nonetheless, the evidence supports that termination was proper due to Latham's exposure of his children to aggravated circumstances and due to his failure to remedy the subsequent conditions that arose after removal — grounds that do *not* require a child to have been out of the home for more than twelve months. *See* Ark. Code Ann. § 9-27-341(b)(3)(B)(ix)(3)(B)(i) and (b)(3)(B)(vii)(a).

[3] Latham cites to two cases in which the termination of parental rights have been reversed based on the insufficiency of the evidence: *Long v. Ark. Dep't of Human Servs.*, 96 Ark. App. 1, 237 S.W.3d 529 (2006); *Conn v. Ark. Dep't of Human Servs.*, 79 Ark. App. 195, 85

It is undisputed that Latham made some progress in this case and has shown an interest in regaining custody of B.L. by writing letters to his son while incarcerated. Nonetheless, the trial court did not err in terminating Latham's parental rights to B.L. where Latham failed to prove that he could provide for one of B.L.'s most basic needs — a stable home. *See Dinkins v. Arkansas Dep't of Human Servs.*, 344 Ark. 207, 40 S.W.3d 286 (2001). Latham testified at the permanency planning hearing in January 2006 that he had enough money "waiting" for him when he was released from prison to rent a suitable home for his children and said that "all I've got to do is find a place that is suitable for them." Upon his release from prison, Latham resumed work in his long-time vocation of building houses; he testified that he earned approximately $2,000-$2,500 per month and paid rent of $120 per week ($480 per month).

Yet, at the time of the termination hearing, three months after declaring his desire and ability to secure proper housing for his children, and two months after his release from prison, Latham had not obtained suitable housing. He was living with friends and had not obtained a home suitable for even one child because, in his words, it would be "pretty expensive." He admitted that the home

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S.W.3d 558 (2002). However, neither case compels reversal here. The *Long* case was, in fact, reversed by the Arkansas Supreme Court. *See Long v. Ark. Dep't of Health and Human Servs.*, 369 Ark. 74, 250 S.W.3d 560 (2007). The termination order in the *Conn* case was reversed on inapposite facts because the trial court there terminated the parent's rights with regard to one child where no evidence was submitted regarding the parent's conduct toward that child, but termination was based solely on a stipulation concerning the earlier termination of the parent's rights to *another* child. There is no lack of evidence regarding Latham's conduct toward B.L. in the instant case.

Latham also purports to challenge the separate findings that the children were subjected to aggravated circumstances and that appellee failed to provide reasonable efforts to effect reunification. We do not address these issues on the merits because they were not raised below. With regard to aggravated circumstances, we note that the trial court orally found that both parents subjected B.L. to aggravated circumstances. The termination statute does not require a specific finding of aggravated circumstances as to *each* child; section 9-27-341(b)(3)(B)(ix)(3)(B)(i) clearly authorizes termination based on a finding that the parent has subjected "any juvenile" to aggravated circumstances. Moreover, given that the trial court orally found that Latham had exposed B.L. to aggravated circumstances and in its orders consistently refers to all three children in the aggregate, as "the children," there is nothing in the trial court's orders to suggest that it excluded B.L. from this finding.

in which he stayed was not suitable for his children because it did not contain enough bedrooms.

Second, Latham remained married to Christine at the time of the termination hearing. Even though Latham and Christine testified that the divorce papers had been signed and they had no plans to reunite, the trial court was not required to ignore the fact that Latham and Christine had a long history of a volatile relationship, that B.L. had suffered as a result of that volatile relationship, and that Latham remained married to Christine. Put differently, the trial court was entitled to assess Latham's credibility regarding his avowed plan to sever his ties to Christine.

Third, while Latham insists that the biggest problem for the children was his chaotic relationship with Christine and insists that "obstacle" has been removed because he no longer lives with her and they are awaiting a divorce, there are other obstacles preventing Latham from providing a stable environment for B.L. within a reasonable time period, from B.L.'s perspective. Latham's failure to recognize and address these additional obstacles is further proof that he is not in tune with B.L.'s needs or with his own deficiencies as a parent. For example, Latham admitted that his children need an environment that does not "fall apart" whenever he is not around. However, he admittedly has been incarcerated "a bunch of times" and will be on parole until 2012. Also, there is no evidence that he sought visitation with B.L. when he was released from prison the last time.

In addition, although Latham admittedly had drug problems and was returned to jail in June 2005 for being drunk and hitting his daughter, he did not begin drug treatment until October 2005, and he offered no explanation for why he delayed in seeking treatment. Similarly, without explanation, he delayed taking the anger-management course. Latham completed the substance-abuse program only three months before the termination hearing and had been out of jail only two months at the time of the termination hearing. He did not finish his anger-management course until after the permanency-planning hearing, and only two months prior to the termination hearing. Given Latham's prior history and the fact that the children were removed from his custody because he was drunk and assaulted his pregnant daughter, the trial court was appropriately concerned about whether Latham would remain sober, control his anger, and stay out of prison.

Contrary to Latham's argument, the trial court did not ignore the progress he made in this case; rather, it simply found that Latham's efforts were not sufficient to prevent termination. The trial judge was in the best position to assess Latham's credibility with regard to his willingness or desire to properly care for B.L. The progress that Latham made in this case was too little and occurred too late to achieve reunification within a reasonable time, from B.L.'s perspective. *See Malone v. Ark. Dep't of Human Servs.*, 71 Ark. App. 441, 30 S.W.3d 758 (2000); Ark. Code Ann. § 9-27-341(a)(4)(A).

Finally, the trial court properly determined that termination is in B.L.'s best interest. Teresa Jones, the caseworker, testified that termination was in B.L.'s best interest, primarily due to the stability of his foster home and the improvements he had made while *not* in Latham's care. B.L.'s foster mother testified that B.L. rarely mentions Latham and that he has never responded to any of Latham's letters. Jones also testified that B.L. had bonded with his foster family, was doing "really well," is happy with his living arrangements, and is adoptable. She said that B.L. is in a stable home and that it is in his best interest to stay there. The CASA volunteer also recommended that B.L. remain with his foster family, and B.L.'s ad litem specifically recommended termination.

Since being removed from Latham's custody, B.L. is more confident, less aggressive toward others, and his attitude toward school has improved. Notably, B.L.'s school counselor stated in a letter dated the day prior to the termination hearing that "B.L. is now interacting with other kids, forming relationships, and taking more of an active role in his education. . . . He seems to be settling into a routine." It is a routine the trial court justifiably determined should not be disturbed.

Affirmed.

PITTMAN, C.J., BIRD, MILLER, and HEFFLEY, JJ., agree.

HART, GLADWIN, ROBBINS, and VAUGHT, JJ., dissent.

JOHN B. ROBBINS, Judge, dissenting. I agree with the majority's conclusion that the trial court did not clearly err in finding that termination of appellant's rights was in B.L.'s best interest. However, I would hold that the trial court clearly erred in finding clear and convincing evidence of one of the additional statutory grounds necessary to support a termination order. Therefore, I re-

spectfully dissent from the majority opinion that affirms the termination of Mr. Latham's parental rights.

The trial court terminated appellant's parental rights on the following three grounds[1] set out in Ark. Code Ann. § 9-27-341(b)(3)(B) (Supp. 2005):

> (i)(*a*) That a juvenile has been adjudicated by the court to be dependent-neglected and has continued out of the custody of the parent for twelve (12) months and, despite a meaningful effort by the department to rehabilitate the parent and correct the conditions that caused removal, those conditions have not been remedied by the parent.
>
> . . . .
>
> (vii)(*a*) That other factors or issues arose subsequent to the filing of the original petition for dependency-neglect that demonstrate that return of the juvenile to the custody of the parent is contrary to the juvenile's health, safety, or welfare and that, despite the offer of appropriate family services, the parent has manifested the incapacity 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.
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> . . . .
>
> (ix)(*a*) The parent is found by a court of competent jurisdiction . . . to:
>
> (*3*)(A) Have subjected any juvenile to aggravated circumstances.
>
> (B) "Aggravated circumstances" means:
>
> (i) A juvenile has been abandoned, chronically abused, subjected to extreme or repeated cruelty, sexually abused, or a determination has been made by a judge that there is little likelihood that services to the family will result in successful reunification[.]

[1] A fourth ground was discussed in the trial court's order of termination, i.e., § 9-27-341(b)(3)(B)(ii)(a); however, the court's findings on this ground specifically pertained only to B.L.'s mother.

The majority appears to acknowledge that the trial court erred to the extent that it terminated Mr. Latham's parental rights on the ground set forth in subsection (i) inasmuch as B.L. had only been out of Mr. Latham's custody for just over ten months rather than twelve months as required under this subsection. The trial court's finding that B.L. had "continued out of the custody of father for twelve (12) months" is clearly erroneous. The majority relies on the two remaining subsections to affirm, which in my view are inapplicable to the circumstances of this case.

> *(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 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.*

As to the trial court's reliance on (vii)(a), the only finding of fact made by the court as pertains to Mr. Latham is "Father went to prison." Actually, Mr. Latham had already been taken into custody when the original petition for dependency-neglect was filed on June 13, 2006. Consequently, Mr. Latham's incarceration was not a factor that *arose subsequent to the filing of the original petition.* Furthermore, even if his incarceration had occurred subsequent to the date of the petition, the requisite additional finding under this ground that "the parent has manifested the incapacity or indifference to remedy the subsequent" factor is clearly erroneous because Mr. Latham had indeed been released from prison prior to the termination hearing. For these reasons subsection (vii)(a) could not support a termination of Mr. Latham's parental rights.

> *(ix)(a) The parent is found by a court of competent jurisdiction . . . to:*
>
> *(3)(A) Have subjected any juvenile to aggravated circumstances.*
>
> *(B) "Aggravated circumstances" means:*
>
> > *(i) A juvenile has been abandoned, chronically abused, subjected to extreme or repeated cruelty, sexually abused, or a determination has been made by a judge that there is little likelihood that services to the family will result in successful reunification[.]*

The trial court's order did not specify the aggravated circumstances to which Mr. Latham had subjected B.L.; however, it incorporated by reference the aggravated circumstances that it had

set forth in its earlier Order For No Reunification Services dated January 19, 2006. That order made numerous findings regarding Mrs. Latham, but only found the following regarding Mr. Latham:

> As to Father, the Court has had several cases on the family over past six years. Father is currently incarcerated by ADOC. When father is out of prison and sets the rules, children do okay, but it is the relationship between Mother and Father gets chaotic & volatile (as it always does) the children suffer — they don't get proper supervision & needs met (D.L. pregnant at age 15, O.L. committing crimes and going to DYS, B.L. not going to school, etc.) When Father hopefully gets out of prison end of Jan. 2006, and will be on parole until 2008. Father will either be successful upon release from prison or not.

These observations fall far short of finding that B.L. had been "abandoned, chronically abused, subjected to extreme or repeated cruelty, [or] sexually abused" by Mr. Latham. Neither does it support a conclusion that "there is little likelihood that services to the family will result in successful reunification."

Mr. Latham did not demonstrate indifference to remedying the problems that resulted in the removal of his children from the home. To the contrary, he wrote frequent letters to all three children during his incarceration in prison, and also completed courses in anger management and substance abuse treatment. Upon his release from prison, Mr. Latham secured gainful employment earning $9.95 per hour working sixty to eighty hours per week. While Mr. Latham was living at a friend's house at the time of the termination hearing, he had only been out of prison for three months and explained that he had the means to rent a larger home appropriate for his children, but had yet to do so due to the uncertainty of this case. Mr. Latham had filed for divorce and had no plans to reunite with the children's mother, who had clearly been a negative factor in the children's lives. Mr. Latham stated, "I've been taking care of them all their lives," and wanted to continue to be a parent to his children.

Nor was there any proof that Mr. Latham was incapable of being a fit parent to any of his children, including B.L. The trial court chose not to terminate Mr. Latham's parental rights to his two older children, and DHHS worker Teresa Jones testified that Mr. Latham's older son O.L. expressed a strong desire to live with him. Ms. Jones stated that Mr. Latham is not an unfit parent, and

she recommended that O.L. be returned to Mr. Latham "if Daniel is able to stay clean and gets a place to live." Ms. Jones testified that Mr. Latham cooperated with her in every way, indicating that Mr. Latham was motivated to pursue reunification with all of his children.

While there are legitimate concerns about Mr. Latham's prior criminal history, it is evident that since his children were removed from his custody he has made legitimate progress toward reunification. Mr. Latham has done nothing since that time to demonstrate that the return of B.L. to his custody would put B.L. at risk. And under the circumstances of this case, I believe that continued services would have resulted in a legitimate likelihood of reunification. For these reasons, I would reverse the order terminating Mr. Latham's parental rights.

HART, GLADWIN, and VAUGHT, JJ., join in this dissent.

Karon D. TROTTER, Jr. *v.* STATE of Arkansas

CA CR 06-863 256 S.W.3d 528

Court of Appeals of Arkansas
Opinion delivered May 9, 2007

John F. Gibson, Jr., for appellant.

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

DAVID M. GLOVER, Judge. Appellant, Karon Trotter, Jr., was tried by a jury and found guilty of the offenses of possession of drug paraphernalia, manufacturing cocaine, possession of cocaine with intent to deliver, and delivery of cocaine. He was sentenced to three years on the drug-paraphernalia conviction and twenty years on each of the remaining convictions. The sentences were ordered to run concurrently. For his sole point of appeal, appellant contends that the trial court erred in denying his motion to suppress evidence. We affirm.

There is no real factual dispute in this case, and the pertinent facts can be summarized as follows. Monticello police officers made arrangements with a confidential informant, Buddy Frost, to make a controlled cocaine buy from appellant within the city limits of Monticello on March 11, 2005. Appellant was staying at the Economy Inn in Monticello. Frost initially tried to contact appellant by using a pay phone located at a store in Monticello. Appellant did not answer the call from that location. According to Frost, appellant would only answer calls from two numbers, one of which was Frost's home telephone. Consequently, the initial plan had to be changed to allow Frost to make the call from his home phone, which was located north of Monticello — outside the city limits.

Appellant was subsequently observed driving toward Frost's house, and Frost then later called Tommy Free, the Monticello Chief of Police, to report that appellant had been there and that the controlled buy had been completed. Chief Free positioned his vehicle along a public road to watch for appellant's return from Frost's house but was not able to see the car. Frost delivered the purchased cocaine to Chief Free and then returned home, soon thereafter reporting to Chief Free that appellant had returned to Frost's home with more cocaine for another sale.

Chief Free alerted other Monticello officers to look out for appellant's vehicle along the road from Frost's house. An officer named Deaton notified Chief Free that he had observed appellant's car on its way from Frost's house. Deaton followed appellant's vehicle, and Chief Free fell in behind Deaton's vehicle when appellant and Deaton passed him. Chief Free explained that the officers had planned to follow appellant into Monticello; however, appellant's vehicle pulled over to the side of the road before reaching Monticello city limits. The officers surmised that appellant had realized he was being followed, and they thought that he might try to dispose of the evidence. Deaton's vehicle went around appellant's car, but Chief Free turned on his lights and pulled in front of appellant's car. As the officers approached the vehicle, it accelerated toward one of the officers and then ran into a ditch. Cocaine, the buy money, a motel-room key, and drug paraphernalia were retrieved by the officers. In addition, bank records and motel-room receipts were retrieved from appellant's briefcase.

Mark Gober testified that he was the sheriff of Drew County, Arkansas. He explained that he issued commissions to various members of the Monticello Police Department for purposes of working in the county. The cards evidencing the commissions provided in pertinent part that the sheriff had appointed the named officers "as a Deputy Sheriff" and that the sheriff "hereby authorize[s] the said Deputy to perform all the duties prescribed by law to my said office." In addition, Sheriff Gober produced an accompanying letter of January 27, 2005, listing the officers to whom he had issued commission cards, which letter also provided in pertinent part:

> As formally stipulated the usage of these cards will be closely monitored.
>
> Utilization of the cards is to be one of the following:
>
> 1. The Sheriff or Chief Deputy request assistance.
>
> 2. At any time the Monticello Police Department has need to be outside the city limits, the Sheriff shall be notified and in his absence the chief deputy shall be notified. At which time the appropriate personnel will be dispatched to assist. Any misuse of the card will be quickly handled and the appropriate action taken.
>
> In the future as I get to know other Police Department personnel additional cards may be issued. Both of our Departments believe in

> a good working relationship towards improving the lives of our citizens by providing good law enforcement for our county.

Sheriff Gober explained that he was not advised of the investigation prior to appellant's arrest; that he first learned city officers had made a stop in the county from one of his own deputies; that he found out about the entire matter after March 11; that he "absolutely" would have approved the operation if he had known; and that the operation was scheduled to take place in the city, but appellant's own actions made it necessary to go into the county and to make the arrest in the county. He stated that he believed the Monticello officers were acting under the authority that he had provided them; that their actions began in the city limits and he would expect them "to stay on it" until finished; and that he believed it was a necessity for the city officers to go into the county. He concluded that he did not believe that the city officers had violated the agreement or misused their commission cards.

Standard of Review

In reviewing the denial of a motion to suppress evidence, this court conducts a de novo review based upon the totality of the circumstances, reversing only if the circuit court's ruling denying the motion to suppress is clearly against the preponderance of the evidence. *Sheridan v. State*, 368 Ark. 510, 247 S.W.3d 481 (2007).

Jurisdictional Authority to Arrest

Appellant contends that all of the evidence obtained in his case was the result of an illegal stop/search of his vehicle and that the trial court therefore erred in denying his motion to suppress. The only basis asserted by appellant in this appeal for his claim that the search was illegal is that the Monticello police officers were operating outside of the city limits, and "beyond the limits of their appointments as deputy sheriffs of Drew County when they made the warrantless stop of his vehicle." Appellant acknowledges that the officers carried commission cards, which purportedly appointed them to act as deputy sheriffs in Drew County. He contends, however, that Sheriff Gober's letter of January 27, 2005, placed limits on the appointments and that the officers involved in the stop and search of his vehicle were not acting within those designated limitations on their authority. He argues, therefore, that all evidence and everything else resulting from the stop should have been suppressed under the fruit-of-the-poisonous-tree doctrine. We disagree.

Arkansas Code Annotated section 14-15-503 (Repl. 1998), provides in pertinent part:

> (a) Every deputy sheriff appointed as provided by law shall possess *all* the powers of his principal and may perform *any* of the duties required by law to be performed by the sheriff.

(Emphasis added.) Appellant does not challenge the appointments themselves. Moreover, the statute clearly grants full powers to appointed deputy sheriffs. The officers involved in the stop were all listed as recipients of commission cards in Sheriff Gober's letter of January 27, 2005. The trial court concluded that the evidence established that the arresting Monticello police officers were all commissioned deputies in Drew County, that appellant had cited him no law pertaining to the placement of conditions on commissions, and that Sheriff Gober was satisfied that the officers had acted within their authority as deputies. The trial court, therefore, denied the motion to suppress.

In addition, upon examining the contents of Gober's January 27 letter, it can be fairly said to provide that use of the cards was to take place in two basic situations: 1) when the sheriff or chief deputy requested assistance, and 2) any time the Monticello Police Department needed to be outside the city limits. In the latter situation, the letter also provides that the Sheriff or Chief Deputy shall be notified, at which time appropriate personnel will be dispatched to assist. Even though the letter uses the term "shall" it does not specify that notification must precede any action. Sheriff Gober testified that he had no problem with the series of events leading to appellant's arrest, and that he "absolutely" would have approved the operation. The trial court determined that the officers acted within their authority as appointed deputy sheriffs. Appellant's argument does not convince us otherwise. Our de novo review of this record reveals no clear error in the trial court's denial of appellant's motion to suppress.

Affirmed.

BAKER and MILLER, JJ., agree.

Cyndall SHARP *v.* M. J. KEELER

CA 06-714 256 S.W.3d 528

Court of Appeals of Arkansas
Opinion delivered May 9, 2007

[redacted]

Brenda Austin, Ltd., by: *Brenda Horn Austin*, for appellant.

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

DAVID M. GLOVER, Judge. Cyndall Sharp appeals the Washington County Circuit Court's grant of M.J. Keeler's petition for change of custody of the parties' minor son, Corbin Michael Jonas Sharp Keeler, who was born August 30, 2004. On appeal, she argues that the trial court erred in finding (1) that she "acted in ways to the detriment of the child and that parental alienation on the part of appellant was a material change of circumstances warranting modification of its original custody decree and thereby granting custody to appellee, M.J. Keeler," and (2) that she was only entitled to supervised visitation when there were no facts to support a finding that supervised visitation was in Corbin's best interest. Briefly stated, we affirm the trial court's decision regarding the change of custody and reverse and remand with regard to visitation. However, "brevity" is not the watchword in this matter — there was a detailed initial order of custody, a detailed petition seeking a change of custody, detailed testimony at the hearing, and a detailed ruling from the bench, all captured in detail in the opinion of this court.

In *Alphin v. Alphin*, 90 Ark. App. 71, 74-75, 204 S.W.3d 103, 105-06 (2005) (internal citations omitted), our court set forth the standards for reviewing modifications of custody:

> 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. The primary consideration is the best interest and welfare of the child, and all other considerations are secondary. Custody awards are not made or changed to punish or reward or gratify the desires of either parent.
>
> 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. A finding is clearly erroneous, 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. Because the question of whether the trial court's findings are clearly erroneous turns largely on the credibility of witnesses, we give special deference to the superior position of the trial judge to evaluate the witnesses, their testimony, and the child's best interest. 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.

Background Facts

The parties in this case were never married. In a very precise order filed of record on April 4, 2005, but ordered to be effective as to February 25, 2005, the trial court initially awarded custody of Corbin to Sharp, subject to visitation by Keeler. The order contained numerous terms and conditions of visitation, including that neither party would make derogatory comments about the other in the presence of the child; that Sharp would not text message Keeler while he was exercising visitation with Corbin; that Sharp would cease leaving "tacky" notes for Keeler; that Sharp was not to do anything to alienate Corbin from Keeler; that Sharp was to have Corbin ready for visitation at the time visitation was to begin; and that when Sharp needed a babysitter, she was to give Keeler first opportunity to babysit and she was to notify Keeler as soon as she was aware she needed a babysitter. The order further enumerated that until Corbin was three years old, visitation would be every Saturday from 9:00 a.m. until 5:00 p.m.; every Wednesday from 5:30 p.m. until 7:30 p.m., unless Keeler's college or employment conflicted, and then the visitation was to be on Thursday at the same time; and any additional visitation upon which the parties agreed was appropriate. Holiday visitation was set forth, as well as visitation for Corbin's birthday, on which Keeler was entitled to visitation from 11:00 a.m. until 2:00 p.m. The order also provided that the parties were to keep each other

fully informed of his or her address, telephone number, and all known pertinent information regarding Corbin's health, education, and welfare. In addition, the order stated that Corbin's birth certificate was to be changed to reflect that his name was Corbin Michael Jonas Sharp Keeler.

Five months later, in September 2005, Keeler filed a thirty-five page document entitled "Petition for Contempt Citation and Petition for Change of Custody," in which Keeler alleged that Sharp had continued to use the name Sharp instead of Sharp-Keeler for Corbin; that she would not acknowledge "Corbin Keeler," stating that that was not their son's name; and that Corbin's medical records indicated Sharp instead of Keeler. Keeler further alleged that Sharp had made derogatory remarks about him in front of Corbin; that Sharp had continued to text message and call him during his visitation; that Sharp had made him miss his Father's Day visitation; that Sharp had continued to leave him tacky notes; that Sharp had actively done things to alienate Keeler from Corbin; that Sharp had failed to have Corbin ready for visitation; that Sharp had denied Keeler visitation; and that Sharp had failed to keep Keeler updated on Corbin's medical conditions.

Hearing Testimony

Keeler testified at length during a two-day hearing. He stated that he was happy when the trial judge initially set rules for visitation because he thought it would be less stressful and that he would be able to babysit Corbin when Sharp could not be with him. However, Keeler testified that Sharp presented difficulties for him getting to see Corbin, that Sharp continued to use "Sharp" as Corbin's last name instead of Keeler, and that she told him that she does not know who Corbin Keeler is. For example, in response to an instant message Keeler testified he sent Sharp to tell Corbin Keeler that he loved him, Sharp replied that Keeler could only speak to his imaginary son because Keeler was not Corbin's name. Keeler stated that Corbin's account with AR Kids First was under the name Corbin Sharp. Keeler also said that Sharp's mother continued to call him names like "sissy" and "asshole" in front of Corbin.

Keeler testified that Sharp tried to give him a book on babysitting, which offended him because he was Corbin's father, not just his babysitter. Keeler recounted that on a check Sharp wrote him for stop-payment fees, she wrote "sexual favors" on the

memo line. Keeler also said that Sharp had on one occasion left him a note taped to Corbin's diaper, which he thought was "disturbing."

Keeler stated that he felt alienated from Corbin. As examples, he said that Sharp would not let him have visitation because Corbin was too sick, but then when he checked with the doctors, they told him that Corbin was not too sick; that Sharp still did not use the last name Keeler for Corbin; that Sharp acted like Keeler was not capable of taking care of Corbin; that Sharp would not let him go to Corbin's doctor visits; that if Corbin was napping when he came to pick him up for visitation, he was required to wait until Corbin woke up, but that rule did not apply if Sharp came to get Corbin at Keeler's and he was napping; and that Sharp would accuse him of causing Corbin to be constipated.

Keeler said that on one occasion when he was picking Corbin up for visitation, Sharp told him that Corbin had an ear infection and needed to see the doctor. Keeler did not take him to the doctor because Corbin was not running a fever and seemed to be okay; however, Keeler testified that he called a doctor and found out the correct dosage of Tylenol for a child under two and gave a smaller dose to Corbin just to be safe. When Keeler returned Corbin to Sharp, he told her that he had given him Tylenol. Thereafter, he testified that Sharp began text messaging him, asking how much Tylenol he had given Corbin. She finally text-messaged him that she and Corbin were at the emergency room and that the doctors needed to know if they needed to pump Corbin's stomach. According to Keeler, he went to the emergency room but did not find Corbin or Sharp there; it turned out that Sharp had never taken Corbin to the emergency room and she was at home all the time.

Keeler testified that Sharp failed to keep him informed about Corbin's medical issues. He said that he found out about Corbin's surgery to put tubes in his ears by reading Sharp's "away" message to friends on Yahoo Messenger that said, "EVERYONE, thanks for all the prayers! Please continue to pray for Corbin during his surgery, leave a message." It was Keeler's testimony that his wife discovered that Corbin was having surgery at the Ear, Nose and Throat Clinic and, when he arrived to see what type of surgery Corbin was having, the doctor told him that Sharp had said that she did not want him back there and that the doctor did not want him to make a scene. Keeler said that he remained outside until the

surgery was completed and then he went back. He said that Sharp ignored him at first but then let him hold Corbin while she got her car.

Keeler said that on another occasion, Sharp began calling his sister, mother, and wife and began asking about family-disease history. Sharp sent Keeler an instant message that she needed to talk to him about Corbin's arm, that it was urgent; Keeler did not answer the message because he was not at a computer. Keeler said that when he finally reached her, Sharp would not tell him why she needed his family disease history but "never mind" because she had found it anyway. Keeler said that on September 22, 2005, he got a message from Sharp that he would not be able to have his visitation because she and Corbin were at the hospital, but that she did not tell him in which hospital they were. He finally found they were in Arkansas Children's Hospital. When he spoke with Sharp next, she told him that Corbin had histiocytosis, a rare blood disease, and that he had had to have a tumor removed from his arm. Keeler said that he thought that Sharp did not want him to come to Little Rock for the surgery and that was why she did not tell him about it. He further stated that at first, Children's Hospital would not tell him anything, then they said that he needed a code word from Sharp before they could tell him anything. He said that he had to beg Sharp for the code word before she gave it to him, and then that Sharp would not let the nurse give him any more information than what Sharp had told him.

Keeler stated that Corbin had to have chemotherapy treatments in Little Rock, but even though he offered, Sharp would not let him take Corbin to Little Rock by himself. Keeler, his wife, Sharp, and Corbin all made the trip together, and Keeler said that they got along fine. He stated that everyone was getting along when Corbin began receiving his treatments in Northwest Arkansas, but then at one treatment, Sharp got upset that Keeler's wife was also present at the treatment. Keeler said that the treatments were initially scheduled in Bentonville so that he could go to them, but that Sharp switched them to Fayetteville so that he could not go anymore. When he arrived at a treatment in Fayetteville, Sharp told him in front of everyone in the waiting room that he could not go back with her when Corbin got his treatment because it was stressful to Corbin; Keeler said that he then left because his feelings were hurt and he was embarrassed. He later asked Sharp if she would let him go back if he came to the next chemotherapy appointment; she said no, so he did not bother going back. Keeler

said that he would like to be able to go to the appointments, but he did not feel like he was welcome, and that was why he did not go anymore. Keeler stated that he had tried to get Corbin's medical records, but that Sharp had still not signed a medical authorization.

Keeler said that he was denied visitation after the tubes were put in Corbin's ears. He said he was also denied visitation for a longer period of time after the surgery at Children's Hospital because Sharp said that Corbin was too clingy and could not be away from her. He testified that Sharp insisted on supervised visitations, which Keeler agreed to a couple of times. Keeler said that he believed that there were times when Corbin was left with other people after his surgery at Children's Hospital even though he was denied his visitation.

Keeler recounted a time where Sharp would not allow Keeler's mother to pick up Corbin, even though she was authorized to pick him up. Sharp emailed Keeler and said that she did not think it would be best for his mother to pick Corbin up because in the past Corbin had been stressed after visiting Keeler's mom. Sharp also told Keeler that she did not think that his mother was capable of taking care of a child undergoing chemotherapy.

Keeler said that on February 18, 2006, he and his wife went to pick Corbin up for visitation. Sharp heard Keeler's wife cough while standing outside in the cold, and Sharp denied visitation because she thought Keeler's wife was sick. He also said that on numerous occasions, Sharp has not had Corbin ready for visitation when he arrived and that he has had to wait for Sharp to get him ready. Keeler said that he does not get to make up any visitation time he misses when he has to wait on Sharp to get Corbin ready.

Keeler stated that Sharp refused to allow his wife to pick Corbin up, even though she was authorized to do so. According to Keeler, he told Sharp that his wife was authorized to pick Corbin up — Sharp told him that she did not care what the order said.

Keeler complained that Sharp would not give him the first right to babysit. He said that Sharp told him that her mother was not considered a babysitter because she was family. Keeler said that he thought Sharp was saying to him that her family got the first option to babysit Corbin instead of him. Keeler said that he asked several times to babysit while Sharp was at work, and that she told him that she needed at least forty-eight hours' notice if he wanted Corbin. He said she told him that a babysitter was a paid person, not family. While Keeler admitted that Sharp occasionally allowed

him to have extra visitation, he said that he did not know if she ever allowed him to babysit while she was working.

Keeler testified that he received a call from DHS because he had been accused of mistreating Corbin; however, that accusation was determined to be unfounded.

Keeler stated that he also had problems getting his mid-week visitation. He said that his understanding was that if he could not have visitation on Wednesday, that he got Thursdays; he said that Sharp now said that visitation should only be on Thursdays, even if there was a conflict.

Keeler said that he had not freely been given Corbin's medical information, and that Sharp sent him a message threatening to withhold all information about Corbin's life if Keeler continued to "loathe Corbin's Mommy." Keeler said that he had to work on Corbin's birthday during his scheduled visitation time, and that Sharp told him that she was not obligated to change her schedule to accommodate him. Keeler said that he did not believe that he had been treated well by Sharp over the last year with regard to Corbin, and that he had learned how a non-custodial parent should be treated. He said that he knew it was important for Corbin to be with Sharp and how important visitation was; he said that if he received custody, he would not treat her the way she treated him.

Jennifer Keeler, Keeler's wife, testified about the times she had tried to pick up Corbin, and Sharp would not allow her to do so. Jennifer said that after she tried twice to pick up Corbin, without being allowed to do so, she did not try to pick him up for visitation any more. Jennifer said that she and Sharp were getting along until she came to one of Corbin's chemotherapy appointments, at which time Sharp became very upset. Jennifer said that she was never really sure with which Sharp she was going to talk.

Sharp also testified at length. She testified that there were different times that she did not follow the court order because she did not believe that it was what the trial court had ordered and she did not think it was a valid order. She said that other times she did not follow the order, she was concerned about Corbin's safety. She stated that there was a period of time after Corbin's biopsy that she did not allow unsupervised visitation because Corbin had had a difficult time at the hospital. Sharp said that Keeler had not made her feel safe about Corbin being with him, and that she had tried to give him information about Corbin's health problems and food

allergies, but that Keeler always treated her like she was overreacting. Sharp said that she was nervous at first because she was a new mom, and then Keeler had refused to tell her what and how much medication he had given Corbin. Sharp also said that Keeler took Corbin into public when Corbin was sick and that he did not feed him properly. In addition, Sharp complained that Keeler had failed to properly clean Corbin after he had bowel movements.

Sharp stated that she had a lot of trouble getting Keeler to administer Corbin's medication, and that was her basis for not allowing unsupervised visitation. She admitted that she had told Keeler that she had taken Corbin to the emergency room — she said that she thought that if Keeler believed it was an emergency, he would tell her how much Tylenol he had given Corbin.

Sharp said that she had tried to tell Keeler about Corbin's ear surgery but that Keeler kept hanging up on her. She also said that she tried to tell him about the surgery at Children's Hospital, but that he hung up again, and she quit trying.

Sharp testified that she felt physically threatened by Jennifer Keeler because she followed her after Sharp would not let her take Corbin. Sharp said that she was driving Corbin to Keeler's house so that he could have his visitation, and that Jennifer followed her extremely closely and that it did not seem to her that Jennifer was thinking of Corbin's safety at all.

Sharp said that she changed the chemotherapy treatments to Fayetteville because Corbin's nurse transferred to Fayetteville. She said that it was an issue of convenience, and that it was not to deliberately keep Keeler from attending the treatments.

Sharp stated that it was her understanding of the order that if she had special dates or appointments that she was supposed to call Keeler to watch Corbin. She said that it seemed disruptive to require Corbin to get up from a nap so that Keeler could watch him. She also said that she did not feel like Corbin was being babysat when he had special play dates with her mother or Sharp's brother. She further explained that she did not contact Keeler if she went into work after Corbin was asleep because her sisters were at home.

Sharp testified that when she wrote "sexual favors" on the check memo line, she was just joking. She denied knowing why Corbin's medication was labeled Sharp instead of Sharp-Keeler. In response to her message to Keeler about "loathing Corbin's

Mommy," she said that she was just saying that Keeler's hatred of her would get in the way of his relationship with Corbin. Sharp also claimed that Keeler had free access to any of Corbin's medical records. She testified that the times she denied unsupervised visitation, she did so out of concern for Corbin's safety, health, and mental health.

With respect to Corbin's stay at Children's Hospital, Sharp denied that she instructed the nurse not to release any information to Keeler. She said that as soon as she knew Corbin's diagnosis, she called Keeler and told him. She said that she did not tell any of Keeler's family about the diagnosis because she thought it would be best to calmly explain things to Keeler.

Trial Court's Findings

At the close of the hearing, the trial court changed custody to Keeler. In a lengthy ruling from the bench, the court first took issue with Sharp's testimony that she did not believe that the initial court order was a valid court order, stating that it was a valid order until the trial court vacated it. The trial court also noted that Sharp "want[ed] your cake, and you want to eat it, too," stating that while Sharp did not want to follow the order, she certainly wanted Keeler to be bound by it. The trial court read the initial order out loud in open court, and then reminded everyone that the court had specifically admonished Sharp to promote the bond and relationship between Corbin and Keeler, but that the court had heard that day that things were worse than they were previously. As an example, the trial court cited the many instances where Sharp continued to send Keeler "tacky little e-mails." The trial court addressed the fact that Sharp sent Keeler notes about Corbin's food taped to Corbin's diaper, and notes in which Sharp had stated that with a little "guidance," Keeler could be a better father. The court questioned how Keeler could get any information from Corbin's doctors when Sharp refused to sign a medical release and continued to instruct nurses not to give Keeler any medical information. The court noted that all of that behavior was to the detriment of the child.

The trial court addressed the "Tylenol incident," noting that Keeler and his wife called a medical professional to find out the correct dose of Tylenol to give Corbin, and then only gave him one-half of that amount to be on the safe side, that Corbin was doing fine and not running a fever, but that Sharp threw a "hissy fit" because Keeler did not take Corbin to the doctor. The court

then contrasted that incident with the one where Corbin was running a fever while in Sharp's custody but Sharp did not take him to the doctor because she could maintain his fever at home and he was not getting worse.

Addressing the visitation after the biopsy incident, the trial court stated that it understood Sharp's concern for Corbin after the biopsy, but it found that there was no testimony to show that Keeler was unfit and could not take care of Corbin during that time. The court further noted that Keeler's visitation was only for the day, that it was not like Keeler was going to have him for an extended period of time.

The trial court addressed the issue of Sharp failing to let Keeler babysit Corbin and allowing her mother, brother, or sisters to do so instead. The court reaffirmed that its order did not say to let Keeler babysit only when Sharp thought it was okay or when Corbin would not miss a nap or only when Corbin was awake, but that Keeler was to have the first right to take care of his child when Sharp could not do so. The court found it "ludicrous" that Sharp did not consider her family to be babysitters but considered Keeler to be a babysitter and that she provided him with a babysitter's guide, which undercut the father-son relationship and evidenced Sharp's attempts to undermine Keeler's relationship with Corbin even after being ordered by the court not to do so. The trial court held Sharp in contempt for failing to allow Keeler to babysit and sentenced Sharp to two days in jail but suspended it on the condition that Sharp follow court orders.

The trial court also addressed the issue of Sharp failing to have Corbin ready for visitation and the fact that Keeler was required to wait for Corbin to wake up if he was asleep when Keeler arrived to pick him up for visitation, but that Sharp did not wait if she was picking Corbin up from Keeler and Corbin was asleep. The court stated that it was as if Keeler played by Sharp's rules or did not get to play at all.

The trial court also addressed the issue of Keeler learning that his son was having surgery from a text message sent out by Sharp on her messenger, but that Sharp did not inform Keeler that Corbin was having surgery. The court told Sharp that her e-mail did not take care of letting Keeler know about the surgery ahead of time; that an e-mail that just says to pray for Corbin was "evil"; and that it was no wonder that Keeler was irritated when he finally tracked down where the surgery was taking place and was then

told by the doctor not to make a scene because he did not know what was going on with his son. The court found that Sharp was clearly not advising Keeler of medical procedures and information; that she did not let him get medical information; and that she then told him that he could not be a good father because he did not know the medical information. The court also found that Sharp e-mailed Keeler that she was at the emergency room with Corbin, when in fact she was not, so that Sharp could "teach [Keeler] a lesson," and that Sharp continued to refuse to keep Keeler updated on medical information with regard to Corbin's biopsy on his arm, leaving only a "little message" that there was something wrong but not giving Keeler the whole picture, i.e., that Corbin had an appointment in Little Rock the next day. In the trial court's words, it found that Sharp was playing "evil games" against Keeler; that her actions were detrimental to her child; that she was terrorizing and harassing Keeler to the detriment of Corbin; and that Sharp, in the whole spirit of co-parenting, rated "zero." The court found that Corbin should have had both his parents at the hospital but that due to his mother's actions, his father was not there. The court also found that Corbin should have had both parents at his chemotherapy treatments, but because Sharp decided that she would not let Keeler come back for the treatment, Corbin, to his detriment, was again denied his father's presence.

The trial court also found that Sharp was in contempt of court for failing to allow Keeler to exercise his court-ordered visitation, finding that Sharp's stated reason of having concerns about Keeler's care of Corbin after the medical procedures was "bogus" and "an extension of this problem that [Sharp has] with undermining [Keeler's] relationship with his son." Accordingly, in addition to the two days in jail that the trial court ordered for Sharp failing to allow Keeler the first right to babysit, the trial court ordered an additional two days in jail for Sharp's failure to allow visitation, but again suspended it on the condition that Sharp follow court orders.

The trial court held that Sharp had continued to damage Keeler's relationship with Corbin and had tried to prevent them from having a healthy bond, picking and choosing what part of the court orders she would follow, to the detriment of her son. It held that Sharp denied visitation for no reason; played "mind games" with Keeler regarding Corbin's medical procedures; and failed to advise Keeler of any medical information and procedures. The court further found a lot of Sharp's testimony to be "incredulous"

and untruthful. Based upon the testimony, the court found that there had been a material change in circumstances since the last hearing and that it was in Corbin's best interest for custody to be changed from Sharp to Keeler. The court noted that removing Corbin from the home that he had known since birth was not something that the court did lightly, but that Sharp had been failing Corbin miserably and that Sharp was unfit to be the custodial parent. The court stated that the change in custody was not a way to punish anyone, but rather it was for the best interest of the child. Explaining its decision, the trial court said that if it could "just send mom to jail for a couple of days and think that Corbin would be okay after that and get mom's attention to where she promotes the relationship between the son and the father and . . . didn't disregard Court Orders, pick and choose what she wanted, and I thought four or five days in jail would get mom's attention, then it would just strictly be a contempt issue, but it's more than that. I'm not changing custody in any way to punish mom. I'm doing it to protect this young man, little Corbin, who deserves to have two parents who love him." The trial court further ordered that Sharp undergo a mental-health examination and also ordered that Sharp have supervised visitation.

I. Change of Custody

On appeal, Sharp argues that the trial court erred in changing custody of Corbin from her to Keeler. She complains that the court placed stricter requirements on her than the original custody order required and that the court failed to consider her diligent and consistent care for Corbin's health. She contends that the court erred in finding that she had engaged in parental alienation by not keeping Keeler completely informed prior to all medical procedures and by disallowing some visitation because she was not ordered to notify Keeler of medical appointments or procedures before they occurred and because when she denied visitation it was based upon health concerns for Corbin after he had received chemotherapy.

From our review, the trial court's extensive ruling from the bench does not indicate that it placed stricter requirements on Sharp than the original order required. Sharp's argument that she was not required to keep Keeler informed of Corbin's medical appointments and procedures prior to them occurring is simply not persuasive. Rather, her actions appear to be another way for her to have control over Corbin to the exclusion of Keeler. The same

rationale applies to visitation — Sharp was not to interfere with visitation unless it was an emergency, yet she took it upon herself to determine when Keeler was going to have visitation based upon her own subjective beliefs. As the trial court pointed out, Keeler is Corbin's father and there was no testimony that he was unfit to care for his child.

We find no error in the trial court's decision to change custody from Sharp to Keeler. The record is replete with Sharp's attempts to alienate Keeler from his son — for example, her refusal to keep Keeler apprised of medical information, especially in light of Corbin's serious medical conditions; her refusal to have Corbin ready for visitation; the fact that she refused Keeler visitation when she decided it was in Corbin's best interest to do so; and the fact that she did not allow Keeler the first right to babysit Corbin when she could not be with Corbin. The trial judge is the person in the best position to observe the parties and evaluate the witnesses, their testimony, and the child's best interest. *See Sheppard v. Speir*, 85 Ark. App. 481, 157 S.W.3d 583 (2004). It is obvious from the trial court's comments from the bench that it did not believe Sharp's testimony about why she did some of the things that she did nor her motivation behind some of her actions, and this was the trial court's determination to make.

The record of continued alienation of Keeler by Sharp is a material change of circumstances. Sharp failed to keep Keeler updated regarding Corbin's medical conditions. In addition to telephoning Keeler, Sharp had other ways of contacting him about Corbin's biopsy and surgery. For example, Sharp knew how to text message, as adduced by the testimony, yet she did not send the important information; rather she just kept leaving cryptic messages. She refused to allow the nurses at Arkansas Children's Hospital to divulge to Keeler more information than she decreed necessary, even after Keeler had to beg Sharp for the password to be able to be told any information about his son. Sharp changed Corbin's chemotherapy appointments and refused to let Keeler be present during the treatments. She denied visitation at times, although she said that she allowed some of it to be made up, and she would not have Corbin ready when visitation was supposed to begin. Sharp would not allow Keeler's wife or mother to pick Corbin up, although they were approved persons. On the whole, the evidence demonstrates a material change of circumstances since the entry of the initial custody order; the trial court found

that it was in Corbin's best interest to have custody changed to Keeler; and we cannot say that this decision was clearly erroneous.

Sharp also argues that custody was modified to punish her. We disagree. In its lengthy ruling from the bench, the trial court found Sharp to be in contempt of the court orders and sentenced her to four days in the Washington County jail, suspended on the condition that Sharp follow court orders. In changing custody, the trial court stated that the fact that it was removing Corbin from the home that he had known since his birth was not something that the court did lightly, but the court admonished Sharp that Sharp had been "failing [Corbin] miserably." Explaining its decision, the trial court found that there had been material changes in circumstances; it was in the child's best interest to change custody; and that if a person was not following court orders, that changing custody was not a way to punish anyone. The court explained that if it could send Sharp to jail for contempt for "a couple of days" and it thought that it would get Sharp's attention to the point that she would promote the father-son relationship and would obey court orders, then it would be strictly a contempt issue, but that this case was about more than just contempt. The court reiterated that it was not changing custody to punish Sharp, but rather to protect Corbin, who deserved to have two parents who loved him. Based upon our review of this ruling, we cannot say that the trial court changed custody simply to punish Sharp.

On this point, the dissent argues that this case was one of contempt, not change of custody. It is not either/or; it is both. We cannot ignore the fact that the trial court did hold Sharp in contempt on two separate bases. The record reflects that the court specifically noted that if it thought placing Sharp in jail for several days would cure the problem, then it would indeed simply be a contempt issue, but that this was in fact more.

II. Visitation

Sharp next argues that the trial court erred in awarding her supervised visitation and that the supervised visitation was only to punish her. In *Hass v. Hass*, 80 Ark. App. 408, 410-11, 97 S.W.3d 424, 426 (2003) (internal citations omitted), this court held:

> In reviewing domestic-relations cases, this court considers the evidence de novo, but will not reverse the trial court's findings

> unless they are clearly erroneous or clearly against the preponderance of the evidence. It is well settled that the trial court maintains continuing jurisdiction over visitation and may modify or vacate such orders at any time on a change of circumstances or upon knowledge of facts not known at the time of the initial order. It is also well settled under Arkansas law that reversal is warranted where a trial court modifies visitation where no material change in circumstances warrants such a change. While visitation is always modifiable, our courts require a more rigid standard for modification than for initial determinations in order to promote stability and continuity for the children, and to discourage repeated litigation of the same issues. The party seeking a change in visitation has the burden below to show a material change in circumstances warranting the change in visitation. The main consideration in making judicial determinations concerning visitation is the best interest of the child. Important factors to be considered in determining reasonable visitation are the wishes of the child, the capacity of the party desiring visitation to supervise and care for the child, problems of transportation and prior conduct in abusing visitation, the work schedule or stability of the parties, and the relationship with siblings and other relatives. The fixing of visitation rights is a matter that lies within the sound discretion of the trial court.

The trial court found that in light of the "horrific testimony" that it heard, which rose to the level of harassment and torment and which was not in the child's best interest, that it had serious concerns about Sharp's mental health, and the court ordered that visitation be supervised. Sharp now argues that there was no evidence to support supervised visitation, and that the trial court ordered that only to punish her.

Following the February 24 hearing, Sharp promptly submitted to a psychological evaluation on March 9, the day before the order changing custody was entered on March 10. The psychological report was filed of record on April 3, the day before Sharp filed her notice of appeal. In that report, Dr. Martin Faitak, a clinical psychologist, summarized that Sharp tended to minimize problems and present herself in a positive manner; that she wanted positive regard but she might have difficulty with empathy and flexibility. However, he also noted that Sharp appeared to have good self esteem; that she was able to maintain employment, including soon to be adding a second job; that she was in good health and had appropriate expectations; that she had a stable mood; and that she had a sense of personal responsibility. Dr.

Faitak also commented that Sharp seemed to have many responsibilities for a twenty year old. He reported that it was difficult for him to know for sure about Sharp's mental-health issues because there was a possibility that she minimized them, and that it was unusual for someone with a history similar to hers not to have more "significant and pervasive emotional problems." He concluded that if what Sharp had reported was true, there was no need for individual counseling, and he recommended that she and Keeler obtain counseling and work together in order for them to be able to give Corbin the long-term support Corbin needed.

There is nothing in the psychologist's report to indicate that Sharp had mental-health issues that rendered her incapable of caring for Corbin during visitation. Furthermore, none of the evidence presented at the hearing revealed that Sharp had mistreated Corbin or neglected his needs during the time he was in her care. In short, we find that there was no evidence to support the trial court's decision that Sharp should only receive four hours of supervised visitation per week, and we hold that that decision was clearly against the preponderance of the evidence. We direct that the trial court award Sharp the same unsupervised visitation that Keeler enjoyed prior to the change of custody, all of which is set out in detail in the initial April 4, 2005 filed order.

Affirmed in part; reversed and remanded in part with instructions.

GLADWIN, ROBBINS, GRIFFEN, and MARSHALL, JJ., agree.

BAKER, J., dissents.

KAREN R. BAKER, Judge, dissenting. Upon review of the record in this case, I believe that the trial court's decision changing custody of this eighteen-month-old child from his mother to his father was clearly erroneous. I dissent due to my conviction that the majority misinterprets and misapplies our precedent regarding alienation of a child in custody disputes and because changing custody was not in the best interest of the child.

The majority's misapplication of precedent concerning alienation of a child is apparent in the majority's statement that the trial judge's decision was correct because "the record is replete with Sharp's attempts to alienate Keeler from his son." There are two problems with the this position. First, alienation has never been understood to mean alienation of a *parent*; rather, it has been

understood to mean alienation of the *child* from the parent. *See generally Turner v. Benson*, 59 Ark. App. 108, 953 S.W.2d 596 (1997) (Arkansas courts do consider whether one parent is *alienating a child* from the other parent when making custody decisions) (emphasis added); *Carver v. May*, 81 Ark. App. 292, 101 S.W.3d 256 (2003) (holding that, because a caring relationship with both parents is important to a healthy upbringing, evidence that one parent is *alienating a child* from the other is an important factor to be considered in deciding whether custody should be changed) (emphasis added). Although we have recognized that a vulnerable child may need protection from the attempts of a parent to alienate him from the other parent, a parent should be expected to be able to resist any attempt to alienate his affections for his own child.

Second, even if our court were to adopt a new standard, the trial court's finding that Sharp was alienating Keeler from this child was not supported by the evidence. Although Sharp's actions might have been irritating to Keeler personally, they were not the type of actions that have been recognized as having an alienating effect. *See Carver*, 81 Ark. App. at 299, 101 S.W.3d at 261 (appellant's interference with visitation was so extreme that the best interest of the children required that they be removed from the situation where there was no evidence to support appellant's drug-abuse allegations, and the sexual-abuse allegations were unsubstantiated; moreover, during the investigation, the children were subjected to medical sexual-assault examinations and were denied visitation with their father even after the investigation concluded that the allegations were unsubstantiated).

There was no evidence that this eighteen-month-old child was alienated from his father despite the majority's statement that "the record is replete with Sharp's attempts to alienate Keeler from his son." Alienation occurs when divorcing parents transform a child into a relationship weapon by engaging in patterns of behavior designed to destroy the child's psychological connection with the other parent. *See* Thomas E. Schacht, Psy.D., *Prevention Strategies to Protect Professionals and Families Involved In High-Conflict Divorce*, 22 U. Ark. Little Rock L. Rev. 565, 592 (2000). This type of behavior was not present in this case. The trial court and the majority focus on Keeler's lengthy testimony at a two-day hearing describing how he felt alienated from his son.

The majority notes that Sharp's attempts to alienate Keeler included her refusal to keep Keeler apprised of medical information, her refusal to have the child ready for visitation, her refusal of

visitation when she decided it was in the child's best interest, and the fact that she did not allow Keeler the first right to babysit when she could not be with the child. Great importance is also placed on Keeler's feelings concerning the use of the mother's surname rather than the father's last name.[1]

While the trial court's order stated that the parents were to communicate generally with each other about the health, education, and welfare of the child, there were no specific requirements that Sharp notify Keeler of any specific medical appointments or give him notice prior to any medical procedures. Moreover, the testimony showed that many attempts made by Sharp to inform Keeler of medical information were met with Keeler and his family members hanging up on her.[2] Moreover, the testimony showed that there was a period just after the child's biopsy that visits with Keeler were not allowed. Sharp testified that her decision was based on her concern for the child, as he had just been in the hospital and had a surgical procedure, and that he was still recovering. Once the child was diagnosed with hystiocytosis, he had to undergo chemotherapy, thereby weakening his immune system and requiring restricted access to the public. Testimony showed that the child became "clingy" with Sharp following chemotherapy treatments and would become upset when she left the room. Further, Sharp admitted that there were a couple of occasions when she did not call Keeler to babysit. However, she testified that on those occasions, the child was asleep, and she thought it would be disruptive to wake the child and take him to

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[1] The first complaint cited by the majority, and used to justify their reasoning, is that the mother continued to use the name Sharp instead of Sharp-Keeler or simply Keeler. The mother did not appeal the order in which the name was changed, but the order specifically directed only that the child's birth certificate be changed — not that the mother ensure that all records maintained by third parties be changed.

[2] Regarding this testimony the trial judge in ruling from the bench stated, "The doctor .... tells you you've got an appointment at the bone doctor tomorrow in Little Rock, so you start calling [father]. You start calling him. Do you call him up and leave a message, oh my goodness, we have an appointment tomorrow at the bone doctor, we don't know what's going on, be there in Little Rock? No. You leave a little message that there's something wrong with his arm. Just enough to get this man worried .... Then you start calling his family to really stir it up and get everybody worried. And you call his mother up. I'm not surprised she's rude to you. Do you say, hold on, don't be mad, I'm just calling to let you know that little Corbin has a thing tomorrow."

Keeler's house for a short period of time.[3] Taken together, none of these actions amount to alienation of this child from his father. Yet, the majority concludes that because of Sharp's alienation of Keeler — not the child — a material change of circumstances existed to warrant a change of custody.

I dissent from the majority opinion for a second reason: it is clear that the trial court's ruling was intended to punish the mother for what the trial court saw as her "evil" behavior. In these cases, the primary consideration is the best interest and welfare of the child. *Carver*, 81 Ark. App. at 296, 101 S.W.3d at 259. All other considerations are secondary. *Id.* Custody awards are not made or changed to punish or reward or gratify the desires of either parent. *Id.*

Below are excerpts from the trial judge's oral ruling that demonstrate her intention to punish the mother by changing custody:

> Now, the other thing about the babysitting thing is that you don't consider your family to be quote/unquote babysitters, but yet when you send your child off to go with daddy you hand him a babysitter's guide. So you don't consider your family babysitting, but you consider this man a babysitter which is the most ludicrous thing that just undercuts this relationship between father and son and is huge evidence of parental alienation, and more importantly, of your undermining [the child's] relationship with his father to this little guy's detriment after I've told you not to. Then more evidence of contempt and parental alienation is that if this man shows up and the son is napping, he has to wait to pick him up until he wakes up, and I told both parties that he was to be ready at the time, and then he says that he's waited 5 to 20 minutes while you're changing him or putting him in his clothes or whatever. But then he testified, and this was not refuted by her testimony, that if [the child] is sleeping at his house and it's time to take him home, by golly, he better get awakened and taken over to mama's. It's like we play by Ms. Cyndall's rules or we don't play at all. So when he has to wait around to pick up [the child] if he's sleeping at mama's, that he doesn't get to make up his time most of the time. The worst

[3] Keeler testified that he was "offended" when Sharp gave him a book on babysitting. He stated that he was offended because he was the child's father, not a babysitter. It is noteworthy that in the trial court's order, it directs that Sharp give Keeler first right when she needs a *babysitter.*

testimony — well, there's so much bad testimony — one of the worst things that I heard today, Ms. Sharp, in addition to you denying this man visitation for no good reason, is this evil mind game thing that you're playing with him, and that would be text messaging about surgery and saying, pray for him on this surgery, and you send it out to different people. Let me — maybe counsel can help me about which one that is — but you send it out to everybody, and you never tell him that your son is going in for surgery, and when you're asked on cross-examination about that you say that you told him the time had come for your child to have ear surgery because he's had eight ear infections. Well, that tells me two things. That's well, when Ms. Cyndall speaks we're going to do what she says. And, number two, that tells me that you knew he had ear surgery lined up, that he's supposed to be the Ali Baba and have ESP and just know that you set up and appointment the day after his birthday for his ears to be — tubes in 'em, but you don't tell him. You don't tell him, and then when they ask you about what did you say, you try to say that this little e-mail that you sent out to everybody took care of letting him know that he was going to have surgery that day. Well, it didn't. It didn't advise him ahead of time. What it said was — let me find it. . . . "Everyone, thanks for all the prayers. Please continue to pray for [the child] during his surgery." You never tell him about the surgery. You just send this e-mail out that says "pray for him." Now, that is evil. That is so evil I can't even understand why you'd do that, and then when asked why do you do these little things, you say, well, I did it to let him know.

. . . .

[Mr. Keeler] doesn't know what's going on. Not only is that bad for [the child's] relationship to have daddy come to the clinic, and he's out there trying to come out of a groggy state, dad's upset and agitated, as well he should be because mom's sending out this little e-mail and she doesn't even tell him what's going on. That is so evil, and that is more evidence of parental alienation.

. . . .

The games that are being played, ma'am, are by you, and they are evil, and they are detrimental to your child, and I don't understand why you are doing it, and I'm ordering a psychological evaluation on you.

. . . .

> I'm not changing custody in any way to punish mom. I'm doing it to protect this young man, [the child], who deserves to have two parents who love him.

While the trial judge said that she was not changing custody to punish the mother, it is unclear how the change of custody was intended to protect the child. Throughout the trial court's thirty-five page oral ruling, it is clear that the judge was concerned with protecting Keeler from Sharp's "evil" behavior. The trial court's finding that the mother's lack of compliance warranted a change in custody allowed the court's desire to punish the mother to override the primary consideration in the case, which was the welfare of the child. *See Powell v. Marshall*, 88 Ark. App. 257, 197 S.W.3d 24 (2004) (citing *Hepp v. Hepp*, 61 Ark. App. 240, 968 S.W.2d 62 (1998); *Ketron v. Ketron*, 15 Ark. App. 325, 692 S.W.2d 261 (1985)). A violation of the court's previous directives does not compel a change in custody, *Carver, supra*. The majority outlines areas concerning the best interest of Keeler rather than the best interest of the child. This is evidenced by the statement that Sharp's "actions appear to be another way for her to have control over Corbin to the exclusion of Keeler" and that "there was no testimony that [Keeler] was unfit to care for his child."

While I agree that there was ample evidence of the immaturity of both parents in this case, I see no evidence supporting a finding that it was in the best interest of this eighteen-month-old child, while undergoing chemotherapy treatments, to be removed from his mother's care and given to his father, who until that time had never even had overnight visitation, and allowing only *four* hours of *supervised* visitation with his mother a week. As the majority recognizes, there was no evidence to support the trial court's decision restricting the mother's visitation to only two hours, twice a week, supervised. If the focus in these cases is truly the best interest of the child, this case should be reversed.

Accordingly, I dissent.

Michael WILKINS, Jerome Wilkins, and Christina Wilkins *v.* FOOD PLUS, INC., Teresa Cain, and John Wilkinson

CA 06-552 257 S.W.3d 107

Court of Appeals of Arkansas
Opinion delivered May 16, 2007

J. Carl Bush, for appellant.

Ledbetter, Cogbill, Arnold & Harrison, LLP, by: *Ronald D. Harrison* and *Jeffrey D. Rickard*, for appellees.

JOHN MAUZY PITTMAN, Chief Judge. Appellants Michael Wilkins and his parents, Jerome Wilkins and Christina Wilkins, sued appellees Food Plus, Inc., Jane Doe I, and John Doe I in Sebastian County Circuit Court on September 16, 2004, for false imprisonment, which has a one-year statute of limitations, because of an incident that occurred in the store on October 6, 2003. On January 13, 2005, appellants filed a motion for extension of time until February 11, 2005, to serve appellees, stating that they had made several unsuccessful attempts to serve the store's president over the past two or three weeks and that their attorney had been busy with other cases and continuing legal education classes.

On February 10, 2005, appellants filed another motion for extension of time to serve appellees. They stated that, since filing the first motion, their process-server had been unsuccessful in serving process and that their attorney had been tied up in other legal matters until February 7. Appellants asked for an extension until February 28, 2005, to serve the store and until March 30, 2005, to serve Jane Doe and John Doe. On February 11, 2005, the circuit court granted both motions, giving them until February 28, 2005, to serve the store and until March 30, 2005, to serve the Doe defendants, after conducting discovery to learn their identities. On February 15, 2005, the circuit clerk first signed a summons issued to Food Plus. Food Plus was served on February 23, 2005. Food Plus filed an answer on March 11, 2005, raising the defenses of statute of limitations, insufficiency of process, and insufficiency of service of process and objecting to the court's subject-matter and personal jurisdiction.

On March 30, 2005, appellants moved for an extension of time until May 30, 2005, to serve Jane Doe and John Doe. This motion was immediately granted. On May 26, 2005, appellants moved for an extension of time until June 30, 2005, to serve an amended complaint and a summons on the Doe defendants. The circuit court granted this motion. On June 30, 2005, appellants filed another motion for extension of time until July 18, 2005, to serve the Doe defendants. The circuit court granted this motion the next day.

Appellants filed a first amended complaint on July 8, 2005, adding Teresa Cain and John Wilkinson as defendants. The circuit

clerk signed summonses issued to Cain and Wilkinson on July 12, 2005. Cain and Wilkinson were served on July 14, 2005. In its answer to appellants' first amended complaint, Food Plus raised the same objections as before.

Food Plus moved to dismiss on August 2, 2005, arguing that appellants had failed to show good cause in their motions for extension and pointing out that a summons for Food Plus had not been issued until February 15, 2005, more than 120 days after the filing of the complaint. Wilkinson also filed a motion to dismiss, arguing that appellants had received five extensions to serve him, none of which contained a showing of good cause. He argued that the service of process on him was insufficient because the summons was not issued within 120 days of the filing of the complaint or within any proper extension of time. In the alternative, he filed an answer to the complaint, raising the defenses of statute of limitations, improper venue, insufficiency of process, and insufficiency of service of process, as well as lack of subject-matter and personal jurisdiction. Cain moved to dismiss on the same grounds asserted by Wilkinson and, in the alternative, filed an answer raising the same defenses.

In response to Food Plus's motion, appellants argued that the doctrine of laches should apply and stated that their recitation of facts about their attorney's hectic schedule in their motions for extension showed good cause. In response to the motions filed by Cain and Wilkinson, appellants raised the same laches defense and argued that their attorney had been too busy to determine the Doe defendants' identities and serve them with process in a timely fashion.

At a hearing on the motions to dismiss, appellants' attorney stated that he had hired the process-server on January 3, 2005, and had provided him with a summons that was to be issued on that day; the process-server, however, had failed to take the summons to be signed at the clerk's office. Upon extensive questioning by the trial court, appellants' attorney defended his failure to have the summons issued when he filed the complaint by explaining that he had been very busy. The process-server, however, testified that he did not recall having been asked to get the summons. The trial judge made the following ruling from the bench:

> Well, Mr. Bush, what I am most distressed about is that no effectual summons was ever issued until after the time period. That's your responsibility to do. You've represented to the Court

> — at least the Court was under the opinion, when it signed this first extension to serve, that, like every other case I'm aware of, you get your summons when you file your Complaint, and you start trying to serve the parties. And when you give me some reason and basis for your inability to serve the parties, then I take that into consideration and grant the motion. Here, you couldn't have gotten effective service, ever, within the 120-day period, because you had no summons that was signed. It would have been impossible to have gotten service.
>
> . . . .
>
> I think these are misrepresentations to the Court, both in the January 13th, and restated in the February 10th, second motion. I think under the *Henyan* case[1] — I mean, the Court is going to accept these things on face value when you represent to me that you've got difficulty or problems, and those types of things, and I routinely will grant these motions.
>
> But when, in essence, it is pointed out to the Court at a subsequent hearing that you could not have complied and obtained service within 120 days, I think the Motion is well taken.

On October 19, 2005, the court entered an order dismissing the complaint against all defendants. Appellants filed a timely notice of appeal.

Appellants first challenge the trial court's construction and application of Ark. R. Civ. P. 4(i). The appellate court uses an abuse-of-discretion standard to review a circuit court's decision on a motion to dismiss for noncompliance with Rule 4(i). *See Boyd v. Sharp County Circuit Court*, 368 Ark. 566, 247 S.W.3d 864 (2007).

Arkansas Rule of Civil Procedure 3 provides that an action is commenced by filing a complaint with the clerk of the proper court. *Bodiford v. Bess*, 330 Ark. 713, 956 S.W.2d 861 (1997). However, effectiveness of the commencement date is dependent upon meeting the requirements of Rule 4(i). *Id.* Upon the filing of the complaint, a summons must be dated and signed by the clerk and it must be under the seal of the court. Ark. R. Civ. P. 4(a) and (b). The summons and a copy of the complaint must be served

[1] *Henyan v. Peek*, 259 Ark. 486, 199 S.W.3d 51 (2004).

together. Ark. R. Civ. P. 4(d). Responsibility for getting these documents into the hands of the process-server rests with the plaintiff or the plaintiff's counsel. Reporter's Note 2 to Ark. R. Civ. P. 4; *Thomson v. Zufari*, 325 Ark. 208, 924 S.W.2d 796 (1996); David Newbern & John J. Watkins, *Arkansas Civil Practice & Procedure* § 9-3 (3d ed. 2002). Arkansas law is long settled that service of valid process is necessary to give a court jurisdiction over a defendant. *Tobacco Superstore, Inc. v. Darrough*, 362 Ark. 103, 207 S.W.3d 511 (2005). It is equally well settled that statutory service requirements, being in derogation of common law rights, must be strictly construed and compliance with them must be exact. *Id.* The same reasoning applies to service requirements imposed by court rules. *Id.* More particularly, the technical requirements of a summons set out in Ark. R. Civ. P. 4(b) must be construed strictly and compliance with them must be exact. *Id.* A summons that is not signed by the clerk does not comply with Rule 4. *Carruth v. Design Interiors, Inc.*, 324 Ark. 373, 921 S.W.2d 944 (1996). Judgments arising from proceedings conducted where the attempted service was invalid because of such noncompliance are void ab initio. *Id.*

Arkansas Rule of Civil Procedure 4(i) states that it is mandatory for the trial court to dismiss the action if service is not made within 120 days after the filing of the complaint and a motion to extend is not timely made. *Tobacco Superstore, Inc. v. Darrough, supra.* The rule provides in part:

> If service of the summons is not made upon a defendant within 120 days after the filing of the complaint, the action shall be dismissed as to that defendant without prejudice upon motion or upon the court's initiative. If a motion to extend is made within 120 days of the filing of the suit, the time for service may be extended by the court upon a showing of good cause.

Where the motion to extend time is filed prior to the expiration of the 120-day period, the trial court may grant the extension after the expiration of 120 days. *Edwards v. Szabo Food Service, Inc.*, 317 Ark. 369, 877 S.W.2d 932 (1994).

At the hearing, the attorney representing Food Plus, Cain, and Wilkinson argued that *Henyan v. Peek*, 359 Ark. 486, 199 S.W.3d 51 (2004), applied to this situation. In that case, the supreme court held that Rule 4(i) requires that the showing of good cause to extend the period of service must be made prior to the granting of an extension. There, the plaintiffs' motions offered

no cause for the extensions, and there was nothing in the trial court's orders indicating that the time for service was being extended upon a showing of good cause. Stating that the plaintiffs made no showing of good cause to extend the time for service under Rule 4(i) and that it was of no consequence that they later offered a reason, the supreme court affirmed the trial court's judgment setting aside the prior orders of extension and dismissing the complaint.

Appellants argue that, because they served appellees with process within the time limits of the extensions granted by the court and before appellees filed their motions to dismiss, they were entitled to rely on the trial court's extension orders, as in *King v. Carney*, 341 Ark. 955, 20 S.W.3d 341 (2000). In that case, the appellant (the plaintiff) moved for an extension of time for service so that she could identify and serve some John Doe defendants. She filed an addendum to her motion asserting that one of the appellees (the defendants) and the agent for service of process for his professional association were deceased. On the last day for serving process, she filed a second motion for an extension, referring to hospital reports she had received in discovery and stating that she needed time to explore settlement options. The same day, the circuit court granted the second motion for extension. Before the extended deadline ran, the appellees moved to dismiss the complaint; the appellant also obtained service on the appellees. The trial court entered an order finding that there had been no attempt to serve the appellees within 120 days and that no good cause existed to excuse this failure. The trial court said that its orders of extension were signed without knowledge that there had been no attempted service and set those orders aside. The supreme court reversed and remanded, explaining that King had obtained service of process on the appellees *before* the extension orders were revoked and that she had the right to rely on the extension orders that were in effect at the time service was obtained, even if they were erroneously granted.

This case, however, is different from *King v. Carney* and *Henyan v. Peek*. Although allegedly good cause for the extensions was offered in a timely fashion, they were granted in reliance upon the plaintiff's attorney's misrepresentations. The trial court obviously believed that appellants had obtained the extensions by practicing a fraud on the court, which is a sufficient ground to vitiate a judgment. *McGuire v. Smith*, 58 Ark. App. 68, 946 S.W.2d 717 (1997). Even though the fraud that vitiates a judgment may be

constructive rather than actual, constructive fraud is nonetheless a species of wrongdoing. Constructive fraud is defined as a breach of a legal or equitable duty that, irrespective of the moral guilt of the fraud feasor, the law declares fraudulent because of its tendency to deceive others; neither actual dishonesty nor intent to deceive is an essential element. *Id.* Appellants' assertions that they were unable because of various unrelated difficulties to obtain service of a summons that had never been issued was, at the very least, constructive fraud. The trial court, therefore, did not abuse its discretion in setting aside the extensions and in dismissing the complaint on this ground.

Appellants also argue that Food Plus's motion to dismiss should have been denied on the basis of the doctrine of laches. They argue that, although Food Plus was served on February 23, 2005, it waited until August 2, 2005, to file its motion to dismiss; that Food Plus's attorney had no objection to their third and fourth motions for extension; and that Food Plus never filed a response to the motions for extension.

The doctrine of laches is based on a number of equitable principles that are premised on some detrimental change in position made in reliance upon the action or inaction of the other party. *Campbell v. Carter*, 93 Ark. App. 341, 219 S.W.3d 665 (2005). It is based on the assumption that the party to whom laches is imputed has knowledge of his rights and the opportunity to assert them; that, by reason of his delay, some adverse party has good reason to believe those rights are worthless or have been abandoned; and that, because of a change of conditions during this delay, it would be unjust to the latter to permit him to assert them. *Id.* Whether a claim is barred by laches depends on the particular circumstances of each case. *Id.* The issue is one of fact, and this court will not reverse the trial court's decision on a question of fact unless it is clearly erroneous. *Id.*

Laches does not apply here because there was no delay. Food Plus promptly raised the defenses of insufficiency of process and insufficiency of service of process in its answer. It was not yet a party to the action when appellants filed their first and second motions for extension and could not have responded to them. Also, the third and fourth motions for extension did not concern Food Plus, which had already been served and had filed an answer.

Affirmed.

BIRD and GRIFFEN, JJ., agree.

Betsy R. DANNER *v.* DISCOVER BANK

CA 06-1052 257 S.W.3d 113

Court of Appeals of Arkansas
Opinion delivered May 16, 2007

Rice & Adams, by: *Scott A. Scholl*, for appellants.

Southern & Allen Law Firm, by: *Kate Bridges*, for appellee.

JOHN MAUZY PITTMAN, Chief Judge. The appellee, a credit-card company, asserted that appellant was past due on her account and sought collection. Appellant defended by admitting that she had had Discover credit cards in the past, but that she thought she had paid them off and was surprised to have received a demand for payment of the sum sought. She did not expressly deny that the card and charges were hers, but simply stated that she had no recollection and put appellee to its proof. The trial court found in favor of appellee on the basis of its findings that appellant "did not say without question that these were not her charges," and that payments had been made on the account. On appeal, appellant asserts that the trial court erred

as a matter of law by impermissibly shifting the burden of proof to her to show that the charges were not authorized. We agree, and we reverse and remand.

Appellee's proof consisted of an affidavit verifying records that the account in question had been opened as the result of an application procured through a "Discover Card Telemarketing Sale." Appellee also showed that the person who applied for the card provided appellant's name and address, and it produced billing statements purporting to reflect appellant's debt that were provided pursuant to appellant's request for validation of the disputed debt. There was, in addition, evidence that appellant had made some payments on the account in the past.

The Fair Credit Billing Act, 15 U.S.C. § 1666, amended the Truth In Lending Act for the express purpose of protecting the consumer against unfair and inaccurate credit card practices, and it is to be liberally construed in favor of the consumer. *Crestar Bank v. Cheevers*, 744 A.2d 1043 (D.C. 2000). Section 1643(b) places upon the card issuer the burden of proving that any disputed use made of the card was authorized. *See id.* Appellee failed to do so in the case at bar, relying instead on its own records that reflect an account and debt that it attributes to appellant, and by evidence that appellant made a few payments on the account before requesting validation of the debt. However, the *Crestar Bank* court held that no ratification or presumption of authorization will be inferred if the cardholder fails to object to charges within a reasonable time, even if those charges were not made by the cardholder, because to do so would impermissibly shift the burden of proof imposed by § 1643(b).

We think this reasoning is sound and that, pursuant to the rule enunciated in *Crestar Bank*, the trial court erroneously shifted the burden of proof and appellee failed to show that the disputed charges were authorized. Here, there was no evidence to verify appellee's statements of accounts. It would, for example, have been possible to prove that the "Discover Card Telemarketing Sale" by which the account was opened was in fact made to appellant's home, or that appellant had executed a credit application, a cardholder agreement, or sales slips in connection with the disputed account so as to identify appellant as the cardholder and the charges as authorized. *See* 15 U.S.C. § 1643. Consequently, we reverse.

It does not follow, however, that this case must be dismissed. It has long been the rule that where there is a simple failure of proof, justice requires that the court remand the case to allow the appellee an opportunity to supply the defect. Only where the record affirmatively shows that there can be no recovery on retrial should the case be dismissed in the appellate court. *Little Rock Newspapers, Inc. v. Dodrill*, 281 Ark. 25, 660 S.W.2d 933 (1983); *Southwestern Underwriters Insurance Co. v. Miller*, 254 Ark. 387, 493 S.W.2d 432 (1973); *St. Louis Southwestern Railway Co. v. Clemons*, 242 Ark. 707, 415 S.W.2d 332 (1967); *JAG Consulting v. Eubanks*, 77 Ark. App. 232, 72 S.W.3d 549 (2002); *Womack v. First State Bank*, 21 Ark. App. 33, 728 S.W.2d 194 (1987); *Colonial Life & Accident Insurance Co. v. Whitley*, 10 Ark. App. 304, 664 S.W.2d 488 (1984). Because we cannot say here that the record affirmatively shows that there could be no recovery, we reverse and remand for a new trial.

Reversed and remanded.

MARSHALL and MILLER, JJ., agree.

Allie CRELIA *v.* RHEEM MANUFACTURING COMPANY, Crawford & Company, Second Injury Fund, Death & Permanent Total Disability Fund

CA 06-1224 257 S.W.3d 115

Court of Appeals of Arkansas
Opinion delivered May 16, 2007

Walter, Hamby & Gaston, by: *Michael Hamby*, for appellant.

Warner, Smith & Harris, PLC, by: *Jason T. Browning*, for appellee Rheem Manufacturing Co.

Terry Pence, for appellee Second Injury Fund.

JOSEPHINE LINKER HART, Judge. Appellant, Allie Crelia, argues that the Arkansas Workers' Compensation Commission erred in finding that she was not permanently and totally disabled or,

alternatively, erred in finding that she was not entitled to wage-loss disability over and above the permanent partial impairment rating to her right hand. We affirm.

On August 5, 2002, appellant sustained an admittedly compensable injury to her right hand during her employment with appellee Rheem Manufacturing Company. The injury occurred when four fingers of her right hand were amputated while she was working on a press. Rheem's insurance carrier, Crawford & Company, accepted a sixty-three percent anatomical impairment rating to appellant's right hand. Appellant also received benefits for a compensable injury to her left elbow, epicondylitis.

Appellant argues that the Commission erred when it found that she was not permanently and totally disabled, and she marshals several facts in support of her position.[1] Appellant notes that she was sixty-four years old at the time of the hearing, has a high-school education, and has performed factory work all her life. She further notes that she has had four fingers on her dominant hand amputated, suffers from post-traumatic stress disorder from the accident, has preexisting problems with ulcers on her feet that limit the amount of standing and walking she can do, and has developed epicondylitis in her left arm due to overcompensation with that arm.

"Permanent total disability" is defined as the "inability, because of compensable injury or occupational disease, to earn any meaningful wages in the same or other employment." Ark. Code Ann. § 11-9-519(e)(1) (Repl. 2002). Further, "[t]he burden of proof shall be on the employee to prove inability to earn any meaningful wage in the same or other employment." Ark. Code Ann. § 11-9-519(e)(2). When an appeal is taken from the denial of a claim by the Commission, the substantial-evidence standard of review requires that we affirm the decision if the Commission's opinion displays a substantial basis for the denial of relief. *See McDonald v. Batesville Poultry Equipment*, 90 Ark. App. 435, 206

[1] Appellees do not cross-appeal the issue of whether a claimant who has a scheduled injury that does not constitute permanent total disability as set forth in Ark. Code Ann. § 11-9-519(b), may nevertheless be awarded permanent total disability benefits. This issue requires interpretation of Ark. Code Ann. § 11-9-519(c) and (f), and we expressly left this issue open in *McDonald v. Batesville Poultry Equipment*, 90 Ark. App. 435, 206 S.W.3d 908 (2005).

S.W.3d 908 (2005). We defer to the Commission on issues involving the weight of the evidence and the credibility of the witnesses. *Id.*

Here, the ALJ, in an opinion adopted and affirmed by the Commission, considered the facts noted by appellant. The ALJ, however, observed that appellant underwent a functional-capacity examination, which considered the amputation of her fingers and her epicondylitis, and was found to be capable of performing "medium" work. Further, the ALJ noted that Rheem offered employment in janitorial services that fell within these restrictions and was willing to make accommodations to facilitate appellant's employment, including allowing her to sit as needed and to work only in the administrative offices. Appellant, however, declined this employment. Also, a clinical psychologist, Winston Wilson, recommended that appellant be considered for work that was less demanding than she previously had performed. Further, to alleviate her foot condition, Dr. John Moore directed that she wear compression stockings and limit the amount of time she spent each day in prolonged standing. The burden of proof was on appellant to prove an inability to earn any meaningful wage in the same or other employment, and given the evidence relied on by the Commission, we cannot say that there was not a substantial basis for the denial of relief.

Appellant alternatively argues that the Commission erred in finding that she was not entitled to wage-loss disability over and above her impairment rating to her right hand, noting her previous diagnosis of foot ulcers. Appellant asserts that the Second Injury Fund bears the liability for wage-loss disability benefits under Ark. Code Ann. § 11-9-525 (Repl. 2002), which governs the liability of the Second Injury Fund. She argues that there is no language in that statute excluding consideration of wage loss to a claimant who has a scheduled injury as well as a prior impairment.

Appellant's injury to her hand was a scheduled injury. We observe that Ark. Code Ann. § 11-9-521(g) (Repl. 2002), provides that "[a]ny employee suffering a scheduled injury shall not be entitled to permanent partial disability benefits in excess of the percentage of permanent physical impairment set forth above except as otherwise provided in § 11-9-519(b)." The later provision, Ark. Code Ann. § 11-9-519(b), then describes what constitutes permanent total disability when there is a combination of two scheduled injuries of particular types. Considering these statutes,

we hold that a claimant with a scheduled injury is not entitled to permanent partial disability benefits. Our holding here is consistent with our decision in *Maxey v. Tyson Foods, Inc.*, 66 Ark. App. 301, 991 S.W.2d 624 (1999), *rev'd on other grounds*, 341 Ark. 306, 18 S.W.3d 328 (2000), where we held that a claimant was not entitled to wage-loss disability benefits for a scheduled injury.

Moreover, as we held in *Maxey*, we construe Ark. Code Ann. § 11-9-521 and -525 harmoniously, and thus, the claimant's recovery for a scheduled injury is restricted to the appropriate scheduled amount, regardless of whether the claimant is seeking recovery from the employer, the insurer, or the Second Injury Fund. Thus, we hold that appellant is not entitled to wage-loss benefits in addition to the compensation she received for her scheduled injury.

Affirmed.

GLADWIN and ROBBINS, JJ., agree.

PUBLIC EMPLOYEE CLAIMS DIVISION, et al. *v.*
John H. KEYS

CA 06-382 257 S.W.3d 570

Court of Appeals of Arkansas
Opinion delivered May 23, 2007

[Rehearing denied June 6, 2007.*]

* GRIFFEN, J., would grant rehearing.

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

Robert L. Wilson, Chief Counsel, and *William L. Wharton*, Staff Attorney, for appellee.

JOHN MAUZY PITTMAN, Chief Judge. The appellee in this workers' compensation case became permanently and totally disabled in 1979 when he sustained an injury in the course of his employment with appellant that left him a paraplegic. Subsequently appellee filed a claim for additional benefits in the form of a hand-controlled, wheelchair-accessible vehicle. After a hearing, the Commission found that this benefit was reasonable and necessary and ordered that it be awarded to appellee. On appeal, appellants argue that the Commission erred because the applicable statute does not provide for the provision of such benefits.

Appellee was rendered a paraplegic in a 1979 injury suffered in the service of appellant. He has subsequently suffered the amputation of both legs in 2003 and a heart attack from a blood clot three days later. His medical condition is poor, his need for care is great, and his quality of life is drastically diminished. Nevertheless, we are duty-bound to reverse the Commission's award.

Appellee's benefits are governed by the law in effect at the time of his injury. In 1979, the applicable statute provided as follows:

> The employer shall promptly provide for an injured employee such medical, surgical, hospital, and nursing services, and medicine, *crutches, artificial limbs and other apparatus* as may be *reasonably necessary for the treatment of* the injury received by the employee.

Ark. Stat. Ann. § 81-1311 (Repl. 1976) (emphasis added). In the general revision of the Workers' Compensation Act that took place in 1993, the legislature revised this section so as to provide a broader range of ancillary medical services and supplies to injured workers:

> The employer shall promptly provide for an injured employee such medical, surgical, hospital, chiropractic, optometric, podiatric, and nursing services and medicine, crutches, *ambulatory devices*, artificial limbs, eyeglasses, contact lenses, hearing aids, and other apparatus as may be *reasonably necessary in connection with* the injury received by the employee.

Ark. Code Ann. § 11-9-508(a) (Supp. 2005) (emphasis added).

In *Liberty Mutual Insurance Co. v. Chambers*, 76 Ark. App. 286, 288, 64 S.W.3d 775, 776-77 (2002), we held that a hand-controlled van was an allowable benefit under the 1993 amendment because:

> Section 11-9-508(a) was amended by the 1993 act and no longer ties "apparatus" to medical services, but rather "other apparatus as may be reasonably necessary in connection with the injury received by the employee."

Under the reasoning of *Chambers*, the van was allowable only because of the 1993 amendment. However, the 1993 amendment, which provides benefits for ambulatory devices, is inapplicable in the present case. Here, we are limited to the language of the prior act, which allows provision only of apparatus that is reasonably necessary for treatment of the compensable injury. Although it is true that the prior act was to be construed liberally, liberal construction is only one of the tools of statutory construction. It is seldom conclusive in itself and will not be used to defeat the legislative purpose implicit in an act. *Arkansas Fire & Police Pension Review Board v. Stephens*, 309 Ark. 537, 832 S.W.2d 239 (1992). In light of the restriction of benefits for mechanical apparatus in the applicable statute to those necessary for treatment of injury, we hold that the provision of a private vehicle without restrictions on the use thereof cannot reasonably be deemed necessary for the treatment of appellee's injury.

Reversed and dismissed.

HART, GLADWIN, BIRD, and MARSHALL, JJ., agree.

ROBBINS, J., concurs.

GRIFFEN, VAUGHT, and MILLER, JJ., dissent.

JOHN B. ROBBINS, Judge, concurring. I concur with the majority in reversing the Commission's decision that requires appellant to provide appellee a hand-controlled, wheelchair accessible van; however, I would remand this claim for further proceedings rather than dismissing the claim altogether.

The prompt provision of medical services reasonably necessary for the treatment of a compensable injury was required of an employer under the law in effect in 1979. Ark. Stat. Ann. § 81-1311. It could not reasonably be contended that transportation for an injured employee to and from his medical services providers is not reasonably necessary for the treatment of his injury.

The evidence in the instant appeal does not suggest that appellee limited the use of his van solely for traveling to and from his medical services providers. Under these circumstances I am of the opinion that appellant should not be responsible for appellee's non-medical use of his van. We have precedent for directing the Commission to apportion the gross cost of a benefit between that portion attributable to those services and apparatus required to be furnished by § 81-1311 and that portion attributable to services for which the employer is not liable. *Pine Bluff Parks & Recreation v. Porter*, 6 Ark. App. 154, 639 S.W.2d 363 (1982). I submit this is what we should do in this case with respect to the wheelchair accessible van, rather than dismiss appellee's claim outright.

For these reasons I would reverse and remand this appeal to the Commission for further proceedings.

BRIAN S. MILLER, Judge, dissenting. I disagree with the majority's interpretation of *Liberty Mutual Insurance Co. v. Chambers*, 76 Ark. App. 286, 288, 64 S.W.3d 775, 777 (2002), because that case simply provides that an employee injured after the 1993 amendment to the Workers' Compensation Act may be awarded a wheelchair-accessible van. In *Chambers*, we did not determine the rights of claimants injured before the 1993 amendment, and we certainly did not address whether an employer is required to "replace" a wheelchair accessible van that it had agreed to provide a permanently disabled employee.

Appellee was injured in 1979 and appellant provided him with a wheelchair-accessible van in 1991, because "he needed a van." Appellant never objected to providing the van and never refused anything that was required to equip the van. The van now has 189,000 miles on it and is inoperable. Appellant recently paid to have hand controls installed in a vehicle owned by appellee's wife and has agreed to pay for any modifications to that vehicle. Appellee, however, has great difficulty transferring between his wheelchair and his wife's vehicle and now has no transportation during the day while his wife is at work.

The Commission ordered appellant to replace appellee's van because it determined that the van was "other apparatus as may be reasonably necessary for the treatment of the injury received by the employee." Ark. Stat. Ann. § 81-1311 (Repl. 1976). It is well settled that we "will not overturn an administrative agency's interpretation of a statute unless it is clearly wrong," *Chambers*, 76 Ark. App. at 288, 64 S.W.3d at 777, and I believe this interpretation of section 81-1311 is not "clearly wrong." In fact, the Commission's reading of the statute is quite reasonable considering that this statute was, at that time, highly remedial and was to be interpreted liberally, with doubtful cases being resolved in favor of allowing benefits. *Elm Springs Canning Co. v. Sullins*, 207 Ark. 257, 180 S.W.2d 113 (1944). Indeed, the Commission was required to act as a jury and to take a liberal view of the evidence in favor of the statute's purpose of compensating those who came within its terms or who by reasonable construction were within it. *See Stout Constr. Co. v. Wells*, 214 Ark. 741, 217 S.W.2d 841 (1949).

By reversing the Commission's decision, we are disregarding our duty to apply a liberal construction to the statute and to resolve this case in favor of allowing benefits. *See Elm Springs, supra.* The majority is indeed making the mistake of substituting its judgment for that of the Commission and reversing because it would have reached a different result. *See Heptinstall v. Asplundh Tree Expert Co.*, 84 Ark. App. 215, 137 S.W.3d 421 (2003).

While I believe a liberal reading of the statute, as required by legal precedent, favors affirming the Commission's decision, I also believe appellant should be estopped from denying its obligation to replace the van it purchased for appellee in 1991. *See, e.g., Thompson v. Washington Reg'l Med. Ctr.*, 71 Ark. App. 126, 27 S.W.3d 459 (2000). For fifteen years, appellant has failed to object to providing appellee with a wheelchair-accessible van. To explain its recent actions, appellant's adjuster testified that she assumed

appellee's file in 2000 and that the previous case manager made the decision to provide the funds to purchase the van. She further testified that

> our position is that we don't purchase vans and aren't obligated to purchase vans, in that particular case it was the more cost effective route to go. There was no intent to establish a pattern of buying vans. It was an exception for that particular circumstance.

The adjuster's testimony is unpersuasive. She was not the case manager in 1991, and she could not know what the previous case manager's intentions were regarding whether the van would be replaced.

Finally, appellee is severely prejudiced by appellant's recent objection to replacing the van. Appellant relies on this van for all transportation, which presumably includes transportation to and from medical visits. Because he receives only $106.12 per week in benefits, it will be extremely difficult for him to afford to replace this van. If appellant had informed appellee in 1991 that it would not replace the van, appellee could have planned for this day. Instead, appellant waited fifteen years and, during that time, led appellee to believe that all of his transportation needs would be covered. Now, without warning, appellant has unjustifiably pulled the plug on appellee.

For these reasons, I dissent. I am authorized to say that Judges Griffen and Vaught join in this dissent.

BAXTER COUNTY REGIONAL HOSPITAL *v.*
Arlene Denise DIXON

CA 06-940 257 S.W.3d 564

Court of Appeals of Arkansas
Opinion delivered May 23, 2007

[Rehearing denied June 27, 2007.]

Walter A. Murray, for appellants.

Frederick S. Spencer, for appellee.

JOHN MAUZY PITTMAN, Chief Judge. The appellee in this workers' compensation case sustained back injuries in February and July of 1991. The appellant employer, Baxter County Regional Hospital, accepted her claim as compensable and paid benefits until August 1994. Appellee filed a timely claim for additional workers' compensation benefits, including an additional five percent physical impairment rating, permanent and total disability benefits, and additional medical benefits. Appellee was found to have failed to prove entitlement to these additional benefits in an opinion delivered by the Commission on November 18, 1996. No appeal was taken from that order. Appellee sought further treatment on her own, underwent surgery by Dr. Bert Park, and filed a new request for benefits on October 27, 1997. An administrative law judge found this claim to be barred by the statute of limitations. The Commission reversed and remanded to the administrative law judge. An appeal from the Commission's order of remand was attempted to this court; in an unpublished opinion delivered on December 12, 2001, we held that we lacked jurisdiction in the absence of a final order awarding benefits and dismissed the appeal. The Commission entered an order awarding further benefits in August 2003. That order was the subject of the second attempt to appeal to this court. However, because the Commission did not adequately explain the basis for its finding that the new claim was not barred by the statute of limitations, we remanded for the Commission to make specific findings in sufficient detail to permit us to conduct a meaningful review. The Commission made such findings in an order awarding benefits issued on June 6, 2006. That order is final and comprehensible, and from it this appeal is taken.

Appellant contends that the Commission erred in finding that appellee's claim was not barred by the statute of limitations. In resolving this issue it is necessary to decide whether the new request for benefits filed on October 27, 1997, constituted a "claim for additional compensation" pursuant to Ark. Stat. Ann. § 81-1318(b) (now Ark. Code Ann. § 11-9-702(b) (Repl. 2002)), or whether it was instead a request to *modify* a *previous* award pursuant to Ark. Stat. Ann. § 81-1326 (now Ark. Code Ann. § 11-9-713(a) (Repl. 2002)).

Arkansas Statutes Annotated section 81-1318(b) (now codified at Ark. Code Ann. § 11-9-702) provides that, in cases where compensation for disability has been paid on account of injury, a claim for additional compensation is barred unless filed with the Commission within one year from the date of the last payment of compensation, or two years from the date of the injury, whichever is greater. In contrast, Ark. Stat. Ann. § 81-1326 (now codified at Ark. Code Ann. § 11-9-713) permits modification of a compensation order or award on the ground of a change of physical condition only within six months of the termination of the compensation period fixed in the original compensation order or award. Here, the period at issue — between the denial of benefits in November 1996 and the request for new benefits in October 1997 — is shorter than one year but longer than six months.

The Commission held that the new claim was one for "additional compensation" and was therefore timely. We disagree. The benefits requested in the current claim were essentially identical to those denied by the Commission in November 1996: an increased impairment rating, permanent and total disability, and additional medical benefits. Appellee did not appeal from that order. The only "additional" element involved in appellee's second claim was based on her "deteriorating condition" as evinced by surgeries that the Commission did not authorize: In an opinion of November 1996, the Commission specifically found that five percent of appellee's disability was not work-related but instead attributable to a degenerative condition. Clearly, appellee's request was to modify the previous order denying the benefits sought and denied in the prior hearing. The request for modification was untimely because Ark. Stat. Ann. § 81-1326 applies only to cases where a previous order or award of compensation has been made, *see Smith v. Servomation*, 8 Ark. App. 274, 651 S.W.2d 118 (1983), and was in any event made more than six months after issuance of the order appellee sought to have modified.

However, even were we to agree that the present claim was one for additional benefits rather than for modification of a prior order, the Commission's finding of timeliness would still be in error. The Commission's finding that the one-year statute of limitations had not run was based on the period between its order denying benefits in November 1996 and the new request for benefits in October 1997. However, this finding was premised on the mistaken assumption that the statute of limitations begins to

run anew at the termination of a proceeding — like that of November 1996 — that *denies* all requested benefits. As noted above, section 81-1318(b) bars claims for additional benefits that are not filed within two years from the date of the injury or one year from the last payment of compensation. Here, the last payment of compensation was made in August 1994, more than three years before the new claim filed in October 1997. Although the filing of a claim for additional benefits tolls the running of the statute of limitations, *see Spencer v. Stone Container Corp.*, 72 Ark. App. 450, 38 S.W.3d 909 (2001), it begins to run anew upon denial resolution of that claim. In the present case, approximately six months had elapsed on the one-year statute of limitations before the filing of the claim that was resolved in the November 1996 order, leaving appellee approximately six additional months in which to file a timely claim. That period ended before appellee filed her new claim for benefits in October 1997. Simply put, an order denying all requested benefits does not allow a claimant an additional year in which to file a claim for additional benefits. Arkansas Statutes Annotated § 81-1318(b) and Ark. Code Ann. § 11-9-702(b) measure the passage of time from the provision of benefits, not from their denial.

Reversed and dismissed.

MARSHALL and MILLER, JJ., agree.

SOUTHEAST ARKANSAS HUMAN DEVELOPMENT CENTER, et al. *v.* Sue J. COURTNEY

CA 06-1046 257 S.W.3d 554

Court of Appeals of Arkansas
Opinion delivered May 23, 2007

Richard S. Smith, Public Employee Claims Division, for appellants.

Kenneth E. Buckner, for appellee.

ROBERT J. GLADWIN, Judge. Appellants Southeast Arkansas Human Development Center (Employer) and the Public Claims Division (Carrier) bring this appeal from the June 15, 2006, decision of the Workers' Compensation Commission (Commission) affirming and adopting the administrative law judge's (ALJ) findings that the treatment recommended by Dr. Edward Saer was reasonable and necessary, that appellee's healing period had not ended, and that appellants had controverted appellee's entitlement to permanent-partial-disability benefits. On appeal, appellants argue that the Commission erred in finding that appellee was entitled to the course of treatment recommended by Dr. Saer, at appellants' expense, and that they had controverted her right to permanent-partial-disability benefits. We affirm.

Appellee was born on May 19, 1949, completed a high-school education, and has work experience that includes grading lumber and manufacturing work. Her health history includes lumbar-degenerative-disc disease, depression, a July 2002 back injury that was treated conservatively, and carpal-tunnel-syndrome surgery in the late 1990s. She began working for Employer in 1999.

On November 13, 2003, appellee was attempting to restrain a patient in a straight jacket when she was kicked and knocked over, which resulted in an injury to her back, consequential pain in her right leg, and difficulty walking. She was treated conservatively by Dr. Joe Wharton, Dr. David Reding, Dr. Barry Baskin, Dr. Thomas Hart, Dr. Edward Saer, and Dr. Scott Schlesinger, but remained symptomatic and desired to undergo a surgical procedure recommended by Dr. Saer.

Dr. Wharton diagnosed appellee with extensive multilevel-degenerative-disc disease and traumatic sacroillitis, but stated that the work injury produced different symptoms, thus he concluded that she had sustained a new injury. Diagnostic testing indicated bulging discs, which contributed to the stenosis, but no herniation or nerve-root compromise. Dr. Wharton excused appellee from work and prescribed medication and physical therapy. His March 15, 2005 report indicated that she developed adverse side effects from the medication.

Dr. Reding examined appellee on January 21, 2004, and prescribed epidural-steroid injections for her degenerative-disc

disease at L4-5, and use of a rigid-lumbosacral corset and a TENS unit. Dr. Reding's reports from March 22, 2004, and April 21, 2004, mentioned surgical intervention, stating that appellee "may eventually come to an interbody fusion," but concluded that appellee was not a good candidate because she had not responded to treatment with the corset, which presumably mimicked the stabilizing effects of a fusion procedure.

Dr. Baskin, a neurologist, evaluated appellee on May 13, 2004, at the urging of appellants, and opined that her work-related injury exacerbated preexisting degenerative-disc disease and recommended intra-disc injections and changes in medication. Dr. Hart, a pain specialist, examined appellee on July 20, 2004, performed the injections, which provided only temporary relief, and discussed surgery with her. He found objective evidence of a leak that correlated to appellee's back pain, and in his report dated July 22, 2004, stated that decompression and fusion of the lumbar spine might be the "way she is heading, if she continues the failed conservative care." Appellee returned to Dr. Baskin on August 9, 2004, accompanied by the nurse/caseworker, Barbara Acuff, who was assigned to her by Carrier. Dr. Baskin again stated that the work-related injury exacerbated preexisting degenerative-disc disease. At that time he recommended that she should be considered a candidate for fusion surgery and referred appellee to Dr. Saer. Dr. Saer's September 16, 2004 report indicated that appellee was a candidate for surgery[1] to address the pain caused by the degenerative-disc disease at L4-5 and L5-S1.

Appellant was then evaluated by another surgeon, Dr. Schlesinger, on November 1, 2004, at which time Dr. Schlesinger opined that the work-related injury aggravated, but did not cause, her preexisting degenerative-disc disease. Dr. Schlesinger disagreed with Dr. Saer's recommendation for surgery, and recommended traction and a TENS unit. In a letter dated April 1, 2005, Dr. Schlesinger recommended that appellee discontinue her narcotic medication, tapering off under medical supervision, and instead using anti-inflammatory medication. He assessed an impairment rating at six percent to the body as a whole, commenting that her April 1, 2005 functional-capacity evaluation (FCE)

[1] He recommended spinal fusion L4 through S1 with a possible interbody fusion at L4-5.

showed that appellee was capable of performing a job with light physical demands, despite displaying inconsistent and unreliable effort.

Linda Amaden, claims adjuster for Employer, received a telephone call from Ms. Acuff on April 1, 2005, advising that Dr. Schlesinger had determined that appellee was at maximum-medical improvement and would be making an impairment rating, but Ms. Acuff did not tell Ms. Amaden what that rating would be. At that time, temporary-total-disability benefits were stopped. Apparently, Ms. Amaden then had difficulty obtaining the relevant reports from Dr. Schlesinger, with his April 1, 2005 rating report not arriving until May 6, 2005. The report and invoice were forwarded to an outside company, Systemedic, for audit against the FCE schedule. Ms. Amaden received the report back in her office on May 13, 2005, and spoke with her supervisor, Terry Lucy, about liability for the impairment rating and settlement options. Ms. Amaden telephoned appellee and spoke to her husband on May 18, 2005, notifying him that appellee would be entitled to permanent-partial-disability benefits based on the impairment rating and inquiring whether she might be interested in a settlement offer. Ms. Amaden advised him that she would be on vacation until May 31, 2005, and her understanding was that he planned to discuss the offer with appellee, and possibly an attorney, and get back to her with a decision. Appellee and her husband did not return the call to Ms. Amaden, and instead, she received a letter from appellee's attorney dated June 7, 2005. Assuming the letter amounted to a rejection of the settlement offer, Ms. Amaden ordered the check on June 8, 2005, for the lump-sum amount of appellee's permanent-partial-disability benefits. Appellee did not receive her benefits until June 10, 2005, via check dated June 8, 2005. The check covered the period from April 2, 2005, through June 24, 2005.

The ALJ stated in her December 14, 2005 opinion that appellee sustained a compensable back injury that aggravated a preexisting condition of degenerative-disc disease, and that she had been unsuccessfully treated by the above-described physicians. The ALJ pointed out that Drs. Wharton, Baskin, Hart, and Saer had all recommended surgery, but Dr. Schlesinger suggested repeating her conservative care. The ALJ admitted that surgical treatment for degenerative-disc disease was controversial, but reiterated that Dr. Hart had documented objective evidence of a leak in the disc that was consistent with appellee's pain. She stated

that appellants were liable for appellee's pain management and that conservative treatment had failed. She also stated that appellants delayed payment of permanent-partial-disability benefits for over two months despite having notice of the rating through their agent, Ms. Acuff, and that appellee had to engage the services of an attorney in order to obtain payment of the benefits and seek continuing medical treatment. The ALJ found that appellants' delay constituted controversion, and that appellee's healing period had not ended. The ALJ awarded temporary-total-disability benefits from April 1, 2005, to a date yet to be determined, and found that the course of treatment recommended by Dr. Saer was reasonable and necessary in connection with the compensable injury pursuant to Ark. Code Ann. § 11-9-508 (Supp. 2005). On June 15, 2006, the Commission affirmed and adopted the ALJ's decision. This appeal followed.

Typically, on appeal to this court, we review only the decision of the Commission, not that of the ALJ. *Daniels v. Affiliated Foods S.W.*, 70 Ark. App. 319, 17 S.W.3d 817 (2000). In this case, the Commission affirmed and adopted the ALJ's opinion as its own, which it is permitted to do under Arkansas law. *See Death & Permanent Total Disability Trust Fund v. Branum*, 82 Ark. App. 338, 107 S.W.3d 876 (2003). Moreover, in so doing, the Commission makes the ALJ's findings and conclusions the findings and conclusions of the Commission. *See Branum, supra.* Therefore, for purposes of our review, we consider both the ALJ's order and the Commission's majority order.

In reviewing decisions from 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 the decision is supported by substantial evidence. *Smith v. City of Fort Smith*, 84 Ark. App. 430, 143 S.W.3d 593 (2004). If reasonable minds could reach the conclusion of the Commission, its decision must be affirmed. *K II Constr. Co. v. Crabtree*, 78 Ark. App. 222, 79 S.W.3d 414 (2002). We cannot undertake a de novo review of the evidence and are limited by the standard of review in these cases. *Id.* The Commission has the duty of weighing medical evidence, and the resolution of conflicting evidence is a question of fact for the Commission. *Smith-Blair, Inc. v. Jones*, 77 Ark. App. 273, 72 S.W.3d 560 (2002). It is well settled that the Commission has the authority to accept or reject a medical opinion and the authority to determine its medical soundness and probative force. *Oak Grove Lumber Co. v. Highfill*, 62 Ark. App. 42, 968 S.W.2d 637 (1998). It

is the responsibility of the Commission to draw inferences when the testimony is open to more than a single interpretation, whether controverted or not; and when it does so, its findings have the force and effect of a jury verdict. *Id.* The Commission is not required to believe the testimony of any witness, but may accept and translate into findings of fact only those portions of the testimony it deems worthy of belief; once the Commission has made its decision on issues of credibility, the appellate court is bound by that decision. *Logan County v. McDonald*, 90 Ark. App. 409, 206 S.W.3d 258 (2005). Speculation and conjecture cannot substitute for credible evidence. *Smith-Blair, Inc. v. Jones, supra.*

I. Additional Medical Treatment

Appellants point out that of all the treating physicians, only Drs. Saer and Schlesinger were surgeons. They contend that Dr. Schlesinger specifically discussed why he thought surgery would not be helpful, in that a fusion procedure was unlikely to relieve her pain and that he thought better addressed spinal instability than degeneration and pain. Dr. Schlesinger also noted that he saw no changes in appellee's MRI from 2002 to 2003, and therefore, was unable to conclude that appellee's lumbar-degenerative-disc disease could be a result of the November 2003 compensable injury. Although Dr. Reding discussed surgery with appellee, he was reluctant to recommend it and was of the opinion that her pain resulted from her long-standing degenerative-disc disease. That opinion was apparently shared by Dr. Baskin, although he did comment that the current condition appeared to have been exacerbated by the work injury.

Appellee takes issue with appellants' creative position that her healing period ended on April 1, 2005, simply because Dr. Schlesinger issued the six-percent-impairment rating. She contends that he was merely an evaluating, rather than a treating, physician and recommended only a TENS unit and physical therapy. Both of these options had been previously utilized and were unsuccessful. She contends that the claims adjuster chose to accept Dr. Schlesinger's opinion over that of the other physicians, even though "as far as the 'medical choir' is concerned, Dr. Schlesinger is singing a solo." There was substantial agreement among the other doctors that there was other treatment available that might very well help her condition. It is the province of the Commission to weigh conflicting medical evidence, and the resolution of conflicting evidence is a question of fact for the

Commission. *See Fayetteville Sch. Dist. v. Kunzelman*, 93 Ark. App. 160, 217 S.W.3d 149 (2005). As such, we agree that there was substantial evidence that her condition had not stabilized and she has not been as far restored as the permanent nature of her injury would permit, and therefore, temporary-total-disability benefits should not have been stopped as of April 1, 2005. *See Clairday v. The Lilly Co.*, 95 Ark. App. 94, 234 S.W.3d 347 (2006). Appellee was entitled to further medical treatment. We affirm on this point.

II. Controversion of Benefits

Arkansas Code Annotated section 11-9-715(a)(2)(B) (Repl. 2002) provides that whenever the Commission finds that a claim has been controverted, in whole or in part, the Commission shall direct that fees for legal services be paid to the claimant's attorney. One of the purposes of the attorney's fee statute is to put the economic burden of litigation on the party who makes litigation necessary. *Lee v. Alcoa Extrusion, Inc.*, 89 Ark. App. 228, 201 S.W.3d 449 (2005). Whether a particular claim is controverted is a question of fact for the Commission. *Id.*

The mere fact that a party investigates a claim prior to admitting liability does not require a finding of controversion. *Stucco, Inc. v. Rose*, 52 Ark. App. 42, 914 S.W.2d 767 (1996). Additionally, appellants point out that the mere fact of a delay in the payment of benefits does not, in and of itself, constitute controversion of those benefits, especially where the compensability of the injury has been accepted. *See Walter v. Southwestern Bell Tel. Co.*, 17 Ark. App. 43, 702 S.W.2d 822 (1986). They maintain that it is clear from Ms. Amaden's testimony that they had no such intention with respect to appellee's benefits. Appellants contend that the delay in making payment was caused by (1) the difficulty in obtaining the actual rating report from Dr. Schlesinger; (2) appellee's request for time to consider the settlement offer and possibly discuss it with an attorney; (3) Ms. Amaden's vacation, about which appellee was made aware; (4) appellee's failure to timely respond to the settlement offer.

Additionally, appellants take issue with the ALJ's finding that they had notice of the rating through their agent, Ms. Acuff, prior to receiving the report. Ms. Acuff's April 19, 2005 report, the first one following Dr. Schlesinger's April 1, 2005 evaluation, notes that she asked Dr. Schlesinger about an impairment rating, and he said that "he would include that information in his report."

Appellants assert that Ms. Acuff did not know what that rating would be, and that it could have been zero percent. They claim that Ms. Acuff had sufficient information to inform Ms. Amaden that Dr. Schlesinger had found that appellee had reached maximum medical improvement, which appellants relied upon as support for the discontinuation of the temporary-total-disability benefits, but not adequate information to quantify the final-rate percentage. Additionally, Ms. Amaden testified that had she received a report of that impairment rating from Ms. Acuff during that telephone call, she would have started benefits based upon that information.

The Commission had substantial evidence before it to conclude that appellants had controverted appellee's entitlement to benefits for purposes of awarding an attorney fee. It is undisputed that the rating report from Dr. Schlesinger was dated April 1, 2005, but Carrier did not issue a check for appellee's permanent-partial-disability benefits until June 8, 2005. The Commission could have properly disbelieved appellants' assertion that they did not learn about the permanent-partial-disability rating on April 1, 2005, as did the ALJ in stating in her opinion that "the [C]arrier had notice of the rating through their agent, the case manager assigned to accompany the claimant to all of her doctor's visits." To reiterate our standard, whether a claim is controverted is a question of fact for the Commission. *See Lee, supra.* Further, the Commission is not required to believe the testimony of any witness, but may accept and translate into findings of fact only those portions of the testimony it deems worthy of belief; once the Commission has made its decision on issues of credibility, the appellate court is bound by that decision. *Logan County, supra.* Accordingly, we affirm on this point as well.

Affirmed.

HART and ROBBINS, JJ., agree.

Brent WILLIAMS and Lemeya Givens *v.*
ARKANSAS DEPARTMENT of HEALTH and
HUMAN SERVICES

CA 06-1492 257 S.W.3d 574

Court of Appeals of Arkansas
Opinion delivered May 23, 2007

[Rehearing denied June 13, 2007.]

Jennifer Oyler Olson, for appellant Lemeya Givens.

James H. Phillips, for appellant Brent Williams.

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

ROBERT J. GLADWIN, Judge. Appellants Brent Williams and Lemeya Givens appeal the order terminating parental rights filed in the Pulaski County Circuit Court on October 9, 2006. Appellants contend that the trial court did not have sufficient evidence before it to support its decision to terminate parental rights, and that the trial court erred in denying their request to proceed pro se. We affirm.

Initially we address appellee Arkansas Department of Health and Human Services's (DHHS) Motion to Strike Portions of the Record, filed with this court on February 13, 2007. The motion requests that the portion of the record from Pulaski County JN 2005-1585 included in the appellant's record on appeal of the instant case, Pulaski County JN 2006-158, be stricken as a violation of Ark. Sup.Ct. R. 6-9. Appellants argue that the portion of the record had been incorporated by the trial court without objection from DHHS at the beginning of the termination hearing. Further, appellants claim that regardless of whether DHHS made a contemporaneous objection, the trial court's incorporation of her previous ruling on the same issue in a different case is not a violation of Rule 6-9. We deny DHHS's motion to strike because DHHS did not make a contemporaneous objection, thereby failing to preserve this issue for appellate review. *E.g.*, *Callahan v. Clark*, 321 Ark. 376, 901 S.W.2d 842 (1995).

Facts

On January 19, 2006, L.W., born December 29, 2004, and B.W., born February 12, 2004, were taken into DHHS custody based upon allegations of physical abuse. On January 20, 2006, an ex parte order for emergency custody was filed placing custody of the children with DHHS. A probable-cause order was filed Janu-

ary 26, 2006, wherein the court found probable cause that the children had been dependent-neglected, and that the children should remain in the custody of DHHS. At the adjudication hearing on March 17, 2006, the trial court found that the allegations of abuse were supported by proof beyond a reasonable doubt.[1] The trial court made a finding that both children were dependent-neglected based on medical neglect and parental unfitness by both parents. The evidence presented at the adjudication hearing indicated that this case began with a call to the child-abuse hotline on January 19, 2006, reporting a bone fracture in L.W. L.W. was later discovered to have ten fractured ribs and a fractured leg. B.W. was discovered to have a fractured leg that was in the process of healing. B.W.'s fracture was between two and six months old at the time it was discovered. Neither parent was aware of either child's injuries until L.W. would not get up and had a swollen leg. A couple of days later, a lump developed on L.W.'s leg, and a couple of days after that, on January 19, 2006, the parents took L.W. to the hospital. Neither parent gave satisfactory explanations for the children's injuries, the mother claiming that L.W. fell off her lap, and the father stating that B.W. caught her leg in the crib railing. Neither child had received any medical treatment prior to this litigation.

On March 30, 2006, the trial court held a hearing and filed an order on the disposition of the case. The trial court found by clear and convincing evidence that the children were dependent-neglected and ordered that the children remain in DHHS custody. The goal of the case at that time was reunification of the children and their mother. The concurrent goal was set as adoption or guardianship. On May 22, 2006, the court held a hearing on the written recommendation of DHHS and the attorney ad litem for no reunification services to be provided by DHHS to the parents. The court filed an order on June 14, 2006, finding beyond a reasonable doubt that the parents had subjected the children to aggravated circumstances as follows:

(1) the children have been chronically abused;

(2) the children have been subjected to extreme or repeated cruelty;

[1] The standard of proof employed by the trial court was that of reasonable doubt because it had not yet been determined whether the case involved the Indian Child Welfare Act, which requires the higher standard of proof.

(3) there is little likelihood that services to the family will result in successful reunification because both children have sustained serious injuries and neither parent has given any explanation for these injuries; thus, without knowing the true reason for the underlying injuries to the children, then the Court can never know when the cause of the removal has been remedied.

By order of June 23, 2006, the trial court changed the goal of the case plan to adoption and authorized a plan for termination of parental rights. A petition to terminate parental rights was filed July 3, 2006. On August 9, 2006, the trial court filed an order relieving appellant father's attorney of record, and appointing attorney Jim Phillips to represent the father. On the same day, the appellant mother's attorney moved to withdraw. At the termination hearing held September 22, 2006, both parents moved to be allowed to represent themselves. The trial court denied their request, and allowed her reasoning for this decision, which had been stated on the record in a separate case involving these parties, to be incorporated in the record in the instant case. An order terminating parental rights was filed October 9, 2006, and this appeal was timely filed on October 23, 2006.

Sufficiency of the evidence

The standard of review in cases involving the termination of parental rights is well established. Arkansas Code Annotated section 9-27-341(b)(3) (Supp. 2005) requires an order terminating parental rights to be based upon clear and convincing evidence. *Camarillo-Cox v. Ark. Dep't of Human Servs.*, 360 Ark. 340, 201 S.W.3d 391 (2005). Clear and convincing evidence is that degree of proof that will produce in the fact-finder a firm conviction as to the allegation sought to be established. *E.g.*, *Lewis v. Ark. Dep't of Human Servs.*, 364 Ark. 243, 217 S.W.3d 788 (2005). When the burden of proving a disputed fact is by clear and convincing evidence, the question that must be answered on appeal is whether the trial court's finding that the disputed fact was proven by clear and convincing evidence was 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. *Gregg v. Ark. Dep't of Human Servs.*, 58 Ark. App. 337, 952 S.W.2d 183 (1997). Such cases are reviewed de novo on appeal. *Wade v. Ark. Dep't of Human Servs.*, 337 Ark. 353, 990 S.W.2d 509 (1999). However, appellate courts do give a high degree of deference to the trial

court, as it is in a far superior position to observe the parties before it and judge the credibility of the witnesses. *Dinkins v. Ark. Dep't of Human Servs.*, 344 Ark. 207, 40 S.W.3d 286 (2001).

When the issue is one involving the termination of parental rights, there is a heavy burden placed upon the party seeking to terminate the relationship. *Ullom v. Ark. Dep't of Human Servs.*, 340 Ark. 615, 12 S.W.3d 204 (2000). Termination of parental rights is an extreme remedy in derogation of the natural rights of the parents. *Id.* Nevertheless, parental rights will not be enforced to the detriment or destruction of the health and well being of the child. *Crawford v. Ark. Dep't of Human Servs.*, 330 Ark. 152, 951 S.W.2d 310 (1997). Parental rights must give way to the best interest of the child when the natural parents seriously fail to provide reasonable care for their minor children. *J.T. v. Ark. Dep't of Human Servs.*, 329 Ark. 243, 947 S.W.2d 761 (1997).

Arkansas Code Annotated section 9-27-341(b) (Supp. 2005) provides in pertinent part as follows:

> (3) An order forever terminating parental rights shall be based upon a finding by clear and convincing evidence:
>
> (A) That it is in the best interest of the juvenile, including consideration of the following factors:
>
> (i) The likelihood that the juvenile will be adopted if the termination petition is granted; and
>
> (ii) The potential harm, specifically addressing the effect on the health and safety of the child, caused by returning the child to the custody of the parent, parents, or putative parent or parents; and
>
> (B) Of one (1) or more of the following grounds:
>
> . . .
>
> (ix)(*a*) The parent is found by a court of competent jurisdiction, including the juvenile division of circuit court, to:
>
> . . .
>
> (*3*)(*A*) Have subjected any juvenile to aggravated circumstances.

> (*B*) "Aggravated circumstances" means:
>
> > (*i*) A juvenile has been abandoned, chronically abused, subjected to extreme or repeated cruelty, sexually abused, or a determination has been made by a judge that there is little likelihood that services to the family will result in successful reunification. . .

Ark. Code Ann. § 9-27-341(b)(3)(A), (B)(ix)(*a*)(*3*)(*A*)-(*B*)(*i*).

Appellants argue that the trial court's findings are not supported by the weight of the evidence. They argue that during the time following the disposition order, they cooperated with every order of the trial court and there was no evidence to indicate anything to the contrary. They claim that nothing new was offered to show unfitness or for any grounds for termination.

DHHS and the attorney ad litem maintain that the appellants' argument regarding sufficiency of the evidence does not clearly articulate which of the trial court's findings was clearly erroneous or how the evidence was insufficient and, therefore, is considered abandoned on appeal. *Benedict v. Ark. Dep't of Human Servs.*, 96 Ark. App. 395, 242 S.W.3d 305 (2006). Even so, both appellees contend that the appellants' reliance on the fact that they fully cooperated with reunification services is misplaced.

DHHS argues that where a parent has subjected a child to aggravated circumstances, reunification services do not have to be provided. *Brewer v. Ark. Dep't of Human Servs.*, 71 Ark. App. 364, 43 S.W.3d 196 (2001). Here, DHHS contends that the aggravated circumstances stem from the physical abuse of both children, which resulted in bone fractures in both children. We agree with DHHS and affirm, holding that the trial court had before it clear and convincing evidence of the children's abuse, and therefore, the decision to terminate parental rights was not clearly erroneous. Because we affirm based upon DHHS's aggravated-circumstances argument, we do not reach DHHS's other arguments in support of affirmation on this point.

Request to proceed pro se

Appellants also argue on appeal that the trial court erred in denying their request to proceed pro se. They ask this court to hold that they properly waived their right to counsel. In *Bearden v. Arkansas Department of Human Services*, 344 Ark. 317, 325, 42

S.W.3d 397, 402 (2001), our supreme court stated, "It is ... well established that an accused has a constitutional right to represent himself and make a voluntary, knowing, and intelligent waiver of his constitutional right to the assistance of counsel in his defense. But every reasonable presumption must be indulged against the waiver of fundamental constitutional rights."

This court set forth the factors used to evaluate whether a parent has made a valid waiver of the right to counsel in *Battishill v. Arkansas Department of Human Services*, 78 Ark. App. 68, 82 S.W.3d 178 (2002), where we said,

> [o]ur supreme court has found that a waiver of the fundamental right to the assistance of counsel is valid only when 1) the request to waive the right of counsel is unequivocal and timely asserted; 2) there has been a knowing and intelligent waiver of the right to counsel; and 3) the defendant has not engaged in conduct that would prevent the fair and orderly exposition of the issues. *Bearden v. Arkansas Dep't of Human Servs.*, 344 Ark. 317, 42 S.W.3d 397 (2001). In order to effectively waive counsel the parent must be "made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and that he has made his choice with his eyes open." *Bledsoe v. State*, 337 Ark. 403, 406, 989 S.W.2d 510, 512 (1999) (citing *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975)). The determination of whether there has been an intelligent waiver of the right to counsel depends on the particular facts and circumstances of each case, including the background, the experience, and the conduct of the accused. *Id.* Every reasonable presumption must be indulged against the waiver of a fundamental constitutional right to counsel. *Daniels v. State*, 322 Ark. 367, 372, 908 S.W.2d 638, 640 (1995).

Battishill, 78 Ark. App. at 72, 82 S.W.3d at 180.

Appellants argue that they properly waived their right to counsel and should have been allowed to proceed pro se. They argue that they both sought to proceed pro se, and on August 10, 2006, during a probable-cause hearing held in Pulaski County JN2005-1585, which involved appellants' minor child T.G. who passed away on August 18, 2006, the trial court took up the motions to proceed pro se in both cases. At that hearing, the trial court extensively questioned the appellants, whose answers were summarized in appellants' abstract as follows:

> We understand that we have a right to an attorney in these dependency neglect proceedings. We also have a right in these dependency neglect proceedings to attorneys appointed to represent us if we are unable to hire our own attorneys. We are aware that the court has appointed attorneys for us. We are not attorneys nor have either of us been to law school or trained in the law. We have studied the law. We have studied everything, their codes, as far as recommendations to terminate parental rights and so forth, seizures of children. We understand that it is wise and prudent to have the advice and the assistance of attorneys to represent them and to protect their rights. We understand it is not advisable to not have an attorney to represent us during the trial proceedings. We have not gone through the training required by attorneys to represent parents in Arkansas, especially in these types of specialized hearings. We are not quite sure if we understand the rules of evidence that cover civil proceedings. We know some of the requirements that attorneys have to hold themselves to particular standards, court room decorum, court room procedure, and stuff like that. We understand we would be held to the same standards as all of the attorneys in this case. We further understand the court could not bend one way or the other to help us. We are not quite sure how to file an appeal but we intend to be filing a couple in the future. We are both high school graduates, ages twenty-one and twenty respectively.

At the beginning of the termination hearing in the instant case, both parents renewed their request to represent themselves, and those requests were denied. Upon appellants' motion, the trial court incorporated the proceedings as set forth above, as well as the trial court's findings in the earlier proceeding, into the record for the purpose of detailing the reasoning for the trial court's denial of the request to proceed pro se.

Appellants claim that they met the requirements set forth in the case law, in that they voluntarily, knowingly, and intelligently waived their right to counsel. Therefore, they argue that because they met the requirements to proceed pro se, this court must reverse and remand for a hearing in which they are allowed to represent themselves.

■ We hold that the trial court erred in finding that the appellants did not make a knowing and intelligent request for waiver of counsel. Based upon the testimony as recited above, the appellants' waiver was made in an unequivocal and timely manner,

and there was no evidence before the trial court of any conduct by appellants that would prevent the fair and orderly exposition of the issues. Therefore, our next inquiry leads us to whether the trial court's denial prejudiced the appellants.

Both DHHS and the attorney ad litem contend, and we agree, that appellants must show prejudice or harm as a result of having appointed counsel represent them at the termination hearing. In *Morgan v. State*, 359 Ark. 168, 195 S.W.3d 889 (2004), the criminal defendant argued on appeal that his conviction should be reversed because the trial court erred in denying his request to proceed pro se. Our supreme court noted an absence from appellant's argument that he was prejudiced as a result of the trial court's ruling. The court held that it is axiomatic that some prejudice must be shown in order to find grounds to reverse a conviction. *Id.* at 176, 195 S.W.3d at 894.

Applying the supreme court's reasoning in *Morgan* to the case at hand, appellants must have been prejudiced by the trial court's denial of their request to proceed without representation in order to obtain relief. The appellant father stated on direct examination by his attorney that "since you were appointed my attorney two or so months ago, you have been better than a private attorney. I mean, you have really been there. . . . You have been responsive to what I have asked [and] have represented me appropriately." DHHS argues that neither parent made any complaints about their counsel. Therefore, even though the trial court erred in denying appellants' request to proceed pro se, that error, by appellants' own admission, did not cause them to suffer prejudice.

Accordingly, we affirm the trial court's order denying the appellants' request to proceed pro se.

Affirmed.

HART and ROBBINS, JJ., agree.

Guadalupe ALVARADO *v.*
ST. MARY-ROGERS MEMORIAL HOSPITAL, INC.

CA 06-1061 257 S.W.3d 583

Court of Appeals of Arkansas
Opinion delivered May 23, 2007

Ken Swindle, for appellant.

Bassett Law Firm, LLP, by: *Dale W. Brown*, for appellee.

JOSEPHINE LINKER HART, Judge. Guadalupe Alvarado appeals from an order of the Benton County Circuit Court dismissing with prejudice pursuant to Arkansas Rule of Civil Procedure 12(b)(6) her complaint against appellee St. Mary-Rogers Memorial Hospital (St. Mary's). On appeal, Alvarado argues that the trial court erred in dismissing her complaint because she did state facts upon which relief may be granted and did allege a justiciable controversy. We affirm.

Alvarado was injured in an automobile accident on October 4, 2005. The following day, she presented at St. Mary's for x-rays. The hospital charges for those x-rays were $312. Alvarado, an employee of Tyson Foods, had CIGNA health insurance. St. Mary's was a member of the Tyson Preferred Network and as such has a contractual agreement with CIGNA whereby it agrees to write off certain charges.

Alvarado settled her case with the other driver's auto insurance company, State Farm Mutual Insurance, for $4,500. The hospital sought to be paid for the medical services it provided to Alvarado. State Farm issued a draft in the amount of $312 payable to St. Mary's. Alvarado asserted that she was entitled to $216.74, the amount of the discount that was negotiated between CIGNA and St. Mary's. While retaining possession of the draft, she demanded that St. Mary's endorse it over to her in exchange for a check written by her attorney in the amount of $95.26, which would have been the cost of Alvarado's treatment if CIGNA was paying for it. Employees of St. Mary's refused Alvarado's demand.

Claiming entitlement to a sum equal to the discount which CIGNA would have been entitled to had they been responsible for the bill, Alvarado filed suit in Benton County Circuit Court, as she threatened to do, seeking declaratory judgment and monetary damages. She alleged that St. Mary's failed to properly assert a lien on the insurance proceeds, breached its contract with CIGNA to which she was a third-party beneficiary, and committed the tort of conversion. Alvarado subsequently amended her complaint to bring in State Farm as a defendant, but nonsuited after the trial court granted St. Mary's motion to dismiss in order to facilitate the filing of this appeal.[1]

In dismissing Alvarado's complaint with prejudice, the trial judge found that "at all relevant times the plaintiff or her attorney has been in exclusive possession and control" of the $312 State Farm draft and St. Mary's did not exercise "actual or constructive dominion" over the draft "at any time." Accordingly, it found that Alvarado's complaint did not state facts upon which relief may be granted and the facts alleged did "not give rise to a present, justiciable controversy capable of adjudication." Further, it found that State Farm had issued two replacement checks which rendered Alvarado's claims moot. Finally, the trial court found that it is "undisputed" that St. Mary's filed or asserted a lien for the medical services rendered on October 5, 2005.

On appeal, Alvarado argues that the trial court erred in dismissing her complaint because it stated facts upon which relief can be granted. First, she argues that the trial court's decision should be treated as based on summary judgment under Rule 56(c) of the Arkansas Rules of Civil Procedure. She contends that "liberally" construing the pleadings, as required by Rule 8(f) of the Arkansas Rules of Civil Procedure, she asserted three causes of action: breach of contract, intentional interference with a business advantage, and conversion. She claims that the interference with a business advantage count was raised when she asserted in her

[1] While this appeal was pending, Alvarado became concerned about whether her dismissal of the cause of action against State Farm deprived this court of jurisdiction because the trial court's order did not dispose of all the claims that she had asserted. We note, however, that in *Driggers v. Locke*, 323 Ark. 63, 913 S.W.2d 269 (1996), the supreme court held that dismissing a party without prejudice did not adversely affect the finality of an order for the purposes of appeal. The *Driggers* court reasoned that nothing requires a plaintiff to sue the prospective defendants simultaneously, and if the plaintiff nonsuits, he is in no different position than he would be if he had filed a separate cause of action. *Id.*

complaint that St. Mary's "had no valid claim to the $316 due to the reduction" and the tort arose when it improperly asserted entitlement to her property—the amount of the discount that CIGNA received from St. Mary's. Alvarado asserts that her entitlement to the discount arose from her status as a third-party beneficiary to the contract between CIGNA and St. Mary's. Alvarado argues that she asserted the tort of conversion when she alleged that St. Mary's refusal to endorse the draft deprived her of her right to be paid in cash the difference between the price of the services rendered and the price to CIGNA had it been responsible for paying for the services. Finally, Alvarado argues that the trial court erred in finding that there was not a justiciable controversy because, even though she eventually received the money she sought, the act of conversion was complete at the time the tort was committed. We find none of her arguments persuasive.

■ We note first that the trial court proceeding was at all times treated as a hearing on St. Mary's motion to dismiss pursuant to Rule 12(b)(6). She never asked the trial court to consider St. Mary's motion as one for summary judgment. We therefore decline to consider it as a motion for summary judgment. It is well settled that this court will not consider arguments raised for the first time on appeal. *See Ford Motor Co. v. Arkansas Motor Vehicle Comm'n*, 357 Ark. 125, 161 S.W.3d 788 (2004).

In reviewing the trial court's decision on a motion to dismiss under Rule 12(b)(6) of the Arkansas Rules of Civil Procedure, this court treats the facts alleged in the complaint as true and views them in a light most favorable to the party who filed the complaint. *Perry v. Baptist Health*, 358 Ark. 238, 189 S.W.3d 54 (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, a complaint must state facts, not mere conclusions, in order to entitle the pleader to relief. *Id.* The court will look to the underlying facts supporting an alleged cause of action to determine whether the matter has been sufficiently pled. *Id.*

■ Regarding the intentional interference with a business advantage count, we hold that Alvarado's complaint fails to plead sufficient facts to establish the elements of this tort. As Alvarado notes, the supreme court discussed the elements of this tort in *Stewart Title Guaranty Company v. American Abstract & Title Company*, 363 Ark. 530, 215 S.W.3d 596 (2005). It stated that to establish a

claim of tortious interference with business expectancy, a plaintiff must prove (1) the existence of a valid contractual relationship or a business expectancy; (2) knowledge of the relationship or expectancy on the part of the interfering party; (3) intentional interference inducing or causing a breach or termination of the relationship or expectancy; and (4) resultant damage to the party whose relationship or expectancy has been disrupted. *Id.* In addition to the above requirements, the supreme court also stated that, for an interference to be actionable, it must be improper. *Id.* (citing *Hunt v. Riley*, 322 Ark. 453, 909 S.W.2d 329 (1995)).

The allegations in Alvarado's complaint, taken as true, fail to allege improper interference. The only wrongful conduct on the part of St. Mary's that Alvarado alleged was that the hospital did not follow the proper statutory procedures to assert a lien against the insurance settlement and it refused to cash an insurance company draft, give Alvarado's attorney the proceeds, and accept that attorney's checks for the amount that she claimed that she was entitled to pay the hospital for the medical services she received. Regarding the former, the failure to follow the procedures set out in our lien statute simply results in St. Mary's not being able to assert a lien. *See* Ark. Code Ann. § 18-46-106 (Repl. 2003). It does not extinguish the debt or St. Mary's right to collect for the medical services it provided. As far as refusing to cash the insurance draft, we hold that St. Mary's had no duty to do so—it is a hospital, not a bank. Furthermore, in both cases, the alleged improper conduct was not misfeasance, but mere nonfeasance. Where intentional torts are concerned, subject to limited exceptions not germane to this appeal, nonfeasance is not actionable. *See Farm Bureau Ins. Co. v. Running M Farms, Inc.*, 366 Ark.480, 237 S.W.3d 32 (2006). Accordingly, the trial court did not err in finding that Alvarado failed to assert a claim arising under this theory.

Alvarado also failed to allege sufficient facts to make out the elements of her conversion claim. In *Grayson v. Bank of Little Rock*, 334 Ark. 180, 188, 971 S.W.2d 788, 792 (1998), the supreme court set out the elements of conversion as follows:

> Conversion is the exercise of dominion over property in violation of the rights of the owner or person entitled to possession. Conversion can only result from conduct intended to affect property. The intent required is not conscious wrongdoing but rather an intent to exercise dominion or control over the goods that is in fact inconsistent with the plaintiff's rights.

Here, Alvarado conceded that she maintained possession of the insurance draft but asserted that St. Mary's exercised dominion over the funds that she was claiming because it failed to cash the instrument as she demanded. We hold that the trial court did not err in finding that Alvarado's factual allegations that St. Mary's refusal to cash the draft equated to dominion over the funds. Indeed, that assertion is belied by the fact that State Farm subsequently issued two replacement drafts that gave Alvarado what she wanted.

Finally, although Alvarado alleged a breach-of-contract claim in her pleadings, her twenty-three page argument does nothing more than mention that such a claim was made in her complaint. We therefore hold that this argument has been abandoned on appeal.

Affirmed.

GLADWIN and ROBBINS, JJ., agree.

Steve NORTON, Individually and as Administrator of the Estate of Trina Norton, Deceased *v.* Rex LUTTRELL, M.D.

CA 06-1093 257 S.W.3d 580

Court of Appeals of Arkansas
Opinion delivered May 23, 2007

Harrelson, Moore & Giles, LLP, by: *Steve Harrelson*, for appellant.

Womack, Landis, Phelps, McNeill & McDaniel, by: *Paul McNeill* and *J. David Dixon*, for appellee.

SAM BIRD, Judge. Appellant Steve Norton filed a wrongful-death/survival action against appellee Dr. Rex Luttrell, alleging that Dr. Luttrell's medical malpractice led to the death of Norton's wife, Trina.[1] On Dr. Luttrell's motion, the trial court granted summary judgment. We affirm.

Trina Norton, a resident of Bowie County, Texas, was admitted to Little Rock's Baptist Medical Center in June 2002 to undergo a gastric-bypass procedure. The procedure was performed by Dr. Luttrell. Two days after the surgery, on June 20, 2002, Mrs. Norton died.

On April 21, 2004, Steve Norton petitioned the Bowie County, Texas, probate court to be appointed administrator of his late wife's estate. On June 18, 2004 — before an order of

[1] A second defendant, Baptist Medical Center, was dismissed with prejudice prior to this appeal being filed.

appointment was filed — Norton instituted this lawsuit against Dr. Luttrell. On January 13, 2005, Dr. Luttrell moved for summary judgment on the ground that Norton lacked standing under Arkansas law because he was not his wife's sole heir nor had he been appointed personal representative at the time suit was filed. Attached to the motion were 1) an affidavit from the Bowie County clerk stating that no hearing had yet been held to appoint an administrator, and 2) an obituary listing children, parents, and siblings among Mrs. Norton's survivors. In light of these matters, the doctor claimed that Norton had no authority to file suit; that the June 18, 2004, complaint was a nullity; and that the statute of limitations had now expired, requiring dismissal of the case.[2]

On March 15, 2005, Norton returned to Bowie County, Texas, and obtained an order appointing him administrator. He then filed an amended complaint in his Arkansas action and responded to the motion for summary judgment, arguing that Texas law applied and that it permitted relation back of the amended complaint to the original, June 2004 filing, thereby vesting him with the authority to sue prior to the expiration of the statute of limitations. He further argued that, even though he had obtained the order of appointment out of an abundance of caution, it was unnecessary for him to do so because his wife's heirs had entered into a family settlement agreement, making administration of her estate unnecessary under Texas law.

Dr. Luttrell replied that Arkansas law rather than Texas law governed the case and, under Arkansas law, Norton had no standing at the time the original suit was filed. Further, the doctor said, Norton's amended complaint did not relate back to the original complaint under Arkansas law. After a hearing, the trial court granted summary judgment in favor of Dr. Luttrell.

Under Arkansas law, a survival action cannot be filed by an heir but must be brought by the estate through an executor or administrator. *See* Ark. Code Ann. § 16-62-101 (Repl. 2005); *Smith v. St. Paul Fire & Marine Ins. Co.*, 76 Ark. App. 264, 64 S.W.3d 764 (2001). A wrongful-death action must be brought by the decedent's personal representative or, if there is no personal representative, by all of the decedent's heirs at law. Ark. Code

[2] The two-year statute of limitations for medical malpractice applies where death ensues from medical injuries. *See Davis v. Parham*, 362 Ark. 352, 208 S.W.3d 162 (2005). In this case, the statute of limitations expired on or about June 20, 2004.

Ann. § 16-62-102(b) (Repl. 2005); *Brewer v. Poole*, 362 Ark. 1, 207 S.W.3d 458 (2005). In the present case, when Mr. Norton filed his original lawsuit in June 2004, no order had been entered appointing him as administrator nor were all of the decedent's heirs at law named as plaintiffs. Therefore, Norton had no standing to sue, and his original complaint against Dr. Luttrell was a nullity. *See generally Hackelton v. Malloy*, 364 Ark. 469, 221 S.W.3d 353 (2006) (holding that Ms. Hackelton did not have standing to file a wrongful-death action and her complaint was a nullity because, at the time she sued, she had not yet been appointed as personal representative — although she had filed a petition to be appointed — and she was not the decedent's sole heir). And, because the initial complaint was a nullity, the amended complaint filed after Norton's appointment in 2005 did not relate back to it. *Brewer, supra*; *Andrews v. Air Evac EMS, Inc.*, 86 Ark. App. 161, 170 S.W.3d 303 (2004). Thus, under Arkansas law, a proper, timely-filed action was never commenced against Dr. Luttrell.

Norton argues, however, that Arkansas law should not apply to determine whether he had standing to file this lawsuit. Instead, he claims, Texas law should apply because his wife was a Texas resident and her estate was subject to administration there. We disagree. The issue of standing is a procedural matter. *See Bagwell v. Hartford Cas. Ins. Co.*, 458 F. Supp. 2d 965 (W.D. Ark. 2006) (stating that, under Arkansas law, standing is a procedural issue). Under traditional conflicts-of-law analysis, procedural matters are governed by the law of the forum, which, in this case, was the State of Arkansas. *See Middleton v. Lockhart*, 355 Ark. 434, 139 S.W.3d 500 (2003). Arkansas was also the place where the alleged wrong occurred, meaning that, under a basic *lex loci delecti* analysis, its substantive law would apply as well. *See Ganey v. Kawasaki Motors Corp., USA*, 366 Ark. 238, 234 S.W.3d 838 (2006). Moreover, in wrongful-death cases, our courts have traditionally applied the law of the place where the injury occurred that caused the decedent's death. *See generally McGinty v. Ballentine Produce, Inc.*, 241 Ark. 533, 408 S.W.2d 891 (1966); *Trotter v. Ozarks Rural Elec. Coop. Corp.*, 226 Ark. 722, 294 S.W.2d 498 (1956); *Wheeler v. S.W. Greyhound Lines*, 207 Ark. 601, 182 S.W.2d 214 (1944).

There are also significant Arkansas connections to this case, which is a consideration in more modern conflicts-of-law analysis. The allegedly tortious conduct took place here, the death occurred here, suit was filed here, and the defendant is an Arkansas resident.

See Schubert v. Target Stores, Inc., 360 Ark. 404, 201 S.W.3d 917 (2005) (holding that significant connections to Arkansas were present and Arkansas law applied where the defendants had Arkansas ties and the alleged wrongful conduct occurred in Arkansas). Additionally, Arkansas statutes contemplate that foreign personal representatives may come into Arkansas courts. *See* Ark. Code Ann. § 16-61-110 (Repl. 2005) (providing that foreign administrators, executors, and guardians may sue in the courts of this state) and Ark. Code Ann. § 28-42-102(a)(1) (Repl. 2004) (providing that a foreign personal representative may be issued letters in this state). However, these statutes, and others, subject foreign representatives to the qualification requirements of Arkansas law. For example, section 16-61-110 states that the "appointed" foreign representative may sue in his representative capacity "to the same and like effect as if the [foreign representative] had been qualified under the laws of this state." Arkansas Code Annotated section 28-42-101 (Repl. 2004) provides that, except when special provision is made, "the law and procedure relating to the administration of estates of resident decedents shall apply to ancillary administration of estates of nonresident decedents."[3]

To support his contention that he had standing as a personal representative to file suit in Arkansas, Norton cites *Henkel v. Hood*, 156 P.2d 790 (N.M. 1945). There, Mrs. Henkel, a Texas resident, was killed in New Mexico in a highway accident. Her husband filed a wrongful-death suit in New Mexico, whose laws required that such a suit be filed by the deceased's "personal representative." Prior to filing suit, the husband had been appointed a "community administrator" in Texas, which, under Texas law, accorded him more limited powers than those possessed by a general administrator. The New Mexico defendants moved to dismiss on the ground that the husband did not qualify as a personal representative under New Mexico law. The New Mexico court held that the husband qualified, and Norton relies on this holding. However, in determining whether the husband qualified as a personal representative, the New Mexico court looked to New Mexico law:

> [The husband's] authority to bring and maintain the action flows from the [New Mexico] wrongful death statute itself and not from the probate, or estate, laws of this or any other state [and it is] *incorrect*

[3] *See also* Ark. Code Ann. § 28-1-102(9) (Repl. 2004) (defining a foreign personal representative as one serving "under appointment" made by another court).

> *to say that his power to sue in this connection should be tested by his authority to administer generally the estate of the deceased in the state issuing the letters.*
>
> . . . .
>
> It is unimportant that the community administrator would not have had the power to bring this suit in Texas, if as much could be said. *We do not test the power of the plaintiff by the laws of Texas but by those of New Mexico.* We look to the Texas appointment only to determine whether plaintiff's status is such as will meet the rather broad definition, "personal representative"; not a "personal representative who would have the power to prosecute such a suit in Texas" as is contended by defendants.

156 P.2d at 791, 793 (emphasis added).

We likewise look to Arkansas law to decide whether Norton had standing to file suit in this state, based on this state's statutory causes of action for survivor and wrongful death. As previously discussed, under Arkansas law, he did not have standing. The trial court's grant of summary judgment is therefore affirmed. Our holding makes it unnecessary to address Norton's argument that he was authorized to file suit under Texas law.

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

IN RE ADOPTION of H.L.M., Wade L. McNew

CA 07-11 257 S.W.3d 587

Court of Appeals of Arkansas
Opinion delivered May 23, 2007

Ables Law Firm, P.A., by: *Ashley E. Caudle* and *Lisa Jones-Ables*, for appellant.

SARAH HEFFLEY, Judge. Appellant Wade L. McNew appeals from an order dismissing without prejudice his petition as a stepparent to adopt his wife's adoptive child. For reversal, he con-

tends that the trial court erred in ruling that, before the adoption could go forward, he was required to either obtain the consent of the child's biological father, or produce an order demonstrating that the biological father's parental rights had been terminated. We agree that the trial court's ruling was in error and thus reverse and remand.

By a petition and an amended petition, filed respectively on July 26 and August 28 of 2006, appellant sought to adopt his wife's child. The amended petition and attached exhibits disclose that appellant married his wife Tammy in August of 2005. Prior to their marriage, Tammy, as a single woman, had adopted the child in question. Both the interlocutory decree of adoption, dated August 24, 2005, and the final decree of adoption, entered on January 19, 2006, state that the child's biological mother and biological father had executed their consent to Tammy's adoption of their daughter.

A hearing was held on appellant's amended petition on September 28, 2006. During this hearing, the trial court inspected the previous interlocutory and final decrees of adoption, whereby Tammy had adopted the child, and noted that, although the biological father had consented to the adoption, neither decree specifically terminated the biological father's parental rights. The court thus required appellant to either obtain the biological father's consent to the present adoption, or an order from the court that granted Tammy's adoption stating that the biological father's rights had been terminated in the previous proceeding.

On September 28, after the hearing, appellant filed a motion to transfer the amended petition to the Seventeenth Division of the Pulaski County Circuit Court where the prior adoption had been heard. The trial court denied the motion to transfer that same day.

On October 2, 2006, appellant's counsel sent a proposed order of dismissal to the trial court for its signature. When the trial court did not act on the proposed order, appellant's counsel wrote to the court again on October 16 to inquire about the order, stating "[i]f the order is not to your satisfaction, please revise and sign for appeal purposes." The trial court entered its own order dismissing without prejudice appellant's amended petition on October 31, 2006. In it, the court reiterated its position that it was necessary for appellant to obtain the consent of the biological father or an order reflecting the termination of his parental rights. The basis for the trial court's ruling was stated as follows:

> The Court explained to Petitioner's attorney [at the hearing] that the wording of the biological father's consent filed in the previous adoption matter was identical to the wording of Tammy Lanee NcNew's consent filed in this proceeding. It did not appear that the biological father authorized a termination of his parental rights when he consented to a female adopting his daughter. ... To explain its reasoning, the Court noted that Tammy Lanee McNew's identical consent to adoption for Petitioner to adopt her child would not terminate her parental rights in this matter. Accordingly, the biological father's consent to adoption would not operate to terminate his parental rights in the previous adoption proceeding, either. However, if the Pulaski County Circuit Court, Seventeenth Division, in the previous adoption case entered an order that the biological father's rights were terminated in that case then this Court would accept that Court's finding regarding the termination.

On November 6, 2006, appellant filed a motion to set aside the order of dismissal, taking issue with certain statements made by the trial court in its dismissal order. The motion to set aside was not acted upon in thirty days and was thus deemed denied on December 6, 2006. Ark. R. App. P.–Civil 4(b)(1). This timely appeal followed.

Appellant contends that the trial court erred by requiring him to acquire the consent of the child's biological father or an order showing the termination of his parental rights before he, as a stepparent, could adopt his wife's child. There is decided merit in this argument. Arkansas Code Annotated section 9-9-204(2) (Repl. 2002) authorizes an unmarried adult, such as appellant's wife Tammy, to adopt a child. Arkansas Code Annotated section 9-9-215 (Supp. 2005) addresses the effect of a decree of adoption and provides in relevant part that

> (a) A final decree of adoption and an interlocutory decree of adoption which has become final, whether issued by a court of this state or of any other place, have the following effect as to matters within the jurisdiction or before a court of this state:
>
> (1) Except with respect to a spouse of the petitioner and relatives of the spouse, to relieve the biological parents of the adopted individual of all parental rights and responsibilities, and to terminate all legal relationships between the adopted individual and his or her biological relatives, *including his or her biological parents,* so that the adopted individual thereafter is a stranger to his or her former relatives for all purposes.

(Emphasis added.)

The supreme court has interpreted this statute as an expression of public policy favoring a complete severance of the relationship between the adopted child and his or her biological family in order to further the best interest of the child. *Vice v. Andrews*, 328 Ark. 573, 945 S.W.2d 914 (1997); *Suster v. Arkansas Dep't of Human Servs.*, 314 Ark. 92, 858 S.W.2d 122 (1993). Based on these authorities, appellant was not required to obtain the consent of the child's biological father, nor was it necessary for there to be an order specifically terminating his parental rights. By operation of law, the former adoption decree forever severed and held for naught the biological father's rights, responsibilities, and legal relationship with the child. In terms of severing parental rights, the statute does provide that the parental rights of "a spouse of a petitioner," like Tammy, are not severed upon a stepparent adoption; however, the statute carves out no exception for a biological parent where an adoption is granted to an unmarried person. The trial court clearly erred in ruling otherwise. Accordingly, we reverse and remand for proceedings consistent with this opinion.

In closing, we note that at the end of the record, after the clerk's certificate, there appears a letter written by the trial court to appellant's counsel on December 29, 2006, that purports to address appellant's motion to set aside the order of dismissal. We do not approve of this belated attempt to address the motion, and we have not considered this letter in reaching our decision. The letter is not file-marked and thus was not entered of record. We will not consider matters that are outside the record to determine issues on appeal. *Wal-Mart Stores, Inc. v. Tucker*, 353 Ark. 730, 120 S.W.3d 61 (2003).

Reversed and remanded.

MARSHALL and VAUGHT, JJ., agree.

Joseph Franklin FORD *v.* STATE of Arkansas

CA CR 06-1030 257 S.W.3d 560

Court of Appeals of Arkansas
Opinion delivered May 23, 2007

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

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

KAREN R. BAKER, Judge. A Union County jury convicted appellant Joseph Franklin Ford of four counts of delivery of a controlled substance, four counts of possession of a controlled substance, and one charge of possession of drug paraphernalia and recommended sentencing of appellant to a total of one hundred fifty-three (153) years in the Arkansas Department of Correction. At trial, defense counsel made a motion to run the sentences concurrently, but the trial judge ran the same consecutively. On appeal, appellant asserts that the sentence was the result of sentence manipulation by law enforcement officers who engaged in conduct designed

to increase the punishment of appellant and that the trial judge erred in sentencing appellant to consecutive sentences. We find no error and affirm.

The charges against appellant arose from four separate sting operations culminating in a series of four controlled buys facilitated through a confidential informant. A narcotics investigator with the El Dorado Police Department, Jeff Stinson, testified regarding the facts and circumstances surrounding the controlled buys. In his testimony, he stated that the officers had enough information after the first transaction to arrest appellant; however, he further explained that they preferred to have multiple buys to avoid an anticipated defense by the accused that the transaction was an isolated incident. He also confirmed that more buys resulted in higher sentences. In response to the question as to why the officers did not continue to raise the number of transactions to ten buys, Officer Stinson explained that it was a matter of resources and allocation of those resources.

On appeal, appellant argues that the officer's explanation supports his argument. Specifically, he asserts that the trial judge erred in sentencing appellant to consecutive sentences because the conduct of the law enforcement officials amounted to sentence manipulation in violation of appellant's rights under the Eighth Amendment and Due Process Clause of the United States Constitution. In presenting his argument, appellant acknowledges that the cases he relies upon to assert error arose in the context of federal courts' interpretation of the mandatory sentencing guidelines in the federal sentencing scheme.

Several federal circuit courts, including the Eighth Circuit, have adopted the doctrines of either "sentence entrapment" or "sentence factor manipulation." Sentencing entrapment occurs when an individual who is predisposed to commit a minor or lesser offense is entrapped into committing a greater offense subject to greater punishment. *U.S. v. Mai Vo*, 425 F.3d 511 (8th Cir. 2005). The focus of such a defense is on the defendant's predisposition to commit the crime. *United States v. Searcy*, 284 F.3d 938, 942 (8th Cir. 2002). In contrast, sentencing manipulation occurs when the government engages in improper conduct that has the effect of increasing a defendant's sentence. *Mai Vo*, *supra*.

The sentencing entrapment or manipulation doctrine developed in response to perceived abuses of the restrictive scheme of the federal sentencing guidelines. *United States v. Berg*, 178 F.3d

976 (8th Cir. 1999); *United States v. Stuart*, 923 F.2d 607 (8th Cir. 1991). These guidelines set forth narrow sentencing ranges determined by both the severity of the offense and the defendant's criminal record. These ranges are required by statute to be no more than six months or twenty-five percent of the minimum, unless the minimum exceeds thirty years. 28 U.S.C. § 994(b)(2). A judge must impose a sentence within that narrow range if the case is "an ordinary one." *Koon v. United States*, 518 U.S. 81, 92 (1996). Despite this restriction, a judge may depart from the range when the case is atypical and involves aggravating or mitigating circumstances that the United States Sentencing Commission did not adequately consider when it created the guidelines. 18 U.S.C. § 3553(b)(1) (1994). Although the commission provides guidance on what factors make a case atypical, *see* United States Sentencing Guidelines (U.S.S.G.) §§ 5H1.1–5H1.12; 5K2.0–5K2.23, a sentencing court is not constrained to these factors; a court may depart from the guidelines based on any circumstance not considered by the commission so long as the circumstance is consistent with the sentencing factors established by Congress. *Koon*, 518 U.S. at 94-96.

While recognizing that other federal courts refuse to acknowledge the concept of sentencing entrapment or sentencing manipulation, *United States v. Stavig*, 80 F.3d 1241 (8th Cir. 1996), the Eighth Circuit has held that a court may legally rely upon sentencing entrapment to depart from the sentencing range in the guidelines.[1] *Berg*, 178 F.3d at 981. The Ninth Circuit in *United States v. Staufer*, 38 F.3d 1103 (9th Cir. 1994), has expressed particular concern that the federal sentencing scheme would not ensure that defendants would be sentenced on the basis of their culpability because of abuse of the sentencing scheme by government agents. *Staufer*, 38 F.3d at 1106-07. The court stated that "courts can ensure that the sentences imposed reflect the defen-

[1] The United States Supreme Court in *U.S. v. Booker*, 543 U.S. 220 (2005), severed and excised two specific statutory provisions of the Sentencing Guidelines on constitutional grounds: the provision that requires sentencing courts to impose a sentence within the applicable Guidelines range (in the absence of circumstances that justify a departure), see 18 U.S.C. § 3553(b)(1) (Supp. 2004), and the provision that sets forth standards of review on appeal, including *de novo* review of departures from the applicable Guidelines range, see § 3742(e) (2000 ed. and Supp. IV) . . . With these two sections excised (and statutory cross-references to the two sections consequently invalidated), the remainder of the [Sentencing Reform] Act satisfies the Court's constitutional requirements. *Id.* at 259.

dants' degree of culpability only if they are able to reduce the sentences of defendants who are not predisposed to engage in deals as large as those induced by the government." *Id.* at 1107. The court then found that the commission had considered this public policy concern of sentence entrapment as reflected in the amendment application note to U.S.S.G. § 2D1.1 on reverse sting operations. Thus, the court concluded, allowing a judge to depart from the sentencing range after finding that the government had engaged in sentencing entrapment is consistent with the sentencing factors prescribed by Congress. *Id.*

Based on the above analysis, the Ninth Circuit has subsequently held that if a defendant proves by a preponderance of the evidence that the law enforcement officer engaged in sentencing entrapment, a district court may reduce the prescribed sentences in one of two ways. *United States v. Riewe*, 165 F.3d 727, 729 (9th Cir.1999); *United States v. Parrilla*, 114 F.3d 124, 127 (9th Cir. 1997). First, the court may grant a downward departure from the sentencing range under the federal guidelines. *Riewe*, 165 F.3d at 729. Second, the court may apply only the penalty provision for the lesser offense that the defendant was predisposed to commit rather than the offense that the defendant was induced to commit. *Id.* This second option allows the court to circumvent 21 U.S.C. § 841(b), which creates a statutory minimum sentence requirement for drug-related offenses. *See id.*

Appellant urges us to apply this defense and hold that the decision of the law enforcement authorities to charge appellant with multiple similar offenses amounted to sentence manipulation. He contends that the authorities' decision was solely for the purpose of increasing appellant's exposure to a sentence in excess of the statutory maximum that could otherwise have been imposed by the court under the law for a single offense. Further, he urges us to find that the trial court's imposition of consecutive sentences was an abuse of discretion in violation of appellant's constitutional rights.

Our supreme court has not adopted the doctrine of sentence manipulation. Given the discretion afforded our trial judges in the imposition of sentencing, the statutory sentencing scheme in Arkansas allows for a much broader discretion within its sentencing range than the federal guidelines. Under our statutory scheme, it is the court's function to impose a sentence, and it is the court's obligation to exercise its discretion in the imposition of that sentence. *Brown v. State*, 82 Ark. App. 61, 68, 110 S.W.3d 293, 298

(2003) (citing *Rodgers v. State,* 348 Ark. 106, 71 S.W.3d 579 (2002); *Blagg v. State*, 72 Ark. App. 32, 31 S.W.3d 872 (2000)). A trial court may reduce the extent or duration of the punishment assessed by the jury if, in the judge's opinion, the conviction is proper but the punishment assessed is still greater than, under the circumstances of the case, ought to be inflicted, as long as the punishment is not reduced below the limit prescribed by the law. *Brown*, 82 Ark. App. at 68, 110 S.W.3d at 298 (citing *Richards v. State*, 309 Ark. 133, 134, 827 S.W.2d 155, 156; Ark. Code Ann. § 16-90-107(e) (1987)).

Furthermore, the trial judge clearly exercised his discretion in accepting the jury's recommendation for consecutive sentences. Arkansas Code Annotated section 5-4-403 (Repl. 2006) provides in relevant part:

> (a) When multiple sentences of imprisonment are imposed on a defendant convicted of more than one (1) offense, including an offense for which a previous suspension or probation has been revoked, the sentences shall run concurrently unless, upon recommendation of the jury or the court's own motion, the court orders the sentences to run consecutively.
>
> . . . .
>
> (d) The court is not bound by a recommendation of the jury concerning a sentencing option under this section.

In *Acklin v. State*, 270 Ark. 879, 606 S.W.2d 594 (1980), our supreme court held that although the criminal code vests the choice between concurrent and consecutive sentences in the judge, and not the jury, there must be an exercise of judgment by the trial judge, and not a mechanical imposition of the same sentence in every case. *Id.* Similarly, in *Wing v. State*, 14 Ark. App. 190, 686 S.W.2d 452 (1985), we stated that in making the decision between concurrent and consecutive sentences, the trial judge should make it clear that it is his or her discretion being exercised when entering the sentences and not the jury's.

[redacted] The trial judge in this case specifically accepted the jury's recommendation of consecutive sentences, noting that the sentences imposed on each count were less than the maximum and that the approach was consistent with other jury sentences in the county. Under these facts, we cannot say that the trial court abused

its discretion in accepting the jury's recommendation of consecutive sentences nor that the imposition of consecutive sentences violated his Eighth Amendment or due-process rights. Accordingly, we affirm.

Affirmed.

GLOVER and MILLER, JJ., agree.

David HAMILTON and Pritam Hamilton *v.*
FORD MOTOR CREDIT CO.

CA 06-838 257 S.W.3d 566

Court of Appeals of Arkansas
Opinion delivered May 23, 2007

Caldwell Law Office, by: *Theresa L. Caldwell*, for appellants.

Hosto & Buchan, PLLC, by: *Arnold N. Goodman*, for appellee.

BRIAN S. MILLER, Judge. This is an interlocutory appeal from an April 21, 2006 order of the Pulaski County Circuit Court denying a motion to compel arbitration, filed by appellants Pritam and David Hamilton. We affirm.

On April 24, 2003, the Hamiltons contracted with North Point Ford to finance the purchase of a 2003 Lincoln Navigator. The contract was assigned to appellee Ford Motor Credit Company (FMC), which was granted a security interest in the vehicle. The contract contained an arbitration provision that provided in pertinent part:

> ARBITRATION
>
> Either you or Creditor ("us" or "we") (each, a "Party") may choose at any time including after a lawsuit is filed to have any Claim related to this contract decided by arbitration. Such Claims include but are not limited to the following: 1) Claims in contract, tort, regulatory, or otherwise; 2) Claims regarding the interpretation, scope, or validity of this clause or arbitrability of any issue; 3) Claims between you and us, our employees, agents, successors, assigns, subsidiaries, or affiliates; 4) Claims arising out of or relating to your application for credit, this contract, or any resulting transaction or relationship, including that with the dealer, or any such relationship with third parties who do not sign this contract.
>
> RIGHTS YOU AND WE AGREE TO GIVE UP
>
> If either you or we choose to arbitrate a Claim, then you and we agree to waive the following rights:
>
> • RIGHT TO A TRIAL WHETHER BY A JUDGE OR JURY
>
> • RIGHT TO PARTICIPATE AS A CLASS REPRESENTATIVE OR A CLASS MEMBER IN ANY CLASS CLAIM

YOU MAY HAVE AGAINST US WHETHER IN COURT OR ARBITRATION

- BROAD RIGHTS TO DISCOVERY AS ARE AVAILABLE IN A LAWSUIT
- RIGHT TO APPEAL THE DECISION OF AN ARBITRATOR
- OTHER RIGHTS THAT ARE AVAILABLE IN A LAWSUIT

RIGHTS YOU AND WE DO NOT GIVE UP: If a Claim is arbitrated you and we will continue to have the following rights, without waiving this arbitration provision as to any Claim: 1) Right to file bankruptcy in court; 2) *Right to enforce the security interest in the vehicle, whether by repossession or through a court of law*; 3) Right to take legal action to enforce the arbitrator's decision; and 4) Right to request that a court of law review whether the arbitrator exceeded his authority.

(Emphasis added.)

The Hamiltons were required by the contract to make fifty-nine payments of $835.01 and one final payment of $835.41. The Hamiltons missed their first payment in June 2005 and FMC granted the Hamiltons a two-month extension. After the extension, the Hamiltons missed three additional payments.

FMC determined that the account was uncollectible and on November 2, 2005, FMC filed a replevin action seeking return of the vehicle. On November 8 and November 28, 2005, the Hamiltons tendered two MoneyGrams to FMC in the amounts of $1,165.04 and $2,500 respectively but FMC refunded the payments. FMC also refunded payments it received from the Hamiltons on December 7, 2005; January 10, 2006; February 15, 2006; and March 15, 2006. The refunds were made because FMC chose to accelerate the balance on the account, making the entire balance due.

On February 16, 2006, the Hamiltons moved to dismiss FMC's complaint and to compel arbitration. The Hamiltons also moved to stay the April 3, 2006 replevin hearing pending arbitration. The trial court denied the Hamiltons' motion to stay the hearing and granted FMC's replevin request. Several days later, the

trial court denied the Hamiltons' motion to compel arbitration. From that order, the Hamiltons now appeal.

An order denying a motion to compel arbitration is an immediately appealable order. Ark. R. App. P.–Civ. 2(a)(12); *Pest Mgmt., Inc. v. Langer*, 96 Ark. App. 220, 240 S.W.3d 149 (2006); *Wyatt v. Giles*, 95 Ark. App. 204, 235 S.W.3d 552 (2006). Our review of a trial court's denial of a motion to compel arbitration is de novo. *Lehman Props. v. BB&B Constr. Co.*, 81 Ark. App. 104, 98 S.W.3d 470 (2003).

We disagree with the Hamiltons' first argument, asserting that the trial court misconstrued the arbitration clause. As a matter of public policy, arbitration is strongly favored. *Hart v. McChristian*, 344 Ark. 656, 42 S.W.3d 552 (2001). Although this is true, the same rules of construction and interpretation apply to arbitration agreements as apply to contracts in general. *Alltel Corp. v. Sumner*, 360 Ark. 573, 203 S.W.3d 77 (2005); *A.G. Edwards & Sons, Inc. v. Myrick*, 88 Ark. App. 125, 195 S.W.3d 388 (2004). Moreover, the court must determine, as a matter of law, the legal effect and construction of a written contract to arbitrate. *Alltel, supra*; *Hart, supra.*

The trial court did not err when it denied the Hamiltons' request to arbitrate the issue of replevin. This is true because the arbitration clause specifically, and unambiguously, provides that FMC does not give up the "[r]ight to enforce the security interest in the vehicle, whether by repossession or through a court of law." In its replevin request, FMC is simply enforcing its security interest in the vehicle by seeking to repossess the vehicle.

The Hamiltons cite a number of cases regarding the construction of ambiguous contracts. *See Tyson Foods, Inc. v. Archer*, 356 Ark. 136, 147 S.W.3d 681 (2004); *Fowler v. Unionaid Life Ins. Co.*, 180 Ark. 140, 20 S.W.2d 611 (1929); *American Ins. Union v. Rowland*, 177 Ark. 875, 8 S.W.2d 452 (1928); *Floyd v. Otter Creek Homeowners Ass'n*, 23 Ark. App. 31, 742 S.W.2d 120 (1988). They also cite a number of cases reminding this court that public policy favors arbitration and that arbitration clauses should be construed against the drafter. *See, e.g., Cash in a Flash Check Advance of Ark. v. Spencer*, 348 Ark. 459, 74 S.W.3d 600 (2002); *Showmethemoney Check Cashers v. Williams*, 342 Ark. 112, 27 S.W.3d 361 (2000); *Sturgis v. Skulks*, 335 Ark. 41, 977 S.W.2d 217 (1998); *Lehman Props., L.P., supra.* We agree that public policy favors arbitration and that, when an arbitration clause is ambiguous, it should be

interpreted against the party drafting the document. In this case, however, the arbitration agreement is unambiguous. It allows both parties to demand arbitration while, at the same time, it allows both parties to maintain certain rights, such as the right of FMC to protect its security interest in the vehicle.

We also disagree with the Hamiltons' second argument, which is that the trial court's interpretation of the arbitration clause creates a lack of mutuality. Mutuality of contract means that an obligation must rest on each party to do or permit to be done something in consideration of the act or promise of the other; thus, neither party is bound unless both are bound. *Tyson Foods, Inc., supra.* A contract, therefore, that leaves it entirely optional with one of the parties as to whether or not he will perform his promise would not be binding on the other. *Id.* Mutual promises that constitute consideration for each other are the classic method of satisfying the doctrine of mutuality. *Asbury Auto. Used Car Ctr., L.L.C. v. Brosh*, 364 Ark. 386, 220 S.W.3d 637 (2005). Mutuality within the arbitration agreement itself is required. *Id.* There is no mutuality of obligation where one party uses an arbitration agreement to shield itself from litigation, while reserving to itself the ability to pursue relief through the court system. *Id.* A lack of mutuality to arbitrate in an arbitration clause renders the clause void. *Id.*

The arbitration clause at issue provides each party with an unbridled right to arbitrate certain issues, while preserving the right for either party to litigate certain other issues. The trial court's decision not to stay FMC's replevin action pending arbitration does not remove FMC's obligation to arbitrate the issue of damages. Consequently, the trial court's interpretation of the arbitration clause does not destroy mutuality and should be affirmed.

Affirmed.

GLOVER and BAKER, JJ., agree.

James R. HENSON *v.* GENERAL ELECTRIC,
Electric Insurance, Second Injury Fund

CA 06-1356 257 S.W.3d 908

Court of Appeals of Arkansas
Opinion delivered May 30, 2007

McDaniel & Wells, P.A., by: *Phillip Wells*, for appellant.

David L. Pake, for appellee Second Injury Fund.

ROBERT J. GLADWIN, Judge. Appellant James R. Henson appeals the August 31, 2006 decision of the Arkansas

Workers' Compensation Commission (Commission) finding that he was entitled to wage-loss-disability benefits of thirty-five percent. The Commission also gave appellee Second Injury Fund (Fund) a dollar-for-dollar credit for both long-term-disability benefits and disability-retirement benefits from their obligation to pay permanent-disability benefits. Further, the Commission ordered the Fund to reimburse the employer, appellee General Electric (GE), for any overpayment of temporary-total-disability benefits up to a maximum of the Fund's liability to pay appellant wage-loss-disability benefits. On appeal, appellant contends that he should be awarded total and permanent-disability benefits, or at a minimum, sixty percent wage-loss-disability benefits. Also, he claims that appellees should not receive a credit for disability-retirement benefits from their obligation to pay permanent-disability benefits. We reverse and remand in part, and affirm in part.

Appellant is fifty-four years old and has a high school education. He began working for GE in 1970 as a utility person, and he later moved into the maintenance department prior to becoming a machine operator. Appellant also obtained vocational training in hydraulics through GE. Appellant sustained a compensable injury on June 12, 2001. At that time, he was earning $19.00 per hour. His total wages exceeded $50,000 per year because he worked considerable overtime. Appellant sustained injuries and surgeries prior to the June 12, 2001 injury. He underwent his first back surgery on December 12, 1995, and he had a second back surgery on April 15, 1996. Further, appellant sustained a knee injury that required surgery on or about June 13, 2002. Due to his compensable back injury on June 12, 2001, appellant underwent a third back surgery on August 15, 2001, followed by an extensive fusion surgery at the L4-L5 level on January 10, 2002. He has not been gainfully employed since the fusion surgery. He takes a number of prescription medications, including Neurontin, Metradose, and Lexapro. He testified that he cannot sit for more than ten to fifteen minutes at a time. He has to move from standing to sitting to reclining in order to relieve his pain. He has a difficult time sleeping and sometimes has to roll out of bed onto the floor in order to get up in the morning. He claims that he is unable to lift anything, and he cannot sit or stand without pain becoming an issue. GE provided appellant with job-placement assistance through Rehabilitation Management, Inc. Ms. Heather Naylor, a vocational-rehabilitation consultant, found job opportunities for the appellant; however, appellant did not obtain a job as a result.

Appellant claimed before the Administrative Law Judge (ALJ) that he was permanently-totally disabled or, alternatively, that he had sustained wage-loss disability in excess of the thirty-five percent to the body as a whole, which had been accepted by the Fund. GE claimed that any wage-loss disability over and above the twelve-percent permanent-anatomical-impairment rating was the responsibility of the Fund. GE requested reimbursement from the Fund for any payments made beyond its obligation to pay the twelve- percent permanent-anatomical-impairment rating. It further maintained that any and all wage loss was the responsibility of the Fund, including, but not limited to, the thirty-five percent accepted by the Fund. The Fund maintained that it was not responsible for reimbursement of any overpayment of temporary-total disability as its liability was limited to wage-loss-disability benefits only. The Fund conceded that it had controverted any wage-loss disability in excess of thirty-five percent for purposes of attorney's fees.

By order filed July 27, 2005, the ALJ made the following findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.

2. The stipulations agreed to by the parties are hereby accepted as fact.

3. The claimant has failed to prove, by a preponderance of the credible evidence, that he is permanently totally disabled.

4. The claimant has shown, by a preponderance of the credible evidence, that he has sustained a wage-loss disability of sixty percent to the body as a whole which was caused by the combined disabilities or impairments, together with the June 12, 2001 compensable injury.

5. Respondent # 2 [the Fund] is responsible for all wage-loss disability, specifically, the sixty percent wage-loss disability awarded herein.

6. Respondent # 1 [GE] is not entitled to any reimbursement for overpayment of permanent impairment benefits. Respondent # 1 [GE] did not obtain a final impairment rating from the primary treating physician until April 28, 2004, and

is estopped from asserting a credit for any alleged overpayment. Furthermore, respondents have failed to prove that any alleged overpayments were considered advanced payments of compensation within the meaning of Ark. Code Ann. § 11-9-807.

7. Respondent # 2 [the Fund] is not entitled to a credit or offset pursuant to Ark. Code Ann. § 11-9-411.

8. Respondent # 2 [the Fund] has accepted a thirty-five percent wage-loss disability in this claim. Respondent # 2 [the Fund] has controverted all wage-loss in excess of the thirty-five percent acknowledged.

9. Respondent # 1 [GE] has paid all appropriate benefits for which it is liable, including continued, reasonably necessary medical treatment and is not obligated for payment of any attorney's fees.

By order of August 31, 2006, the Commission reversed in part and modified in part the ALJ's decision. The Commission found that the evidence demonstrated that appellant was capable of working a job that pays $12.35 an hour. Accordingly, the Commission found that appellant's loss-of-earning capacity was thirty-five percent. Further, the Commission determined that appellant did not have a financial incentive to work. The Commission found that GE was entitled to be reimbursed by the Fund the $37,136 that GE overpaid the appellant in compensation. Further, appellant was not required to reimburse GE for the overpayment he received. Finally, the Commission found that the Fund should be given a dollar-for-dollar credit for the long-term-disability benefits and disability-retirement benefits received by the appellant.

The Fund filed a motion for the Commission to reconsider its decision that GE was entitled to be reimbursed $37,136 by the Fund for GE's overpayment to appellant. After considering the motion, the Commission, by order of September 29, 2006, found that its finding should be modified, stating:

> Our original finding with respect to [GE's] entitlement to reimbursement is correct. In addition, our original finding that [the Fund] is entitled to a credit for benefits claimant received pursuant to § 411 is also correct. Due to the circumstances of [GE's] oversight in overpayment and failure to claim the § 411 credit on their own behalf, the facts in this claim dictate [the Fund] should not be required to reimburse [GE] beyond their own liability in this claim.

> The claimant has already received more money than he is entitled and a true correction would actually require the claimant to reimburse the respondents, which is against longstanding public policy.

The Commission ordered that GE was entitled to reimbursement; however, the Fund was not required to pay this reimbursement beyond the extent of its actual liability to appellant, which was $11,223.12. Appellant filed his notice of appeal on September 11, 2006, and thereafter, the parties filed a joint stipulation with this court agreeing that no party intended to appeal the September 29, 2006, opinion of the Commission. This stipulation rendered GE's brief to this court moot.

In appeals involving claims for workers' compensation, this court views the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's decision and affirms the decision if it is supported by substantial evidence. *See Kimbell v. Ass'n of Rehab Indus.*, 366 Ark. 297, 235 S.W.3d 499 (2006). Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion. *Id.* The issue is not whether the appellate court might have reached a different result from the Commission; if reasonable minds could reach the result found by the Commission, the appellate court must affirm the decision. *Id.* We will not reverse the Commission's decision unless we are convinced that fair-minded persons with the same facts before them could not have reached the conclusions arrived at by the Commission. *Dorris v. Townsends of Ark., Inc.*, 93 Ark. App. 208, 218 S.W.3d 351 (2005).

Questions concerning the credibility of witnesses and the weight to be given to their testimony are within the exclusive province of the Commission. *Patterson v. Ark. Dep't of Health*, 343 Ark. 255, 33 S.W.3d 151 (2000). When there are contradictions in the evidence, it is within the Commission's province to reconcile conflicting evidence and to determine the true facts. *Id.* 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 that it deems worthy of belief. *Id.* 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). Thus, we are foreclosed from determining the credibility and weight to

be accorded to each witness's testimony. *Arbaugh v. AG Processing, Inc.*, 360 Ark. 491, 202 S.W.3d. 519 (2005). As our law currently stands, the Commission hears workers' compensation claims de novo on the basis before the ALJ pursuant to Ark. Code Ann. § 11-9-704(c)(2), and this court has stated that we defer to the Commission's authority to disregard the testimony of any witness, even a claimant, as not credible. *See Bray v. Int'l Wire Group*, 95 Ark. App. 206, 235 S.W.3d 548 (2006).

Wage loss

The wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. *Emerson Elec. v. Gaston*, 75 Ark. App. 232, 58 S.W.3d 848 (2001). The Commission is charged with the duty of determining disability based upon a consideration of medical evidence and other matters affecting wage loss, such as the claimant's age, education, and work experience. *Eckhardt v. Willis Shaw Exp., Inc.*, 62 Ark. App. 224, 970 S.W.2d 316 (1998). Objective and measurable physical or mental findings, which are necessary to support a determination of "physical impairment" or anatomical disability, are not necessary to support a determination of wage-loss disability. *Arkansas Methodist Hosp. v. Adams*, 43 Ark. App. 1, 858 S.W.2d 125 (1993). To be entitled to any wage-loss-disability benefit in excess of permanent-physical impairment, a claimant must first prove, by a preponderance of the evidence, that he or she sustained permanent-physical impairment as a result of a compensable injury. *Wal-Mart Stores, Inc. v. Connell*, 340 Ark. 475, 10 S.W.3d 882 (2000). Other matters to be considered are motivation, post-injury income, credibility, demeanor, and a multitude of other factors. *Glass v. Edens*, 233 Ark. 786, 346 S.W.2d 685 (1961); *Curry v. Franklin Elec.*, 32 Ark. App. 168, 798 S.W.2d 130 (1990); *City of Fayetteville v. Guess*, 10 Ark. App. 313, 663 S.W.2d 946 (1984). The Commission may use its own superior knowledge of industrial demands, limitations, and requirements in conjunction with the evidence to determine wage-loss disability. *Oller v. Champion Parts Rebuilders Inc.*, 5 Ark. App. 307, 635 S.W.2d 276 (1982).

■ Appellant contends that the Commission placed great weight on a November 4, 2004 report from Heather Naylor of Rehab Management that indicated appellant was capable of performing light-duty work and that a job was available that paid $12.35 per hour. Based on this evidence, the Commission found that the appellant's loss of earning capacity was thirty-five percent.

Appellant argues that none of the jobs listed in the reports and letters from Heather Naylor, which were submitted as evidence, paid $12.35 per hour. A review of the record submitted on appeal reveals that the November 4, 2004, report referred to in the Commission's decision and relied upon to a great extent was not included. When reviewing decisions from the Commission, we review the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's finding and affirm if supported by substantial evidence. *Welch's Laundry & Cleaners v. Clark*, 38 Ark. App. 223, 832 S.W.2d 283 (1992). Because the relied-upon report is missing from the record herein, this issue is reversed and remanded to the Commission for reconsideration because there is no basis upon which to make this factual statement.

Credit

Appellant claims that as a result of his disability, he received two disability payments in addition to his workers' compensation benefits. The first was $150 per month for long-term disability and the second was $876 per month for disability-retirement benefits. The Commission allowed the Fund to receive a dollar-for-dollar credit for these benefits against any workers' compensation payments, pursuant to Ark. Code Ann. § 11-9-411(a) (Repl. 2002), which provides as follows:

> Any benefits payable to an injured worker under this chapter shall be reduced in an amount equal to, dollar-for-dollar, the amount of benefits the injured worker has previously received for the same medical services or period of disability, whether those benefits were paid under a group health care service plan of whatever form or nature, a group disability policy, a group loss of income policy, a group accident, health, or accident and health policy, a self-insured employee health or welfare benefit plan, or a group hospital or medical service contract.

Appellant concedes that his long-term-disability benefits fit within the definition of a group-disability policy under Ark. Code Ann. § 11-9-411(a). He argues that the language of the statute does not allow for a dollar-for-dollar offset for disability-retirement benefits. He points out that the statute does not include the term "disability-retirement benefits." Appellant contends that if the legislature intended to consider an offset of disability-retirement

benefits, those would have been included in the statute. He cites *Kildow v. Baldwin Piano & Organ*, 333 Ark. 335, 969 S.W.2d 190 (1998), for the proposition that workers' compensation statutes are to be construed strictly. He argues that disability-retirement benefits are benefits paid primarily based on the eligibility of an employee to retire based on years of service in addition to being disabled, and since those benefits do not appear in Ark. Code Ann. § 11-9-411, they are not subject to credit or offset by the Fund.

Appellees argue that the Commission noted that the ALJ instructed appellant to disclose the identity of the entity that was paying his disability benefits. Thus, appellees claim that the instruction carries with it the reasonable presumption that appellant has the burden of proving that disability-retirement benefits are based on years of service. The Commission found the opposite, and reasonable minds could come to the conclusion that an injured worker would not be eligible for disability retirement unless he was physically unable to perform the job he was doing for that employer. Appellees claim that a worker's physical condition, and not the amount of time the worker was employed, would be of consequence. We agree.

The Commission stated in its opinion of August 31, 2006:

> Long-term disability benefits and the disability retirement benefits which the claimant receives are the types of benefits which subsection 411 is intended to address. The only type of benefit which respondent no. 2 [Fund] pays is the weekly benefit for wage loss disability. The claimant is receiving two types of disability payments from other sources. A disability "retirement" is not the same thing as a regular one. An employee becomes eligible for a disability retirement by virtue of injury, not by meeting the minimum number of years for a normal retirement. As such, it would meet the definition of a "welfare benefit plan . . . of whatever form or nature . . ." [as stated in the statute].

We note that the interpretation given a statute by the agency charged with its administration is highly persuasive, and while not conclusive, it should not be overturned unless it is clearly wrong. *Death & Perm. Dis. Trust Fund v. Anderson*, 83 Ark. App. 230, 125 S.W.3d 819 (2003).

Appellees further claim that Ark. Code Ann. § 11-9-411 is clear. First, appellees argue that it was the intent of the legislature to include all types of benefits paid for disability because

the term "any" is a term of expansion rather than a term of limitation. Second, the statute was meant to prevent a claimant from receiving a double recovery for the same period of disability. Third, the legislature included benefits "received by" the claimant, rather than "received from" a certain source. Appellees claim that it is therefore clear that if a claimant receives any type of disability benefit during a particular time period of disability, the legislature does not want the claimant to also receive workers' compensation benefits for that same time period. We agree and hold that the Commission did not err in finding that Ark. Code Ann. § 11-9-411 applies to retirement-disability benefits, as the overriding purpose of § 11-9-411 is to prevent a double recovery by a claimant for the same period of disability.

Reversed and remanded in part, and affirmed in part.

HART and ROBBINS, JJ., agree.

Reggie Joe PATTERSON *v.* STATE of Arkansas

CA CR 06-736 257 S.W.3d 921

Court of Appeals of Arkansas
Opinion delivered May 30, 2007

Scott A. Strain, for appellant.

Dustin McDaniel, Att'y Gen., by: *Carolyn Boies Nitta*, Ass't Att'y Gen., for appellee.

DAVID M. GLOVER, Judge. Appellant, Reggie Patterson, appeals from the revocation of his probation. For his sole point of appeal, he contends that the trial court erred in finding that he willfully refused to comply with his probation requirements, arguing in particular that the State did not produce a signed acknowledgment from him that he had received the written terms of his probation. We affirm.

Because of the limited nature of appellant's argument on appeal, it is unnecessary to recount the testimony from the revocation hearing beyond that which deals with the issue on appeal, which can be done within the argument itself. Briefly, we note that evidence was presented at the hearing that appellant had committed several criminal offenses, including aggravated robbery, first-degree battery, residential burglary, theft of property, and aggravated assault. In addition, there was testimony that he had not performed his community service nor paid certain fees and restitution.

Standard of Review

In *Jones v. State*, 355 Ark. 630, 633, 144 S.W.3d 254, 255-56 (2004), our supreme court explained:

> We note at the outset our well-settled law regarding revocation of probation or suspended sentence. To revoke probation or a suspended sentence, the burden is on the State to prove the violation of a condition of the probation or suspended sentence by a preponderance of the evidence. Ark. Code Ann. § 5-4-309(d) (Supp. 2003). *See also Williams v. State*, 351 Ark. 229, 91 S.W.3d 68 (2002); *Bradley v. State*, 347 Ark. 518, 65 S.W.3d 874 (2002). On appellate review, the trial court's findings will be upheld unless they are clearly against the preponderance of the evidence. *Id.* Because the burdens are different, evidence that is insufficient for a criminal conviction may be sufficient for revocation of probation or sus-

> pended sentence. *Id.* Thus, the burden on the State is not as great in a revocation hearing. *Id.* Furthermore, because the determination of a preponderance of the evidence turns on questions of credibility and weight to be given to the testimony, we defer to the trial judge's superior position. *Id.*

Arkansas Code Annotated section 5-4-303(g) (Repl. 2006) provides:

> (g) If the court suspends imposition of sentence on a defendant or places him or her on probation, *the defendant shall be given a written statement explicitly setting forth the conditions under which he or she is being released.*

(Emphasis added.) In addition, Arkansas Code Annotated section 5-4-303(b) (Repl. 2006), requires that "[t]he court shall provide as an express condition of every suspension or probation that the defendant not commit an offense punishable by imprisonment during the period of suspension or probation."

Appellant contends that the "State did not produce a signed paper showing Mr. Patterson was in receipt of any terms." The State acknowledges the statutory requirement to provide a defendant with a written statement explicitly setting forth the conditions under which he or she is being released. It is the State's position, however, that "there is no corollary requirement that the defendant sign a written acknowledgment when he receives this written statement or that one be introduced at a revocation hearing." We agree with the State's position, and appellant has cited no legal authority nor developed any argument that convinces us of his assertion that the State must introduce a signed acknowledgment of his receipt of the terms and conditions of probation.

The judgment and disposition order by which appellant was placed on probation in Case No. LCR-2002-55-5 (theft by receiving) provided in pertinent part:

> Defendant was advised of the conditions of the sentence and/or placement on probation and understands the consequences of violating those conditions. The Court retains jurisdiction during the period of probation/suspension and may change or set aside the conditions of probation/suspension for violations or failure to satisfy Department of Community Punishment rules and regulations.

. . . .

Conditions of disposition or probation are attached/included.
__XX__ Yes _____ No.

In addition, several of the terms and conditions of appellant's probation were set out in the body of this order:

> **THE DEFENDANT SHALL KEEP IN CONTACT WITH THE ADULT PROBATION OFFICE AND NOTICE OF ANY COURT APPEARANCE UPON THE ADULT PROBATION OFFICER CONSTITUTES NOTICE TO DEFENDANT OF SUCH APPEARANCE.**
>
> The defendant shall pay the above-stated court cost, fine, attorney fee, user's fee, DNA fee, and restitution to the Jefferson County Sheriff's Office at the rate of $ __75.00__ per month.
>
> The defendant shall pay the above-stated probation fee of __25.00__ per month to the Department of Community Punishment Adult Probation.
>
> . . . .
>
> Restitution in the amount of: __$3,500.00__ is to be paid to: [Although shown in the judgment, we purposely omit the name of the recipient in this opinion.]

Ms. Pearce-Lewis testified that she was employed by the Department of Community Corrections, Probation/Parole in Lincoln County and that she is charged with the supervision of the probationers/parolees in that county. She described her office's practices in informing probationers of what is expected of them. Appellant argues that Ms. Pearce-Lewis's "opinion that [appellant] received written notice because that's 'usually' what happens, is nothing but sheer speculation" because she did not have personal knowledge of the matter. We disagree. Not only did appellant not object to her testimony on that basis at the hearing, it is clear that in discussing the regular business practices of the Lincoln County probation office, she did have personal knowledge of those practices as a representative of that office.

Appellant testified at the revocation hearing and did not refute Ms. Pearce-Lewis's testimony. He acknowledged that he was placed on probation with an agreement that he was to pay restitution and other fines and that he had not done so, and he acknowledged that he was expected to perform community service and that he had not done so. Thus, by his testimony alone, appellant demonstrated his knowledge of at least some of the conditions of his probation, and the violation of one condition of probation is sufficient to support a revocation. *Sisk v. State*, 81 Ark. App. 276, 101 S.W.3d 248 (2003).

Affirmed.

BAKER and MILLER, JJ., agree.

Kathleen Ann PORTER a/k/a Kathleen Ann Kempf *v.* STATE of Arkansas

CA CR 06-1114 257 S.W.3d 919

Court of Appeals of Arkansas
Opinion delivered May 30, 2007

Butler, Green & Boyd, P.A., by: *Chad M. Green*, for appellant.

Dustin McDaniel, Att'y Gen., by: *Brad Newman*, Ass't Att'y Gen., for appellee.

D.P. MARSHALL JR., Judge. Kathleen Porter appeals her conviction for possession of methamphetamine. This is a residue case, and the question presented is whether the record contains sufficient evidence of possession within the meaning of our statute as construed in *Harbison v. State*, 302 Ark. 315, 790 S.W.2d 146 (1990). It does not. Because the State offered no evidence that Porter possessed a usable or measurable amount of the contraband, we reverse her conviction and dismiss this case.

I.

We recite the facts of record in the light most favorable to the State. *Baughman v. State*, 353 Ark. 1, 5, 110 S.W.3d 740, 742 (2003). After receiving information about drug activity, two police detectives went to Porter's duplex. She was there with her two young children. The detectives questioned her. Porter got upset, said any "stuff" they were looking for was gone, and eventually led the officers into a bedroom. She pulled a plastic bag out of a shirt pocket and gave it to them. In the bag were three coin-type plastic bags that, as described by one of the detectives, contained an "off white, kind of brownish powdery substance on the inside[.]"

The State's forensic chemist could not weigh the residue because it was stuck to the insides of the small bags. There was no testimony that anyone could or did weigh the residue. Instead, the chemist washed the residue out of all the bags with a methanol solution and tested the resulting mixture. It tested positive for methamphetamine. Neither the chemist nor any other witness testified that the bags contained a usable amount of this controlled substance.

At trial, Ms. Porter twice moved for a judgment of acquittal. She argued that no proof existed that she possessed a usable amount of methamphetamine. The circuit court denied both motions.

II.

Almost two decades ago, our supreme court interpreted our possession statute in *Harbison*. Justice Newbern's opinion for the court considered the words of Ark. Code Ann. § 5-64-401 (Repl.

2005) and its rationale, canvassed the relevant law in other states and the scholarly literature on point, and laid down a clear and considered rule for residue cases such as this one. That rule is:

> The intent of the legislation prohibiting possession of a controlled substance is to prevent use of and trafficking in those substances. Possession of a trace amount or residue which cannot be used and which the accused may not even know is on his person or within his control contributes to neither evil.

302 Ark. at 322, 790 S.W.2d at 151.

Though it was not a unanimous decision, *Harbison* has stood the test of time. The General Assembly has met several times in the intervening years and left the supreme court's construction of § 5-64-401 undisturbed. The construction has thus become as much a part of the statute as the words in the code book. *Morris v. McLemore*, 313 Ark. 53, 55, 852 S.W.2d 135, 136 (1993).

In this case, the State proved that Porter possessed plastic bags containing an amount of methamphetamine residue that could not be weighed. The State offered no evidence that a usable amount of the contraband existed. "As a practical matter," Porter possessed bags "which had had [methamphetamine in them], and that is not a crime." *Harbison*, 302 Ark. at 323, 790 S.W.2d at 151.

The State seeks to sustain Porter's conviction based on *Jones v. State*, 357 Ark. 545, 182 S.W.3d 485 (2004), and *Sinks v. State*, 44 Ark. App. 1, 864 S.W.2d 879 (1993), both of which rejected *Harbison*-based challenges. These precedents, however, are distinguishable. In both cases, the jury heard evidence that the defendant possessed a measurable and usable amount of contraband. *Jones*, 357 Ark. at 552-54, 182 S.W.3d at 489-90; *Sinks*, 44 Ark. App. at 3-4; 864 S.W.2d at 880-81. This record contains no proof of either fact.

Harbison means what it holds. Possession of a container with a trace amount or residue of contraband that is neither measurable nor usable is not possession of a controlled substance under Ark. Code Ann. § 5-64-401.

Reversed and dismissed.

VAUGHT and HEFFLEY, JJ., agree.

Lorenzo BENITEZ *v.* STATE of Arkansas

CA CR 05-1293 257 S.W.3d 902

Court of Appeals of Arkansas
Opinion delivered May 30, 2007

B. Kevin Holland, for appellant.

Dustin McDaniel, Att'y Gen., by: *Carolyn Boies Nitta*, Ass't Att'y Gen., for appellee.

LARRY D. VAUGHT, Judge. Lorenzo Benitez was convicted of two counts of possession of controlled substances with the intent to deliver. He was sentenced to two consecutive eighty-year terms in the Arkansas Department of Correction. Benitez raises

two issues on appeal — that there was a lack of sufficient evidence to support the convictions and that the trial court erred in denying his motion to suppress evidence. We affirm.

On January 26, 2003, at approximately 10:05 p.m., Arkansas State Police Officer Jeff Thomas, along with his canine partner Sida, was patrolling Interstate 40 in Miller County when he observed a Ford Explorer with a Texas license plate cross the fog line and travel onto the shoulder on three occasions in less than a one-mile stretch. Officer Thomas initiated a traffic stop, which was videotaped.[1] Officer Thomas asked for and received the driver's licenses of the driver, Martha Quirros Mojica, and the passenger, Benitez. Through questioning, Officer Thomas learned that Mojica was the owner of the Explorer and that Benitez was Mojica's brother-in-law. At trial, Officer Thomas testified that Mojica advised that she and Benitez were traveling to Arkansas while Benitez advised they were traveling to Indianapolis.

Officer Thomas returned to his patrol vehicle to verify the information from Mojica's and Benitez's licenses. While waiting for a response from dispatch, Officer Thomas wrote a warning ticket for Mojica for improper lane usage; however, he did not give it to her at that time. Dispatch advised Officer Thomas that the Explorer was registered to Mojica; that Mojica had no warrants or criminal history; and that Benitez had no outstanding warrants but did have a criminal history of weapons violations, terroristic threatening, and possession of a controlled substance.

Officer Thomas then asked Mojica and Benitez to exit the vehicle and wait on the side of the road. The officer requested permission from Mojica to search the vehicle, and Mojica consented. Before searching the vehicle, Officer Thomas walked Sida around it, and she alerted at numerous areas of the vehicle, including the rear. Officer Thomas then explained to Mojica and Benitez that Sida's alert was an indication of the presence of drugs and that gave him probable cause to search the vehicle. He further advised them that they were no longer free to leave in the vehicle. After a lengthy and laborious search,[2] which included the use of a pry-bar to open a false compartment in the rear of the vehicle,

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[1] Although the videotape was shown to the jury at trial, Benitez's appellate counsel stated in his brief that he was unable to view the videotape as it was defective. This court was also unable to view the videotape.

[2] Officer Thomas testified the entire stop lasted almost two hours.

Officer Thomas found three large bundles wrapped in electrician's tape. The state crime laboratory later confirmed that two of the bundles were cocaine, and one was heroin.[3] After discovering the drugs, Officer Thomas returned to where Mojica and Benitez had been standing on the side of the road to find only Mojica present. Benitez had fled the scene. Benitez was located by the United States Customs Service in Texas in October 2004.

Prior to trial, Benitez moved to suppress the evidence seized by Officer Thomas on the grounds that the search and seizure was unlawful under both the United States and the Arkansas Constitution. The State responded that Benitez lacked standing to contest the search and that the search was legal. The trial court denied the motion. Benitez's directed-verdict motions at trial challenged the sufficiency of the evidence that he possessed the drugs with the intent to deliver. The trial court denied his motions.

Benitez first argues that the evidence was insufficient to prove that he was in possession of the drugs found in the Explorer. He argues that (1) the drugs seized from the Explorer were not in plain view, nor were they found in his personal effects or in proximity to him; (2) there is a lack of evidence demonstrating that he was the lawful owner of the Explorer or had authorized possession of it; (3) there was no evidence that, at the time of the stop, Benitez was acting suspiciously; and (4) there was no fingerprint evidence linking him to the drugs or to the false compartment in the vehicle. Benitez contends that the only evidence presented by the State on the issue of possession was that Benitez was in a vehicle that contained the drugs and that he fled from the scene.

A motion for a directed verdict is a challenge to the sufficiency of the evidence. *Littlepage v. State*, 314 Ark. 361, 863 S.W.2d 276 (1993). The test for determining the sufficiency of the evidence is whether there is substantial evidence to support the verdict. *Id.* On appeal, we review the evidence in the light most favorable to the appellee and sustain the conviction if there is substantial evidence to support it. *Id.* Evidence is substantial if it is

[3] One of the packages weighed 1002.3 grams and was 83.8% cocaine. The second package weighed 103.5 grams and was 84.4% cocaine hydrochloride. The third package weighed 974.2 grams and was 51.9% heroin hydrochloride.

of sufficient force and character to compel reasonable minds to reach a conclusion and pass beyond suspicion and conjecture. *Id.*

In order to prove a defendant is in possession of a controlled substance, constructive possession is sufficient. *Littlepage v. State*, 314 Ark. at 366, 863 S.W.2d at 279. Neither exclusive nor actual physical possession of a controlled substance is necessary to sustain a charge. *Id.* Constructive possession can be implied when it is in the joint control of the accused and another. *Id.* However, joint occupancy alone is not sufficient to establish possession or joint possession. There must be some additional factor linking the accused to the contraband. *Id.* In other words, there must be some evidence that the accused had knowledge of the presence of the contraband in the vehicle. *Malone v. State*, 364 Ark. 256, 217 S.W.3d 810 (2005).

The Arkansas Supreme Court has enumerated linking factors to be considered in cases involving vehicles occupied by more than one person: (1) whether the contraband is in plain view; (2) whether the contraband is found with his personal effects; (3) whether it is found on the same side of the car seat as the accused was sitting or in near proximity to it; (4) whether the accused is the owner of the vehicle, or exercises dominion and control over it; (5) whether the accused acted suspiciously before or during arrest. *Id.*

Benitez is correct that some of the linking factors are not present in this case. For example, the drugs seized by Officer Thomas were not in plain view, were not on Benitez's person, were not in or near his personal belongings, and were not in close proximity to him. Officer Thomas testified that while Benitez's response regarding the destination of their trip may not have been consistent with Mojica's response, Officer Thomas never witnessed Benitez behaving suspiciously. Lastly, the evidence demonstrated that the Explorer belonged to Mojica.

Nevertheless, the substantial evidence in this case supports a conclusion that Benitez acted suspiciously before arrest to a degree sufficient to link him to the contraband in the vehicle. This pivotal evidence was Benitez's behavior just prior to Officer Thomas's discovery of the drugs. Benitez waited for more than an hour on the side of the road while Officer Thomas searched the vehicle and was still standing on the side of the road with Mojica when Officer Thomas retrieved the pry-bar from his patrol car. But when Officer Thomas started to pry open the false compartment (containing the drugs) Benitez fled from the scene.

Additional facts surrounding Benitez's flight from the scene link him to the drugs in the vehicle. Benitez left the scene without telling the officer. Mojica testified that Benitez "ran." When Benitez fled, he was a three-hour drive from his home — somewhere on the side of the highway surrounded by woods. It was late at night and cold. He fled the scene without his driver's license and personal belongings. He left his female traveling companion, a family member, on the side of the road with a law-enforcement official who had already advised that he believed narcotics were in the vehicle.

We acknowledge that the sole "linking factor" in this case was the suspicious activity of Benitez prior to arrest. This factor alone would not necessarily support a conviction for constructive possession. However, the facts in this case are unique in that Benitez's suspicious activity was not only undisputed (Officer Thomas and Mojica both testified that Benitez fled the scene late in the search of the Explorer, and he was apprehended twenty months later by United States Customs), but it was also objective in nature rather than based upon the subjective beliefs of a law-enforcement officer. This is not a case where suspicion arose from a law-enforcement officer's subjective observations of an accused, e.g., the accused seemed nervous, was fidgeting and/or sweating, or the like. Accordingly, we hold that Benitez's perfectly-timed flight was sufficiently compelling to show Benitez had knowledge that contraband was secreted inside the false compartment of the vehicle.

Next, Benitez contends that the trial court erred in denying his motion to suppress evidence based on an illegal search. In reviewing the trial court's denial of a motion to suppress evidence, we conduct a de novo review based on the totality of the circumstances, reviewing findings of historical facts for clear error and determining whether those facts give rise to reasonable suspicion or probable cause, giving due weight to inferences drawn by the trial court. *Sims v. State*, 356 Ark. 507, 157 S.W.3d 530 (2004).

The State argues that Benitez did not have standing to contest the search. The rights secured by the Fourth Amendment are personal in nature, therefore, a defendant must have standing to challenge a search on Fourth Amendment grounds. *Littlepage*, 314 Ark. at 368, 863 S.W.2d at 280. Whether a defendant has standing depends upon whether he manifested a subjective expectation of

privacy in the area searched and whether society is prepared to recognize that expectation as reasonable. *Id.* It is well settled that a defendant, as the proponent of a motion to suppress, bears the burden of establishing that his Fourth Amendment rights have been violated. *Ramage v. State*, 61 Ark. App. 174, 177, 966 S.W.2d 267, 269-70 (1998).

A person's Fourth Amendment rights are not violated by the introduction of damaging evidence secured by the search of a third party's premises or property. *Id.* at 177, 966 S.W.2d at 269. Further, a defendant has no standing to question the search of a vehicle unless he can show that he owns the vehicle or that he gained possession of it from the owner or someone else who had authority to grant possession. *Id.* This court will not reach the constitutionality of a search where the defendant has failed to show that he had a reasonable expectation of privacy in the object of the search. *Id.*

Here, the record does not support Benitez's standing to contest the search. Benitez was not driving the Explorer when it was pulled over. There is no evidence that Benitez owned the Explorer or that the rightful owner gave him possession of the vehicle. Benitez did not testify at the suppression hearing and assert a proprietary or possessory interest in the vehicle necessary to establish standing, although he had the right to do so without danger of self-incrimination. *See Ramage, supra.* In fact, Benitez argued in his motion for directed verdict and in his brief on appeal that it was Mojica that owned and operated the Explorer — not him.

Benitez relies upon *Fernandez v. State*, 303 Ark. 230, 795 S.W.2d 52 (1990), for the proposition that "if either driver or passenger is owner of the car, and other facts demonstrate a reasonable expectation of privacy, then the aggrieved defendant can claim Fourth Amendment protection from unreasonable searches." He contends that he did have a reasonable expectation of privacy in the vehicle as he was traveling with his sister-in-law, the vehicle's owner, was an invited guest, and he had his personal belongings in the cargo area.

Benitez's interpretation of *Fernandez* is incorrect as the holding in that case does not state or even imply that if one occupant of a vehicle is the owner of the vehicle or had lawful possession of it, then other occupants have standing to challenge a

search.[4] Moreover, both our court and our supreme court have held contrary to Benitez's position. *See Dixon v. State*, 327 Ark. 105, 937 S.W.2d 642 (1997) (holding that passenger had no standing to contest search even though he was traveling with the driver, who owned vehicle); *Swan v. State*, 94 Ark. App. 115, 226 S.W.3d 6 (2006) (holding that passenger lacked standing to contest search of vehicle where driver of vehicle, one with possessory interest in vehicle, consented to search).

Because of the lack of evidence that Benitez owned or had lawful possession of the Explorer, we hold that he had no expectation of privacy in the vehicle, and accordingly, he had no standing to challenge the search as unconstitutional.

Affirmed.

MARSHALL and HEFFLEY, JJ., agree.

Christopher McBRIDE *v.* STATE of Arkansas

CA CR 06-1158 257 S.W.3d 914

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Opinion delivered May 30, 2007

[4] Our supreme court in *Fernandez* held that neither the driver of the vehicle nor the passenger showed that they lawfully owned or possessed it, and therefore, the passenger had no reasonable expectation of privacy and no standing to contest the search. *Fernandez*, 303 Ark. at 233, 795 S.W.2d at 53.

Mark D. Leverett, for appellant.

Dustin McDaniel, Att'y Gen., by: *Brad Newman*, Ass't Att'y Gen., for appellee.

LARRY D. VAUGHT, Judge. Christopher McBride was convicted of three counts of second-degree unlawful discharge of a firearm from a vehicle and was sentenced to three separate terms of ten years' imprisonment, to run concurrently. On appeal, McBride contends that there was insufficient evidence to support the convictions and that the jury failed to follow the trial court's instructions regarding the burden of proof. We disagree with both points and affirm.

McBride first argues that there is insufficient evidence to support the convictions. When reviewing a challenge to the sufficiency of the evidence we view the evidence in the light most favorable to the State and consider only the evidence that supports the verdict. *O'Neal v. State*, 356 Ark. 674, 158 S.W.3d 175 (2004); *Baughman v. State*, 353 Ark. 1, 110 S.W.3d 740 (2003). The conviction will be affirmed if there is substantial evidence to support it. *Id.* Substantial evidence is evidence forceful enough to compel a conclusion one way or the other beyond suspicion or conjecture. *Id.*

McBride was convicted of three counts of unlawful discharge of a firearm from a vehicle pursuant to Arkansas Code Annotated section 5-74-107(b)(1) (Repl. 2005), which provides:

> A person commits unlawful discharge of a firearm from a vehicle in the second degree if he or she recklessly discharges a firearm from a vehicle in a manner that creates a substantial risk of physical injury to another person or property damage to a home, residence, or other occupiable structure.

The following is a summary of the evidence, presented in the light most favorable to the State.

On June 3, 2005, a shooting incident occurred at a combination Shell gas station/Subway restaurant located at Fourche Dam Pike. Natasha Nichols, an employee of Subway, testified that around 11:45 p.m. she served sandwiches to two customers, KP and Latrell, who thereafter went outside. While outside, KP began arguing with McBride. As KP and McBride argued, each pulled out a gun and pointed them at each other. Latrell and KP then got into a red Chevy Caprice and pulled out of the Shell parking lot, while McBride got into a black SUV and followed them. The red vehicle quickly returned to the Shell parking lot with the black SUV still following. Next, Nichols saw gunfire coming from the vehicles. She testified that she actually saw "the defendant shoot

out of his Jeep window. He was shooting at the red car." She testified that "the gun was in the defendant's hand outside the truck" and that "the defendant's bullets were coming towards the store because his gun was pointed towards the store." Nichols was "positive about who was shooting at the store" and testified "that at least some of this defendant's shots hit the store."

Cora Shelton, an employee of the Shell station, testified to substantially the same cascade of events as did Nichols. She recalled seeing "sparks coming from a gun . . . coming from the [black] vehicle as the vehicle was going by." She further testified that she "saw the fire coming from the gun, after the Caprice pulled away. The gun was in the black Denali." Finally, she testified, "So either the ice chest or the store [was] hit as soon as I saw those sparks from the Denali."

A third witness to the shooting incident, Will Hemenway, testified that on June 3, 2005, he was getting gas at the Exxon gas station across the street from the Shell station when he heard gun shots and saw gunfire from a black SUV headed toward the Shell station. He returned to his vehicle and pursued the black SUV on the interstate. He contacted 911 and the Arkansas State Police, advised them of his location, and provided a partial license plate number of the black SUV. Hemenway discontinued his pursuit when the black SUV exited onto Roosevelt.

Little Rock Police Department Officers Chris Bonds and Michael Ford testified that while on patrol, they received information regarding a black SUV and were able to locate it within minutes. As they followed the black SUV, they observed the vehicle pull over at a gas station on Roosevelt and a gun being thrown out its window. The black SUV then left the gas station, at which time Bonds and Ford pulled it over. They testified that McBride was the driver of the black SUV and that there were no other passengers in the vehicle. When McBride exited the vehicle, a shell casing fell out of his lap onto the ground. McBride was placed into custody at approximately 11:58 p.m.

After McBride was arrested, Little Rock Police Officer Joe Hill was advised by Bonds and Ford that McBride threw a gun out of his vehicle at a gas station on Roosevelt. Officer Hill found the gun at that location.

Reuben Linder, Jr., employed with the Arkansas State Crime Laboratory as a firearms and tool mark examiner, testified that several items of evidence were submitted to him for review, including the gun-shell casing that fell out of McBride's lap when

he was arrested. Linder testified that the gun-shell casing was a definite match with McBride's gun.

We hold that this evidence overwhelmingly supports the convictions in this case. Nichols testified that she saw McBride shooting toward the gas station while Shelton and Hemenway testified that they witnessed gunfire from the black SUV toward the gas station. While Shelton and Hemenway did not actually see McBride shooting the gun from the black SUV, there is substantial evidence that McBride was the only person in the SUV at the time of the shooting. Not one witness at the gas station testified that they saw another individual in the black SUV. Hemenway pursued McBride from the gas station until just a couple of minutes before McBride was arrested and Hemenway testified that he only saw one person in the vehicle. When McBride was arrested, the black SUV was searched, no other individual was found, and a gun-shell casing (that matched the gun that McBride threw out of the window of his vehicle) fell out of his lap. All of this evidence supports the conclusion that McBride was the person who shot a gun from his vehicle towards the Shell station.

We note that McBride's girlfriend testified that she was with McBride at the gas station, and he never fired a gun that night. Clearly, the jury did not believe her testimony. Reconciling conflicts in the testimony and weighing the evidence are matters within the exclusive province of the jury and the jury's conclusion on credibility is binding on this court. *Silverman v. State*, 63 Ark. App. 94, 974 S.W.2d 484 (1998) (citing *Ashley v. State*, 22 Ark. App. 73, 732 S.W.2d 872 (1987)). Accordingly, we hold that substantial evidence supports the convictions, and we affirm on that issue.

McBride's second point on appeal is that the trial court erred in denying his motion for new trial because the jury was confused as to the trial court's instructions. The confusion, according to McBride, came to light when the jury sent two questions to the judge during jury deliberations. The question at issue was:

> Please elaborate on the three counts we are deciding on. Are we to decide that he actually shot the gun, or are we to decide that he endangered the three people inside the Shell?[1]

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[1] The second question was: "Also, may we have a map of the area?" In response, a map used at trial as a demonstrative aid was provided to the jury. This question and the response are not pertinent to this appeal.

The State first contends that our court lacks jurisdiction to review this point because McBride appealed only from the judgment and commitment order and failed to specifically state in the notice that he was appealing from an order denying the new-trial motion. According to the State, McBride should have filed an amended notice stating that he was appealing from the order denying his motion. The State cites *Wright v. State*, where our supreme court stated that "a notice of appeal must designate the judgment or order appealed from, and be filed within thirty days of that order." 359 Ark. 418, 423, 198 S.W.3d 537, 540 (2004) (citations omitted).

The judgment and commitment order was filed on January 23, 2006. On February 21, 2006, McBride filed a timely motion for new trial. The trial court took no action on the motion, and thirty days later, on March 23, 2006, it was deemed denied. *See* Ark. R. Crim. P. 33.3(c) (2006). McBride filed his notice of appeal on April 21, 2006, which stated:

> Notice is hereby given that, Christopher McBride, defendant appeals to the Arkansas Court of Appeals from the judgment of the Pulaski County Circuit Court, Sixth Division, entered January 23, 2006. The defendant's Motion for New Trial was denied on March 21, 2006.[2]

We acknowledge that McBride did not specify that he was appealing from an order denying his motion for new trial; however, he did state the (incorrect) date that his motion for new trial was denied. Because the motion was deemed denied, there was no document actually entered that could be identified in the notice of appeal. Finally, *Wright* is distinguishable from this case because there, the defendant filed a notice of appeal after the judgment and commitment order was entered *but before* filing his motion for new trial. In that case, because there was a notice filed before disposition of the post-judgment motion, Rule (2)(b)(2) of the Arkansas Rules of Appellate Procedure – Criminal applied. That Rule requires that an amended notice be filed if a party seeks to appeal from the grant or denial of the post-trial motion.

Because McBride filed his notice of appeal after *both* the judgment and commitment order and new-trial motion were

[2] McBride incorrectly stated the date his motion was denied. As noted above, the motion was deemed denied on March 23, 2006.

filed, Rule (2)(b)(2) (and its requirement of an amended notice) is not applicable. Instead, Rule (2)(b)(1) applies, which requires a notice of appeal to be filed within thirty days from the date the post-trial motion was filed where the trial court neither grants or denies that motion. *See* Ark. R. App. P.–Crim. (2)(b)(1). McBride's notice was filed within thirty days of the filing of his post-trial motion on which the trial court made no ruling, and it sufficiently identified the trial court's deemed denial of his post-trial motion. Therefore, he was in compliance with Rule (2)(b)(1), and no amended notice was required. Although the better practice is to clearly identify the ruling that the party seeks to appeal, under the facts of this case we hold that McBride properly appealed from the judgment and commitment order and the denial of his motion for new trial.

As to the merits of his second point on appeal, McBride relies solely upon the post-trial statement of juror Shasta Dockery, which provided in pertinent part:

> We were confused as to whether Mr. McBride's conviction was decided by if he just fired a gun in a public place or if he actually fired at the attendants and customer inside. Did we all think he fired the gun? Yes. Did we think he intended to do bodily harm to the other two men involved? Yes. Did we think he was the one who shot into the store? We had no evidence to say that it was Mr. McBride or the other men involved who shot into the store. . . . I do believe that Mr. McBride shot into that store, but that is not the same thing as knowing. . . .

The State contends that the juror's statement is inadmissible pursuant to Rule 606(b) of the Arkansas Rules of Evidence, which provides:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to asset [assent] to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received, but a juror may testify on the questions whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror.

The purpose of Rule 606(b) is to attempt to balance the freedom of the secrecy of jury deliberations with the ability to correct an irregularity in the jury's decisions. *State v. Osborn*, 337 Ark. 172, 988 S.W.2d 485 (1999).

The juror's statement falls squarely within the type of testimony prohibited by Rule 606(b). The statement is essentially a characterization of the jury deliberations. The statement does not include any allegations that prejudicial information was given to the jury or that the jury was influenced by outside sources. Because the juror's statement is inadmissible, McBride failed to show that he was entitled to a new trial based on jury confusion.

Affirmed.

MARSHALL and HEFFLEY, JJ., agree.

SINGLE SOURCE TRANSPORTATION, INC. *v.*
Walter W. KENT

CA 06-1376 258 S.W.3d 416

Court of Appeals of Arkansas
Opinion delivered June 6, 2007

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

Aaron L. Martin, for appellee.

JOHN MAUZY PITTMAN, Chief Judge. The appellee in this workers' compensation case, a truck driver, sustained neck and shoulder injuries in August 1995 when his vehicle struck a bull that was standing in the road. Appellee received medical benefits for a time and filed a claim for additional benefits in 2005. The appellant-employer argued that the 2005 claim was barred by the statute of limitations. The Commission found that the claim was not barred and awarded benefits. Appellant contends that the Commission erred in so finding. We reverse and remand.

The applicable statute of limitations is set out in Ark. Code Ann. § 11-9-702(b) (Repl. 2002) as follows:

> (b) TIME FOR FILING ADDITIONAL COMPENSATION. (1) In cases where any compensation, including disability or medical, has been paid on account of injury, a claim for additional compensation shall be barred unless filed with the commission within one (1) year from the date of the last payment of compensation or two (2) years from the date of the injury, whichever is greater.

This appeal raises several issues concerning the 2005 claim, including the sufficiency of the evidence to support the award and whether medical treatment obtained by appellee after 2002 constituted "payment of compensation" for statute-of-limitations

purposes. We do not address those issues at this time because the Commission's method of computing the running of the statute of limitations is fundamentally flawed.

The crucial period in determining the timeliness of appellee's claim is that falling between the filing of a claim for additional compensation on March 12, 2001, and treatment obtained by appellant on March 13, 2002. Between these dates, an order dismissing appellant's March 12, 2001 claim for failure to prosecute was entered on December 13, 2001. The question on appeal is whether the Commission erred in holding that the claim was timely because the claimant "obtained treatment for his left shoulder [on March 13, 2002] within one year of the December 2001 order of dismissal." We hold that it did.

It is true that the filing of a claim for additional benefits tolls the running of the statute of limitations. *Spencer v. Stone Container Corp.*, 72 Ark. App. 450, 38 S.W.3d 909 (2001). However, in *Dillard v. Benton County Sheriff's Office*, 87 Ark. App. 379, 192 S.W.3d 287 (2004), we held that once a claim is dismissed for lack of prosecution, the claim is considered to have never been filed, and unless a new claim is filed within the statutory period of time allowed by Ark. Code Ann. § 11-9-702, the statute of limitations will bar any subsequent claims. This is in accord with Ark. Code Ann. § 11-9-702(d) (Repl. 2002), which provides that:

> (d) If, within six (6) months after the filing of a claim for additional compensation, no bona fide request for a hearing has been made with respect to the claim, the claim may, upon motion and after hearing, if necessary, be dismissed without prejudice to the refiling of the claim within the limitation period specified in subsection (b) of this section.

The relevant period in determining the timeliness of appellee's request for additional benefits, then, is set out in Ark. Code Ann. § 11-9-702(b). *See Baxter County Regional Hospital v. Dixon*, 99 Ark. App. 83, 257 S.W.3d 564 (2007). As quoted above, subsection (b) bars claims for additional benefits that are not filed within two years from the date of the injury or one year from the last payment of compensation. Here, however, the Commission made no finding whatsoever as to the last payment of compensation. Instead, the Commission erroneously determined timeliness based on the date of an order of dismissal for failure to prosecute

that, under *Dillard*, had the effect of transforming the claim filed on March 12, 2001, into a nullity that should be considered as never having been filed.[1]

We reverse and remand for further consistent proceedings before the Commission, to include findings regarding the time of the last payment of compensation prior to March 13, 2002.

Reversed and remanded.

BIRD and GRIFFEN, JJ., agree.

Crystal DOBBS *v.* Johnathan DOBBS

CA 06-1037 258 S.W.3d 414

Court of Appeals of Arkansas
Opinion delivered June 6, 2007

[1] The dissenting Commissioner noted that the Commission had held in prior cases that the Arkansas savings statute does not apply in Workers' Compensation cases. We think this is correct. The general savings statute, codified at Ark. Code Ann. § 16-56-126 (Repl. 2005), is found in Title 16 of the Code, which deals with courts and civil procedure therein. The courts are listed in Title 16, Subtitle 2 as the Supreme Court, Court of Appeals, Circuit Courts, County Courts, District Courts, certain Inferior Courts, and Justice of the Peace Courts. The reasoning in *Rogers v. International Paper Co.*, 66 Ark. App. 34, 988 S.W.2d 23 (1999), holding that the Arkansas Rules of Civil Procedure do not apply to proceedings before the Workers' Compensation Commission, strongly suggests that the savings statute would not be applicable in a proceeding before an administrative agency such as the Commission. *See also Sosebee v. County Line School District*, 320 Ark. 412, 987 S.W.2d 554 (1995).

Andrea Walker, Legal Aid of Arkansas, for appellant.

JOSEPHINE LINKER HART, Judge. Crystal Dobbs appeals from the portion of a Jackson County Circuit Court order of protection stating, that, if the filing fees were not paid within thirty days by her estranged husband, Johnathan Dobbs, the person against whom the order of protection issued, the permanent order would not go into effect. She argues that the trial court's order thwarts the intent of the Domestic Abuse Act of 1991 and is contrary to public policy and the intent of the legislature. We hold that the contingent nature of the order renders it not final for the purposes of appeal, and we dismiss the case.

On April 20, 2006, Crystal petitioned for an order of protection against Johnathan. The petition was granted in an ex parte proceeding and a hearing was scheduled for May 22, 2006. At the hearing, both Crystal and Johnathan appeared, but Johnathan did not contest the issuance of the order of protection. The trial court orally granted Crystal's petition.

After announcing his intention to grant the order of protection, the trial judge recalled that Crystal had secured an order of protection the previous September, and she and Johnathan had appeared together and had that order dissolved. The trial judge noted that the court did not assess any costs for the September order and expressed concern over the court not receiving the fees. Ultimately, he entered an order that continued the ex parte protection order in force for an additional thirty days and conditioned the executing of a permanent order on Johnathan paying $190 in fees within those thirty days. The judge stated that "we're just trying to set up a policy. If you come in the second time, it's got to be paid."

Subject to a very few exceptions not applicable in this case, this court only has jurisdiction to decide cases where a final order has been entered. Ark. R. App. P. – Civ. 2(a)(1). Whether an order is final and appealable is a matter going to our jurisdiction; jurisdiction is an issue that we are obligated to raise on our own motion. *Capitol Life & Acc. Ins. Co. v. Phelps*, 72 Ark. App. 464, 37 S.W.3d 692 (2001).

In our view, we have before us a case in which the trial judge committed a manifest abuse of discretion. Inexplicably, he placed

the decision as to whether or not a protective order will be entered in the hands of the person against whom the protective order is sought. As we can conceive of no reason why Johnathan would desire to have a permanent order of protection issued against him, Johnathan obviously has no incentive to pay the fees. Furthermore, while the trial judge made Johnathan responsible for paying the costs, he also told Crystal that she could "assist" Johnathan. Given the previously mentioned lack of incentive for Johnathan to pay the fees, we believe that this ruling is tantamount to shifting the burden of paying the costs to Crystal despite the fact that the statute explicitly states that the petitioner shall not be required to bear these costs. Ark. Code Ann. § 9-15-202 (Repl. 2002).[1] We note that if the trial court simply wished to have the costs paid, it could order Johnathan to pay the costs and enforce the order with its contempt power if the fees remained unpaid.

However, the conditional nature of the trial court's order denies us jurisdiction. *See Corbit v. State*, 334 Ark. 592, 976 S.W.2d 927 (1998) (holding that a conditional judgment, order, or decree, the finality of which depends upon certain contingencies which may or may not occur, is not final for the purposes of appeal); *Mid-State Homes, Inc. v. Beverly*, 20 Ark. App. 213, 727 S.W.2d 142 (1987) (holding that a decree that grants alternative relief at the election of one of the parties is not appealable). Accordingly, we must dismiss this appeal.

Appeal dismissed.

GRIFFEN and GLOVER, JJ., agree.

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[1] Arkansas Code Annotated section 9-15-202 states:

(a) The court, clerks of the court, and law enforcement agencies shall not require any initial filing fees or service costs.

(b) Established filing fees may be assessed at the full hearing.

(c)(1) The abused in any domestic violence petition for relief for a protection order sought pursuant to this subchapter shall not bear the cost associated with its filing, or the costs associated with the issuance or service of a warrant and witness subpoena.

(2) Nothing in this subsection shall be construed to prohibit a judge from assessing costs if the allegations of abuse are determined to be false.

Paul A. DEE, Jr. *v.* Erin DEE

CA 06-1163 258 S.W.3d 405

Court of Appeals of Arkansas
Opinion delivered June 6, 2007

[Rehearing denied October 24, 2007.*]

George R. Spence, for appellant.

Boyer, Schrantz, Rhoads & Teague, P.A., by: *Johnnie Emberton Rhoads*, for appellee.

ROBERT J. GLADWIN, Judge. Appellant Paul Dee, Jr. appeals from the divorce decree granted in favor of appellee Erin Dee on the ground of general indignities. On appeal appellant argues that the circuit court erred in granting the divorce because there was insufficient evidence as to the grounds asserted by appellee. He also argues that the circuit court failed to give him full credit for pre-marital funds that were loaned to the marital estate. We find merit in his first argument; accordingly, we reverse and dismiss.

The parties were married on November 22, 1997, and separated on October 22, 2005. One child was born of the marriage. On April 12, 2006, a hearing was held related to the

* GRIFFEN, J., concurs.

division of property and debts, as well as issues related to the parties' child. At the commencement of the hearing, appellant's counsel announced that his client waived corroboration of grounds. Appellant confirmed that statement at the time it was made, as well as during his testimony.

Appellee presented only a general affirmative response to her attorney's question as to whether, during the course of their marriage, appellant had treated her in such a manner as to render her condition in life intolerable. There was neither elaboration nor corroboration of that testimony. Appellant did not object to the lack of evidence presented in support of appellee's alleged grounds, and he did not move for a directed verdict based on insufficient evidence thereof.

As to the property issues, appellant presented testimony that he owned a corporation, D & D Ventures, prior to the parties' marriage. Appellant testified that approximately $32,000 had been transferred into accounts jointly owned by the parties, pursuant to three checks in the amounts of $25,000, $5,000, and $9,952.92, respectively. He testified that the last check was to repay the marital estate for funds that had been advanced to the corporation, and that the other $30,000 had been loans. The circuit court agreed that those transfers were loans from the corporation. The circuit court further found that the Suburban and Impala vehicles were jointly held marital property, but that the money used to purchase the Suburban was traceable to appellant's pre-marital account owned by D & D Ventures. As a result, the circuit court awarded appellant the Suburban outright. As to the Impala, it was ordered sold, with the first $9,000 of the sale proceeds to go to appellant to repay the other loan from the pre-marital account used to purchase that vehicle.

This court reviews divorce cases de novo on the record. *Taylor v. Taylor*, 369 Ark. 31, 250 S.W.3d 232 (2007). Moreover, we will not reverse a circuit court's finding of fact in a divorce case unless it is clearly erroneous. *Id.* A circuit court's finding of fact in a divorce proceeding 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. *Baxley v. Baxley*, 86 Ark. App. 200, 167 S.W.3d 158 (2004).

I. Insufficient Evidence of Grounds

Appellant maintains that the decree entered by the circuit court is subject to reversal based on the failure of appellee to prove grounds for divorce. He contends that the only evidence she

presented was a general statement reiterating the statutory language, which was wholly conclusory and insufficient as proof of grounds. While he admits that he waived corroboration of grounds, he cites *Harpole v. Harpole*, 10 Ark. App. 298, 664 S.W.2d 480 (1984), for the proposition that regardless of whether a divorce is contested or uncontested, the injured party must always prove his or her grounds as set forth in the statute.

More recently, this court has reiterated that divorce is a creature of statute and can only be granted upon proof of a statutory ground. *See Poore v. Poore*, 76 Ark. App. 99, 61 S.W.3d 912 (2001). In that case, the plaintiff's action for divorce was also based on the ground of general indignities. The court held that in order to obtain a divorce on that ground, the plaintiff must show a habitual, continuous, permanent, and plain manifestation of settled hate, alienation, and estrangement on the part of one spouse, sufficient to render the condition of the other intolerable. *Id.* The court restated the type of evidence necessary to establish indignities as a ground for divorce:

> It is for the court to determine whether or not the alleged offending spouse has been guilty of acts or conduct amounting to rudeness, contempt, studied neglect or open insult, and whether such conduct and acts have been pursued so habitually and to such an extent as to render the condition of the complaining party so intolerable as to justify the annulment of the marriage bonds. This determination must be based upon facts testified to by witnesses, and not upon beliefs or conclusions of the witnesses. It is essential, therefore, that proof should be made of specific acts and language showing the rudeness, contempt, and indignities complained of. General statements of witnesses that the defendant was rude or contemptuous toward the plaintiff are not alone sufficient. The witness must state facts-that is, specific acts and conduct from which he arrives at the belief or conclusion which he states in general terms-so that the court may be able to determine whether those acts and such conduct are of such nature as to justify the conclusion or belief reached by the witness. The facts, if testified to, might show only an exhibition of temper or of irritability probably provoked or of short duration. The mere want of congeniality and the consequent quarrels resulting therefrom are not sufficient to constitute that cruelty or those indignities which under our statute will justify a divorce.

Id. at 102, 61 S.W.3d at 915 (citing *Bell v. Bell*, 105 Ark. 194, 150 S.W. 1031 (1912), and holding that it is still the law that mere incompatibility is not grounds for divorce in this state).

Appellant contends, and we agree, that as in *Harpole*, despite his waiving corroboration of grounds and failing to object to the sufficiency of proof of grounds at trial, appellee was required to offer sufficient, nonconclusory proof of grounds, and she failed to do so. Accordingly, we reverse on this point.

II. Credit for Loans Made from Pre-Marital Funds

Because we reverse the grant of the divorce decree for lack of proof of grounds, we decline to address appellant's issue regarding the credit granted for loans made to the marital estate from pre-marital funds. As the parties are still married, the property issues will have to be resolved at such time as the marriage is dissolved.

Reversed and dismissed.

MARSHALL and MILLER, JJ., agree.

SUPPLEMENTAL OPINION ON DENIAL OF REHEARING
OCTOBER 24, 2007

WENDELL L. GRIFFEN, Judge, concurring. I am constrained in the instant case to concur in the denial of the wife's petition for rehearing due to the governing law requiring corroboration of grounds by a party other than the complainant or the defendant in a divorce case. However, I write separately to express my disagreement with current law governing the corroboration requirement.

In this case, the wife sued for divorce based on general indignities. The husband admitted that, during the parties' marriage, he placed several Internet ads seeking sexual partners in which he mentioned the parties' minor daughter. In one ad, he purported to be divorced. Further, he admitted that the ads were

still running on the day of the hearing. The husband also admitted that, over his wife's objection, he allowed a woman whom he met on the Internet to babysit the parties' daughter.

A petition for divorce will not be granted on the testimony of the complainant alone, even if the defendant admits the allegations. *See Moore v. Davidson*, 85 Ark. App. 104, 145 S.W.3d 833 (2004). While I understand that corroboration is required to prevent collusion, I believe the law needs to be changed because the corroboration requirement seems to operate as an irrebuttable presumption of collusion. Courts should not presume collusion. Moreover, the corroborative testimony of a third party does not guarantee there will be no collusion. After all, the third party could be involved in the collusion.

Where there is no evidence of collusion (as in the instant case), I do not understand the purpose of requiring yet another witness to reiterate conduct to which a defendant has admitted. It is well settled that where there is no evidence of collusion, the evidence of corroboration need only be slight. *Id.* "Corroboration" of a complainant's testimony in a divorce action is testimony of some substantial fact or circumstance *independent of the complainant's statement* that leads an impartial and reasonable mind to believe that material testimony of the complainant is true. *Id.* Where no collusion is alleged, the defendant's statement, like the statement of any other witness, is independent of the complainant's statement and should constitute sufficient, impartial evidence of the conduct alleged.

Thus, where the defendant in a divorce case has admitted to certain conduct, what more would another witness need to say to prove the complainant has grounds for a divorce? The only question that needs to be answered after a defendant has admitted to certain conduct is whether that conduct constitutes grounds for a divorce. Proof of general indignities requires proof of a habitual, continuous, permanent, and plain manifestation of settled hate, alienation, and estrangement on the part of a spouse that is sufficient to render the condition of the other spouse intolerable; it may include rudeness, unmerited reproach, contempt, studied neglect, open insult and other plain manifestations of settled hate, alienation and estrangement, so habitually, continuously and permanently pursued as to create an intolerable condition. *See Rocconi v. Rocconi*, 88 Ark. App. 175, 196 S.W.3d 499 (2004)(granting a

divorce to the husband on the basis of wife's gambling problem, which made his life intolerable).

Here, the husband's admitted, repeated solicitation of sexual partners outside of the marriage directly subverted the marital relationship and demonstrated, at least, open insult and a plain manifestation of alienation and estrangement from his wife. The use of his minor daughter in soliciting sexual partners, his use of pornography over his wife's objection, and his use of a woman he met over the Internet to babysit the parties' daughter, which was also over his wife's objection, compounded that insult. If a gambling addiction constitutes a sufficient ground for a divorce pursuant to personal indignities, *see id.*, the husband's conduct in the instant case certainly does so. But for the governing law concerning corroboration of grounds in divorce proceedings, I would grant the wife's petition for rehearing.

CEDAR CHEMICAL COMPANY, Employer,
Zurich American Insurance Company, Crawford and Company,
Insurance Carrier, TPA, Death & Permanent Total Disability
Trust Fund *v.* Jimmy T. KNIGHT

CA 06-538 258 S.W.3d 394

Court of Appeals of Arkansas
Substituted Opinion on Denial of Rehearing June 6, 2007

Lawrence W. White, for appellants.

Charles P. Allen, for appellee.

ROBERT J. GLADWIN, Judge. This is an appeal from the March 14, 2006 decision of the Arkansas Workers' Compensation Commission (Commission) awarding benefits to appellee Jimmy T. Knight. The employer and insurance carrier appellants contend that no substantial evidence exists to support the Commission's decision that appellee sustained a compensable injury. We affirm the Commission's decision.

Facts

Knight is a fifty-five year old man who had been employed with appellant for about five years when he sustained his injury on July 1, 2001. Knight worked as a lead operator in Unit Six of the Cedar Chemical Company plant where he was required to perform various job duties involving the formulating and manufacturing of certain chemical products. Throughout his workday, Knight was required to walk up and down three flights of stairs. Knight testified that during the middle of May 2001, he hyperextended his left knee while walking up some stairs at work. He heard a pop in his knee and felt pain that extended up into his back. Knight claims he reported this to his supervisor, but told the supervisor at the end of the day that an accident report was not necessary because he did not feel any more pain. He testified that he did not miss any work because of the incident in May 2001.

On July 1, 2001, Knight began work at 6:30 a.m. and at 11:00 a.m he noticed pain in his left knee as he was walking down some stairs. He testified that he did not know the cause of the knee pain. He continued to work until 2:00 p.m., when he took a lunch break. After lunch, he had great difficulty walking because of the pain in his left knee. Knight sought medical treatment, and x-rays were taken of his left knee on July 2, 2001. The radiologist's opinion of the x-ray was as follows: "Features consistent with gout and/or osteoarthritis with evidence for calcification ligamentous structures with other features as described which may or may not be related to trauma. History is pain."

An MRI taken on July 3, 2001, revealed the following findings: "Probable complete disruption of the anterior cruciate ligament. Probable tear and maceration of the posterior horn of the medial meniscus." On July 5, 2001, Dr. John Wilson wrote, "The MRI revealed a posterior horn tear of the medial meniscus as well as an anterior cruciate tear. Mr. Knight needs an arthroscopy. He is scheduled for this."

On August 1, 2001, Dr. Frederick Azar wrote, "He did have an acute injury recently and I believe this has wakened his arthritis." Subsequently, Knight underwent left knee arthroscopy with Dr. Herbert Hahn on October 17, 2001. After surgery, Knight developed a postoperative sepsis of the left knee with staph aureus, which was treated with two surgical debridements and admission into the hospital from October 25, 2001, until November 19, 2001. Dr. Hahn wrote on October 16, 2002:

> In response to your inquiry dated September 12, 2002, I have reviewed the entire file. The acute injury of the torn medial meniscus that prompted Mr. Knight's surgery on 10-17-01 represents more than 50% of his current problem. It was also this surgery that precipitated the joint infection which is a great part of his current impairment. He will continue to require frequent visits to an orthopedist until such time as he undergoes total knee replacement surgery, and then he will continue to require management after that, all related to recent injury.

On January 7, 2005, a hearing was held before the administrative law judge (ALJ) to determine the compensability of Knight's claim arising out of the July 1, 2001, job injury. The ALJ found that Knight's injury was idiopathic in nature and as a result, Knight failed to prove by a preponderance of the evidence that he

sustained a compensable injury arising out of the course and scope of his employment on July 1, 2001. Knight appealed to the Full Commission, which filed an opinion on March 14, 2006, reversing the ALJ's decision. The Commission held that Knight's injury had resulted from a specific incident arising out of and in the course of his employment with the appellant. This appeal follows.

Statement of Law

In appeals involving claims for workers' compensation, our court views the evidence in a light most favorable to the Commission's decision and affirms the decision if it is supported by substantial evidence. *Death & Permanent Total Disability Fund v. Legacy Ins. Servs.*, 95 Ark. App. 189, 235 S.W.3d 544 (2006). Substantial evidence exists if reasonable minds could reach the Commission's conclusion. *Foster v. Express Pers. Servs.*, 93 Ark. App. 496, 222 S.W.3d 218 (2006). We will not reverse the Commission's decision unless we are convinced that fair-minded persons with the same facts before them could not have reached the conclusions arrived at by the Commission. *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). 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).

Ark. Code Ann. § 11-9-102(4)(A)(i) defines compensable injury as follows:

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

An idiopathic injury is one whose cause is personal in nature, or peculiar to the individual. *Swaim v. Wal-Mart Assoc., Inc.*, 91 Ark.

App. 120, 208 S.W.3d 837 (2005). Injuries sustained due to an unexplained cause are different from injuries where the cause is idiopathic. *Id.* Where a claimant suffers an unexplained injury at work, it is generally compensable. *Id.* Because an idiopathic injury is not related to employment, it is generally not compensable unless conditions related to the employment contribute to the risk of injury or aggravate the injury. *Id.*

Specific incident vs. idiopathic condition

Appellants argue that the Commission's finding that Knight's injury resulted from a specific incident as opposed to being an idiopathic condition that was personal to Knight was arbitrary and there was clear evidence in the record to the contrary. Appellants claim that Knight's own testimony makes it clear that his injury did not result from a specific incident when he stated, "I really don't know exactly when it happened." Appellants cite *Hapney v. Rheem Manufacturing Company*, 342 Ark. 11, 26 S.W.3d 777 (2000), for the proposition that if the claimant cannot specify the time and cause of an injury, then the injury is not compensable. The supreme court stated:

> In her second point, Hapney submits that her neck injury is compensable because the injury was caused by a specific incident and was identifiable by time and place of occurrence pursuant to Ark. Code Ann. § 11-9-102(4)(A)(i). This argument is meritless and can easily be dismissed. Section 11-9-102(4)(A)(I) defines a compensable injury as one "caused by a specific incident and . . . identifiable by time and place of occurrence." Hapney's own deposition testimony reflected that she did not know how she was injured and that she did not recall anything specific happening, nor did Hapney tell her treating physician that her pain was associated with any particular, specific incident. Thus, her own words belie her argument that the injury was caused by a specific, identifiable incident.

Id. at 16, 26 S.W.3d at 780.

Appellants claim that as in *Hapney*, Knight cannot remember how he was injured, and Dr. Azar's medical report of August 14, 2001, indicates that the left-knee injury did not result from a "specific incident." Further, Knight had previously injured his knee, just as the employee in *Hapney* had a previous injury to her shoulder and neck. Here, Knight had surgery on his knee related to

a sports injury about twenty years ago. Also, Knight suffered a hyperextended left knee in May 2001. Therefore, appellants argue that *Hapney* should dictate the result. And, as in *Hapney*, this court should find that Knight's injury was not caused by a specific incident.

Knight submits that *Hapney, supra*, can be distinguished from the facts in the instant case. In this case, there is uncontradicted evidence that he had to climb stairs regularly. Specifically, he noticed a pain in his left knee around 11:00 p.m. which continued to get worse. Further, there is no dispute that when he started his shift on July 1, 2001, he did not have any problems with his knee. When he ended his shift that day, he was barely mobile. He emphasizes that injuries sustained due to an unexplained cause are different from injuries where the cause is idiopathic. *Swaim, supra*. We agree with Knight's argument and hold that this case is distinguishable from *Hapney*. In the instant case, Knight knew the day and time of when his knee began to hurt. He reported the pain to his supervisor and sought medical treatment the next day.

Appellants claim that *Crawford v. Single Source Transportation*, 87 Ark. App. 216, 189 S.W.3d 507 (2004), relied upon by the Commission and the appellee, can be distinguished. In *Crawford*, the claimant was injured when he stepped out of his truck, down two steep steps, and onto an oil field. *Id.* As his foot reached the ground, appellant's knee "gave" or buckled. *Id.* As a result, appellant fell to the ground and began to feel pain in his knee. *Id.* The court held that the work conditions contributed to the injury and found the injury to be compensable and not idiopathic. Appellants argue that in the instant case, there was no danger that existed to contribute to Knight's risk of injury. Appellants contend that occasionally utilizing stairs cannot be considered to increase the risk of injury as is contemplated by the law.

Appellants cite *ERC Contractor Yard & Sales v. Robertson*, 335 Ark. 63, 977 S.W.2d 212 (1998), where the supreme court held the risk of injury accompanied with working high atop the scaffolding increased the effects of the fall and thus made the injury compensable. Appellants claim that in the instant case, the stairs in Unit Six do not increase the risk of injury so as to make Knight's idiopathic injury compensable. Appellants claim that *Crawford* is also distinguishable in that the claimant's knee gave way when he put his foot on the ground. Here, Knight testified that he could not recall a specific incident such as a hyperextension, popping or

jamming of his knee. Therefore, appellants assert that the Commission incorrectly applied the case law.

Appellants claim that *Whitten v. Edward Trucking/Corporate Solutions*, 87 Ark. App. 112, 189 S.W.3d 82 (2004), is factually closer to the instant case than is *Crawford*. In *Whitten*, the employee walked up a set of stairs to his employer's office to turn in various trucking receipts. *Id.* at 115, 189 S.W.3d at 84. When he reached for the door, he felt pain in his back and fell to the ground. *Id.* The Commission found that appellant's fall was idiopathic and affirmed the ALJ's opinion, which stated that appellant had been diagnosed as suffering from three separate conditions, none of which were caused or aggravated by appellant's employment. *Id.* The employee had suffered a stroke in the past, a herniated disc at the L3-4 level he discovered more than a year prior to the fall, and a compressive lesion on his thoracic spinal chord. *Id.* This court affirmed the Commission, holding further that appellant's employment did not contribute to his accident because he was simply ascending stairs. *Id.* at 116, 189 S.W.3d at 84. We held that the fall was idiopathic, but not compensable because no evidence suggested that his employment contributed to his fall. *Id. Whitten* can be distinguished from the instant case in that an integral part of Knight's employment involved ascending and descending several sets of stairs. Further, Whitten suffered three separate conditions, any one of which could have caused his fall. Here, Knight had no conditions that could have led to his knee injury, other than the hyperextension of his left knee that he suffered at work in May 2001. That injury did not cause Knight to miss any work.

Knight claims that *Crawford* should control. Knight argues that at the time of his injury, he had been working twelve-hour shifts and was required to ascend and descend three flights of stairs throughout the day. He claims that the record is clear that his wife testified that when he left to go to work on July 1, 2001, he was not having any problems. However, when he arrived home that day, she noticed he was in acute distress.

The Commission found his and his wife's testimony credible regarding the circumstances and facts surrounding his injury. Dr. Hahn opined on October 16, 2002, that Knight's torn medial meniscus was related to his recent injury. Based on this evidence, Knight claims that the Commission's decision is supported by substantial evidence. We agree, and accordingly, we affirm the Commission's decision.

Affirmed, and the motion for rehearing is denied.

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

ROBBINS and BIRD, JJ., dissent.

JOHN B. ROBBINS, Judge, dissenting. I fully agree with the majority's analysis and discussion of this appeal, except, however, for its failure to address our recent decision in *Weaver v. Nabors Drilling USA*, 98 Ark. App. 161, 253 S.W.3d 30 (2007). While I disagreed with the majority's opinion when *Weaver* was decided, that decision was published and is now precedent. Although *Weaver* had not been decided on March 7, 2007, when we delivered our initial opinion in the instant case, a timely petition for rehearing was filed and I do not think that we now may, or should, ignore its existence.

Because I believe that *Weaver,* which decision is discussed in Judge Bird's dissent, requires a reversal of this appeal, I would grant rehearing.

SAM BIRD, Judge, dissenting. I would grant appellants' petition for rehearing and would reverse the Commission's finding that this claim is compensable. I believe that this court has erred as a matter of law and fact in upholding the Commission's finding that Knight sustained a compensable specific-incident injury rather than a noncompensable idiopathic injury.

A pre-hearing order reflects that Knight abandoned an alternate claim for a gradual-onset injury and contended only that he suffered a compensable injury to his left knee on July 1, 2004. Cedar Chemical responded that Knight did not sustain a specific trauma associated with his employment and that any injury he did sustain was not the major cause of his condition. The Commission found that the employment conditions of repeatedly walking up and down the stairs contributed to Knight's knee injury. Also noting a doctor's opinion that Knight's "torn medial meniscus resulted from his recent work injury" and finding Knight's testimony credible that his knee pain began while descending the stairs at around 11:00 a.m., the Commission found that the injury was not personal in nature and did not result from his degenerative disease, but was a specific-incident workplace injury arising out of and in the course of employment. This court has affirmed the Commission's opinion.

I believe that it is incongruous with our case law to classify Knight's onset of pain around 11:00 a.m. while walking down

stairs as a specific-incident injury. Arkansas Code Annotated § 11-9-102(4)(A)(i) (Repl. 2005) defines compensable injury as "an accidental injury causing internal or external physical harm . . . arising out of and in the course of employment . . . . An injury is 'accidental' only if it is caused by a specific incident and is identifiable by time and place of occurrence." The phrase "arising out of the employment" refers to the origin or cause of the accident, while the phrase "in the course of the employment" refers to the time, place, and circumstances under which the injury occurred. *Swaim v. Wal-Mart Assocs., Inc.*, 91 Ark. App. 120, 208 S.W.3d 837 (2005).

In *Crawford v. Single Source Transportation*, 87 Ark. App. 216, 189 S.W.3d 507 (2004), the claimant stepped down from an elevated position in his truck, his knee buckled, he fell, and he experienced immediate pain and rapid swelling; his twisting/flexion knee injury was a specific-incident injury and, because employment conditions contributed to the injury, it could not be considered a noncompensable idiopathic injury. In *Swaim v. Wal-Mart, supra*, the claimant felt his foot pop while he was pulling a heavy pallet; the resulting fracture was a compensable specific-incident workplace injury rather than a noncompensable idiopathic injury. In *ERC Contractor Yard & Sales v. Robertson*, 335 Ark. 63, 977 S.W.2d 212 (1998), where the supreme court affirmed the Commission's finding of a compensable idiopathic fall, there was evidence of a specific incident of trauma when the claimant fell from scaffolding while he was working on a building demolition.

Conversely, in *Hapney v. Rheem Manufacturing Co.*, 342 Ark. 11, 26 S.W.3d 777 (2000), no specific incident occurred where the claimant did not know how her neck was injured, did not recall anything specific happening, and did not tell her treating physician that her pain was associated with any particular, specific incident.[1] In *Weaver v. Nabors Drilling USA*, 98 Ark. App. 161, 253 S.W.3d 30 (2007), we upheld the Commission's finding of no specific incident although medical records stated that the claimant was at work when he first felt symptoms in his hands, he testified that his hands tingled and burned while he was "mixing mud" at work and lifting and carrying a mud sack, and no one denied that he identified the approximate time and date when he first noticed the symptoms at

[1] Hapney's cervical injury was compensable as a rapid repetitive motion injury under Arkansas Annotated Code section 11-9-102(4). *See id.* at 17, 26 S.W.3d at 780 (summarizing evidence that she bent her neck more than three times a minute during her ten-hour shift on the assembly line).

work. Noting the Commission's province to determine credibility, we wrote: "He could have easily injured himself the day before, weeks before, or during his 1995 fall. . . . He only proved that he had [a neck] injury and that he felt pain while at work — he failed to show that a specific incident occurred at work." *Id.* at 163, 253 S.W.3d at 32.

In my view, it is an error of law and fact to hold that Knight's experiencing knee pain around 11:00 a.m. while descending the stairway was a specific incident of trauma when there was no accidental event or apparent cause of injury occurring at the workplace to cause his pain. Testimony regarding the time, place, and circumstances of Knight's pain and swelling goes to "the course of employment" but does not satisfy the additional statutory requirement that an injury is "accidental" only if it is caused by a specific incident. The evidence simply does not identify a specific incident such as the ones in *Crawford v. Single Source Transportation, Swaim v. Wal-Mart,* or *ERC Contractor Yard & Sales v. Robertson.* Today our court holds that the onset of pain, rather than being the result of a specific incident, constitutes the specific incident itself. I believe this to be an error of law.

Furthermore, this court's review of evidence supporting the Commission's decision fails to acknowledge a factual error by the Commission. The medical record in this case, which is included in the addendum to Knight's brief, shows that Dr. Hahn opined "that Knight's torn medial meniscus was related to his recent injury." This court presents Dr. Hahn's words from the medical record as evidence that supports the Commission's decision. The Commission's reference to his opinion, however, includes a factual error:

> In a letter dated October 16, 2002, Dr. Hahn opined that the claimant's torn medial meniscus resulted from his *recent work injury.*
>
> Considering Dr. Hahn's expert opinion and in light of the claimant's credible account of the incident, the Full Commission finds that there is insufficient evidence to support a finding that the injury suffered by the claimant was personal in nature, as it was caused while descending the steps of his unit.

(Emphasis added.) Clearly, the word "work" does not appear in Dr. Hahn's actual statement that Knight's condition was "related to recent injury."

This court fails to acknowledge that the Commission cited a medical opinion that does not exist, a factual error that I believe

requires at least that this case be remanded for proper consideration of Dr. Hahn's opinion. The Commission and this court also fail to acknowledge Dr. Azar's notation of August 14, 2001, that Knight reported significant knee pain after climbing the stairs at work but had "no specific injury" and that his x-rays showed the presence of "tricompartmental degenerative changes." Thus, our opinion contains errors of fact.

I do not agree that Knight's injury differs significantly from that in *Whitten v. Edward Trucking*, 87 Ark. App. 112, 189 S.W.3d 82 (2004), the case in which we affirmed the Commission's decision that a truck driver suffered a noncompensable idiopathic fall. Whitten was walking up stairs to his employer's office, reached for the door, felt pain in his back, and fell; he neither tripped nor stumbled, nor was he carrying anything heavy. The Commission found that he was not engaged in a work-related activity at the time of the fall, that there was insufficient evidence of an employment risk as the cause of injury, and that the fall was idiopathic, stemming from one or more of three diagnosed medical conditions. Here, there was evidence that there were degenerative changes in Knight's knee, that Knight had previously undergone knee surgery, and that he had recently hyperextended his knee, any or all of which could have caused the symptom of pain that occurred while he was walking on the stairway.

Again, the evidence is insufficient to support a finding that Knight's injury was caused by a specific incident and that it arose out of his employment. I would reverse the finding of specific-incident injury and would find that an idiopathic injury occurred. In the absence of a specific injury, it was Knight's burden to prove that his idiopathic injury was compensable within our workers' compensation law. I would remand this case to the Commission with instructions that it consider all relevant evidence, including employment conditions and Knight's medical history, for determination of the compensability of the idiopathic injury.

For the reasons stated above, I dissent to the denial of the petition for rehearing.

Charles Grant DAVIS II *v.* STATE of Arkansas

CA CR 06-1367 258 S.W.3d 401

Court of Appeals of Arkansas
Opinion delivered June 6, 2007

[Rehearing denied August 1, 2007.]

Lisa D. Davis, for appellant.

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

JOHN B. ROBBINS, Judge. Appellant Charles Grant Davis II entered a conditional guilty plea to possession of marijuana with intent to deliver, reserving in writing his right to appeal from the trial court's denial of his motion to suppress in accordance with Ark. R. Crim. P. 24.3(b). He was sentenced to eighteen months in prison, followed by a three-year suspended imposition of sentence. On appeal, Mr. Davis argues that the marijuana seized by the police should have been suppressed because the search of his vehicle was unreasonable, and thus violated the Fourth Amendment of the United States Constitution as well as article 2, § 15 of the Arkansas Constitution. We affirm.

Officer Jeff Bradish of the Clay County Sheriff's Department testified for the State. At about 6:00 p.m. on April 8, 2003, Officer Bradish received information that a car was traveling toward Clay County on Highway 67 at a speed of around 100 miles per hour. Officer Bradish subsequently located a vehicle matching the de-

scription given and he followed the car, pacing it at 60 miles per hour. The speed limit was 55 miles per hour, and Officer Bradish conducted a traffic stop for exceeding the speed limit. Officer Bradish was accompanied by another officer in his patrol car, and he also called for backup, which arrived soon thereafter.

Upon approaching the stopped car, Officer Bradish noticed a temporary license tag in the rear window that was issued from McAllen, Texas. He made contact with Mr. Davis, who was driving the car and stated that he was coming from San Antonio, Texas, and driving to his grandmother's funeral. According to Officer Bradish, Mr. Davis stated that he had wrecked his truck and had to rent a car, and that he was heading to Michigan where he would pick up his sister and then drive to the funeral in West Virginia on the following day. Mr. Davis advised that he had dropped off a friend earlier at a bus station in Dallas, Texas, but declined to give the friend's name. Mr. Davis presented a valid Michigan driver's license and a rental agreement. Mr. Davis asked Officer Bradish "if [he] could get on with it because he was in a hurry," and Officer Bradish said he could and asked Mr. Davis to come back to the patrol car.

After exiting the vehicle at the officer's request, Mr. Davis locked the car doors. Officer Bradish thought this was unusual, and Mr. Davis explained that when he gets out of his car he locks the doors out of habit. Officer Bradish asked for consent to search the car, and Mr. Davis refused. Officer Bradish stated that it would not take long for the other officer to conduct a search, but Mr. Davis again refused. Officer Bradish testified:

> I then stated I had a dog with me. I advised him I was a Canine Officer and I had my partner in the rear of the car and pointed back and showed him. He said that was fine, he had already been through two check points and had a dog run twice. I asked where and he said at the border patrol check point a dog went around his car. He explicitly said the dog went around his car three times at the bus station in Dallas. I said okay and we had a seat in my car. Mr. Davis said "go ahead and use your dog, I've been through two check points with dogs already."

While the two men sat in the patrol car, Officer Bradish ran background checks for warrants or violations, which came back clear. Officer Bradish then placed appellant's driver's license above the visor on the driver's side of the patrol car, and advised Mr.

Davis to step out of the car for a weapons search. During a pat down of Mr. Davis, Officer Bradish did not find any contraband but did find a large amount of cash. Officer Bradish then walked his canine along the side of appellant's car, and the dog alerted by aggressively scratching on the back passenger door. Officer Bradish retrieved appellant's keys and unlocked the car, and a subsequent search uncovered eight bricks of marijuana concealed in a backpack on the right rear floorboard.

Officer Bradish testified that he did not cite Mr. Davis for speeding, but that at the time he ran his dog along Mr. Davis's car he had not yet decided whether or not to write him a speeding ticket. Officer Bradish further testified that about eight minutes elapsed from the time he initiated the traffic stop until the dog alerted.

On appeal, Mr. Davis does not challenge the legality of the traffic stop. However, he argues that the search was illegal because it was based on the canine sniff, which occurred after the purpose of the traffic stop had been completed.

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 on the vehicle's registration and the driver's license and criminal history, and the writing up of a citation or a warning. *Sims v. State*, 356 Ark. 507, 157 S.W.3d 530 (2004). 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.* However, after those routine checks are completed, unless the officer has a reasonable articulable suspicion for believing that criminal activity is afoot, continued detention of the driver may become unreasonable. *Id.*; *United States v. Mesa*, 62 F.3d 159 (6th Cir. 1995). In the absence of a reasonable, articulable suspicion of some drug-related criminal activity, once the purpose of the traffic stop is completed, the operator of the vehicle should be allowed to proceed on his way, without being subject to further delay by police for additional questioning. *See Sims v. State, supra*; *United States v. Wood*, 106 F.3d 942 (10th Cir. 1997).

In the present case, Mr. Davis maintains that the purposes of the initial traffic stop were completed after the background checks came back clear. However, instead of returning Mr. Davis's driver's license and issuing a citation or warning, Officer Bradish

placed the driver's license above his sun visor and continued the detention by running his canine. Because the purposes of the stop were completed, and there was no reasonable suspicion of any criminal activity at that point, Mr. Davis argues that the subsequent search of his vehicle violated his constitutional rights and that the marijuana should have been suppressed.

In reviewing the denial of a motion to suppress evidence, we conduct a de novo review based on the totality of the circumstances, reviewing findings of historical facts for clear error and determining whether those facts give rise to reasonable suspicion or probable cause, giving due weight to inferences drawn by the trial court. *Simmons v. State*, 83 Ark. App. 87, 118 S.W.3d 136 (2003). Based on our review of the totality of the circumstances in this case, we hold that the trial court committed no error in denying Mr. Davis's motion to suppress on the basis that the traffic stop was not completed at the time that the canine sniff was conducted.

The testimony of Officer Bradish revealed that although he made no specific request to do so, Mr. Davis encouraged Officer Bradish to "go ahead and use your dog" well within the time limits of the traffic stop. Consequently, Mr. Davis consented to an extension of the traffic stop for the canine sniff before the purposes of the stop had been completed. Therefore, the canine alert and subsequent search were lawful.

Affirmed.

PITTMAN, C.J., and HEFFLEY, J., agree.

William Ray PITTMAN *v.* STATE of Arkansas

CA CR 06-1120 258 S.W.3d 408

Court of Appeals of Arkansas
Opinion delivered June 6, 2007

Leah Lanford, Christian Legal Service, for appellant.

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

DAVID M. GLOVER, Judge. Appellant, William Pittman, was tried by a jury and found guilty of the offenses of first-degree terroristic threatening, third-degree domestic battery, possession of a controlled substance, and possession of drug paraphernalia. For his sole point of appeal, appellant contends that the trial court erred in denying his motion to suppress the evidence that was obtained from his truck. We affirm.

Appellant was arrested on February 27, 2005, inside the apartment of his ex-wife, who had reported to police that she had been raped and held at knife-point in the apartment by appellant, that he had finally fallen asleep in her apartment, and that she wanted them to come get him. The police arrived, arrested appellant, and removed him from the premises. The criminal

information that was filed against appellant charged him with 1) first-degree terroristic threatening in that he allegedly threatened to kill his victim while pressing the blade of a knife into her right side; 2) first-degree false imprisonment in that he allegedly forcibly restrained her in her apartment and would not allow her to leave; 3) rape in that he allegedly engaged in sexual intercourse with her against her will by holding a knife at her throat and threatening to kill her; 4) third-degree domestic battery in that he allegedly repeatedly hit and kicked her, causing minor injuries; 5) possession of a controlled substance; and 6) possession of drug paraphernalia.

Appellant's vehicle was parked in front of the victim's apartment. His name was not on the lease of any apartment in the complex. The officers decided to impound appellant's vehicle because, as Sergeant Randall Gilbert testified at the suppression hearing, the nature of appellant's offenses against his ex-wife were violent, appellant did not reside at the apartment complex, and Sergeant Gilbert did not want appellant to have any excuse to return to the apartment complex. During the inventory of the truck, the officers discovered what was later confirmed to be a rock of crack cocaine and a crack pipe.

Rule 12.6(b) of the Arkansas Rules of Criminal Procedure provides:

> (b) 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 safe-keeping of the vehicle and its contents.

Appellant contends that there was no evidence in the instant case to support a finding that his vehicle needed safeguarding, that it posed a public-safety hazard, or that it contained any evidence related to the crimes with which he was charged. Consequently, he argues that it was not reasonably necessary for the officers to impound the vehicle and to conduct an inventory search for safekeeping of the contents, and that, therefore, the motion to suppress the evidence recovered from the vehicle should have been granted.

We do not find appellant's argument convincing. Rather, we find the rationale of *Folly v. State*, 28 Ark. App. 98, 771 S.W.2d 306 (1989) persuasive. In *Folly*, the appellant argued that the inventory search, which was conducted on a motel parking lot,

was not justified because his vehicle was not abandoned in a place where it created a traffic hazard. We explained that the fact that a vehicle is legally parked does not necessarily negate the need to take the vehicle into protective custody. We quoted with approval from a Fifth Circuit Court of Appeals case, *United States v. Staller*, 616 F.2d 1284 (5th Cir. 1980), which explained that even though a vehicle was lawfully parked and presented no apparent hazard to public safety, cars parked overnight in a mall parking lot run an appreciable risk of vandalism or theft — a fact known to the officers in that case. Accordingly, the court determined that under those circumstances, taking custody of the car was a legitimate exercise of what the court termed the officer's "community caretaking function."

Here, the trial court determined that Sergeant Gilbert's explanation for his decision to impound appellant's vehicle was reasonable, and we agree. The violent nature of appellant's attack on his ex-wife justified Gilbert's desire to eliminate any justifiable reason for appellant to return to his ex-wife's apartment complex. There was no indication that Gilbert's action was taken in bad faith. The unrefuted testimony of Sergeant Gilbert was that it was taken in accordance with standard police procedures. Consequently, we hold that Gilbert's explanation represented "other good cause" under Rule 12.6(b) of the Arkansas Rules of Criminal Procedure, that his action constituted an exercise of the officer's community caretaking function, and therefore that the trial court did not err in refusing to suppress the evidence obtained from appellant's truck.

MARSHALL, VAUGHT, and HEFFLEY, JJ., agree.

BAKER and MILLER, JJ., dissent.

KAREN R. BAKER, Judge, dissenting. I disagree with the majority's conclusion that the "other good cause" provision included in Rule 12.6(b) of the Arkansas Rules of Criminal Procedure creates a constitutionally permissible good-faith exception to the requirement that a warrant be obtained prior to a government seizure of a citizen's property. The police officer in this case stated that he seized appellant's vehicle because he thought that it was best for the victim to remove any excuse for appellant to return to the apartment complex where the victim resided. Specifically, the officer testified:

> Due to the violence of the crime that he was arrested for, I felt that to remove his vehicle would be best for the victim, left him no reason to go back to that complex, and his name is on no lease of any apartment at that complex.

I do not doubt the officer's sincerity; however, whether the officer acted in good faith in seizing the vehicle is not the issue in this case. The issue is whether the officer's seizure of the vehicle because he "felt . . . [it] would be best for the victim" was a legitimate exercise of the officer's authority under Rule 12.6(b) of the Arkansas Rules of Criminal Procedure.

The problem lies in the government's seizure of appellant's truck rather than the subsequent inventory search. The majority's reliance upon Rule 12.6(b) for affirmance fails for two reasons. First, as the majority acknowledges, the vehicle was not impounded in consequence of an arrest. Second, the alternative to impoundment upon arrest provides that a vehicle "retained in official custody for other good cause" may be searched. It is clear under these facts that appellant's truck was not in official custody until it was seized and the seizure did not occur as a consequence of appellant's arrest. Appellant had driven his truck to the complex and left it in the parking lot the previous day. Appellant was arrested in the victim's apartment and transported in police custody from the premises. Accordingly, no action on behalf of law enforcement placed the truck in the apartment's parking lot, and the police incurred no corresponding obligation to safeguard the vehicle. The majority is mistaken when it reasons that the seizure of the truck "to eliminate any justifiable reason for appellant to return to his ex-wife's apartment complex . . . represented 'other good cause' under Rule 12.6(b)" and "that his action constituted an exercise of the officer's community caretaking function." Until the department seized the vehicle, after appellant's removal from the premises, the truck was not in police custody; therefore, it could not be *retained* in official custody for other good cause. The majority substitutes the word "taken" for "retained." That substitution changes the meaning of the rule.

Furthermore, the majority's error in substituting the concept of retention with a taking is compounded by the majority's misapplication of the "other good cause" provision. The majority accepts that the reason for the officer's impounding the vehicle was because he "did not want appellant to have any excuse to return to the apartment complex." It may be admirable, if naive, for a law

enforcement officer to believe that removing a conceivable excuse for an accused to return to the vicinity of the victim's residence will thwart future harm. However, to excuse the seizure of a vehicle by finding that law enforcement may seize property without a warrant for some imagined contingent is contrary to fundamental due process. The majority condones the seizure of a vehicle where the owner of the vehicle was arrested in an apartment after leaving the vehicle legally parked the day before, where appellant was nowhere near the vehicle when arrested, where he gave no consent to have the vehicle searched, where there was no nexus between the vehicle and the criminal conduct upon which the arrest was based or any other crime, where there was no objective basis to believe that the vehicle posed a threat to the public or to the officers, and where there was no reason to believe that the search was necessary to safeguard the vehicle or its contents. *See Knowles v. Iowa*, 525 U.S. 113 (1998); Ark. R. Crim. P. 12.1; Ark. R. Crim. P. 12.4; Ark. R. Crim. P. 12.6.

The majority's attempted analogy to *Folly v. State*, 28 Ark. App. 98, 771 S.W.2d 306 (1989) is misplaced because the vehicle in *Folly* was impounded from a motel parking lot after officers lawfully stopped and arrested the driver. The action of the law enforcement officers caused the vehicle to be parked in the motel parking lot; therefore, it was reasonable for the officers to assume responsibility for safeguarding the vehicle and its contents. In contrast, the majority in this case acknowledges that the seizure of appellant's truck was not incident to the arrest.

Neither does the majority's reliance on *United States v. Staller*, 616 F.2d 1284 (5th Cir. 1980), support the seizure. The seizure of the vehicle in *Staller* was made after law enforcement made an arrest in the parking lot of a shopping mall resulting in the abandonment of the vehicle driven by the individual taken into custody. The court reasoned:

> In this case the automobile's owner, who was from out of state, had just been arrested for passing counterfeit money and taken to jail. The owner had no friend or relative available to take care of the car, as his only travelling companion had also been arrested. The officers who made the arrest had every reason to expect that appellants would be separated from their vehicle for an extended period of time. Although Saunder's vehicle was lawfully parked and presented no apparent hazard to public safety, the officers were aware that a car parked overnight in a mall parking lot runs an

> appreciable risk of vandalism or theft. The likelihood of such harm would increase with every passing day. Under these circumstances taking custody of Saunder's car was a legitimate exercise of the arresting officer's community caretaking function. Once the officers took custody of the car, they were required by police department regulations to inventory its contents.

Staller, 616 F.2d at 1289-90 (1980) (footnotes omitted).

"Before the need for a legitimate inventory search can arise the police must have the right to take custody of the vehicle." *United States v. Nelson*, 511 F. Supp. 77, 81 (W.D. Tex. 1980) (citing *Staller*, 616 F.2d at 1289); *see also Mounts v. State*, 48 Ark. App. 1, 888 S.W.2d 321 (1994) (holding that where officers lacked probable cause to arrest for driving under a suspended or revoked driver's license officers were precluded from inventorying impounded vehicle in which 130 pounds of cocaine were discovered). As discussed above, this vehicle was not impounded in consequence of an arrest. Even if it had been, there was no testimony that would establish that the vehicle or its contents needed safeguarding due to the location or manner in which it was parked. *Cf. Stephens v. State*, 342 Ark. 151, 28 S.W.3d 260 (2000) (affirming a search incident to arrest for hot-check charges where the defendant was arrested at a grocery store). Thus, the fact that the vehicle was located on an apartment complex parking lot did not justify the seizure of the vehicle in this case.

The majority is further misapplying the safekeeping functions of law enforcement regarding an officer's duty and responsibility to a citizen taken into custody from his vehicle. Police officers may conduct a warrantless inventory search of a vehicle that is being impounded in order to protect an owner's property while it is in the custody of the police, to insure against claims of lost, stolen, or vandalized property, and to guard the police from danger. *Colorado v. Bertine*, 479 U.S. 367 (1987); *see also Welch v. State*, 330 Ark. 158, 955 S.W.2d 181 (1997). The cases relied upon by the majority are consistent with these caretaking duties because the vehicle in each case came into possession of the authorities through some legitimate police function. However, none of our previous applications of this safekeeping function apply in this case. The majority makes no attempt to validate the officer's seizure of the vehicle by relating the taking to any of our previously recognized justifications. A review of the cases reveals that police were justified in *retaining* custody of the vehicle that came

into police possession by virtue of the driver being taken into police custody resulting in the vehicle being stopped or abandoned in a public place. *See, e.g.*, *Asher v. State,* 303 Ark. 202, 795 S.W.2d 350 (1990) (affirming inventory search of vehicle where driver was removed from the accident scene in semi-conscious state); *Cooper v. State*, 297 Ark. 478, 763 S.W.2d 645 (1989) (affirming inventory search of vehicle where narcotics suspect fled scene after attempting to shoot officer); *Colyer v. State*, 9 Ark. App. 1, 652 S.W.2d 645 (1983) (affirming inventory search where the driver, a transient, was arrested on outstanding warrants and for being drunk on the highway, and where the vehicle lacked a license and was stuck in mud).

Other times, the vehicles came into police custody through the safekeeping function of reclaiming stolen property, *see Lipovich v. State,* 265 Ark. 55, 576 S.W.2d 720 (1979) (affirming inventory search where the vehicle, reported as stolen, was found abandoned and was a hazard on a public highway), or through investigation of traffic accidents. *Bratton v. State*, 77 Ark. App. 174, 72 S.W.3d 522 (2002) (affirming inventory search of a vehicle that had been involved in accident and left disabled on road after the defendant had been transported to hospital).

Inventory searches have also been affirmed where the search of the vehicle is related to the alleged criminal activity. *Chambers v. Maroney*, 399 U.S. 42 (1975) (affirming where the police had probable cause to believe that the robbers, carrying guns and fruits of crime, had fled the scene in the vehicle that was impounded and searched at the station house); *Lewis v. State*, 258 Ark. 242, 523 S.W.2d 920 (1975) (affirming the warrantless search of an automobile where the search was closely related to reason defendant was arrested, the reason the automobile was impounded, and the reason it was being retained); *cf. Goodwin v. State*, 263 Ark. 856, 568 S.W.2d 3 (1978) (reversing the warrantless seizure of a truck because the defendant was arrested for transporting controlled substances and there was no evidence that the particular truck had been used to transport controlled substances).

We do not affirm a warrantless search and seizure without a clear demonstration of an exception to the warrant requirement:

> As a general rule, searches conducted outside the judicial process, without prior approval by a judge or magistrate, are per se unreasonable under the Fourth Amendment. This rule is subject to a few specifically established exceptions, and those who seek to prove an

> exception must demonstrate that the exigencies of the situation made that course imperative. The burden is on the party claiming the exception, the State, to establish an exception to the warrant requirement and to show its need.

Izell v. State, 75 Ark. App. 377, 382, 58 S.W.3d 400, 403 (2001) (citations omitted).

In *Izell*, we reversed a warrantless search of defendant's vehicle after defendant was arrested holding that the search did not fall within an exception as a warrantless search since there was no legitimate basis for the officer's decision to inventory and tow defendant's vehicle over the defendant's objections, no probable cause existed to assume that the vehicle was related to any criminal activity; and the vehicle was, in fact, unrelated to the defendant's arrest, and the vehicle was not likely to be in danger of tampering or serve as a hazard to public safety.

The facts in this case, like the facts in *Izell*, cannot support the finding that the police had a legitimate reason to take the vehicle into custody that would in turn support the inventory search. I cannot agree with the majority's conclusion that the seizure of appellant's vehicle complied with constitutional and procedural safeguards. As discussed above, none of our previously recognized exceptions are present in this case. Nor can I agree with the majority's statement that the "unrefuted testimony of Sergeant Gilbert was that [appellant's vehicle] was taken in accordance with standard police procedures." The record contains no reference to any procedures of the El Dorado Police Department setting forth standard police procedures to take a citizen's vehicle. Even if the department had a manual setting forth the proper procedures to follow in order to seize a citizen's vehicle without a warrant, neither the manual nor reference to it is included in the record.

There was, however, evidence that the inventory search of the vehicle was done in accordance with the standard procedures established by the department to be followed after a vehicle was impounded. The evidence supports the conclusion that these inventory procedures were followed by Sergeant Gilbert. Nevertheless, the compliance with inventory procedures cannot legitimize the initial seizure of the vehicle. Neither can adherence to established inventory procedures justify an inventory conducted as the result of the unlawful seizure of the vehicle. As this court explained in *Mounts, supra*, a vehicle may be impounded and

inventoried only as the consequence of a *legal* arrest; if an arrest was illegal, an inventory of the vehicle would also be improper. *Mounts*, *supra* (emphasis added).

Warrantless seizures and searches are per se unreasonable under the Fourth Amendment. *See Izell*, *supra*. Rule 12.6(b) and our precedents applying the rule create no exception to the warrant requirement. Under the facts of this case, the seizure of appellant's vehicle was unreasonable and unlawful; consequently, there could be no lawful inventory of the vehicle's contents. Accordingly, I dissent.

MILLER, J., joins.

Virginia P. BAILEY *v.* Marilyn McROY

CA 06-878 258 S.W.3d 388

Court of Appeals of Arkansas
Opinion delivered June 6, 2007

Watts, Donovan & Tilley, P.A., by: *Karen J. Hughes* and *Staci Dumas Carson*, for appellant.

Wilson, Walker & Short, by: *Charles M. Walker*, for appellee.

DAVID M. GLOVER, Judge. In the early-morning hours of July 15, 2000, appellant, Virginia Bailey, and appellee, Marilyn McRoy, were involved in a two-vehicle accident. The wreck occurred at a large, well-lit, intersection that was controlled by a traffic light at approximately 1:30 a.m. Bailey was following an ambulance that was transporting her son to the hospital after he suffered an ATV accident; McRoy was on her way to pick up her husband from work. McRoy filed a lawsuit against Bailey, alleging that as a direct and proximate result of Bailey's negligence, McRoy's vehicle was damaged and she suffered injuries to her back and hips. McRoy further alleged that as a result of those injuries she suffered permanent bodily impairment, physical pain, suffering and mental anguish, and will continue to do so in the future. The jury returned a general verdict, finding for Bailey.

McRoy's attorney made an oral motion for judgment notwithstanding the verdict, which was denied. McRoy then filed a motion for new trial, alleging that the verdict was clearly contrary to the preponderance of the evidence. Bailey filed a motion to recover costs pursuant to Rule 68 of the Arkansas Rules of Civil Procedure. The trial judge granted McRoy's motion for a new trial, and in light of that decision, denied Bailey's motion for costs. Bailey now appeals, arguing that the trial judge erred in granting a new trial and in denying her motion for costs. We find merit in both of these arguments, and we reverse and remand this case for entry of orders consistent with this opinion.

Our supreme court set forth our appellate standard of review for motions for new trial in *Razorback Cab v. Martin*, 313 Ark. 445, 446-47, 856 S.W.2d 2, 3 (1993) (citations omitted):

> The law affecting the granting of a new trial and appellate review of that decision is settled. A trial court may not substitute its view of the evidence for that of the jury and grant a new trial unless the verdict is clearly against the preponderance of the evidence. The test we apply on review on the granting of the motion is whether the trial court abused its discretion. A showing of abuse is more difficult when a new trial has been granted because the party opposing the motion will have another opportunity to prevail. In *Worthington v. Roberts*, [304 Ark. 551, 803 S.W.2d 906 (1991)], we noted that "abuse of discretion in granting a new trial means a discretion improvidently exercised," *i.e.*, exercised without due consideration.

At trial, McRoy testified that about a hundred feet before the intersection where the accident occurred, she had slowed down to cross the railroad track; she saw that she had a green light, and approached the intersection slowly. McRoy said that she realized that she had been hit "about the time I went through that green light." She testified that she did not see anyone approaching the intersection, and she did not see an ambulance. She stated that she got hit and then she was "just spinning," turning twice and ending up on the other side of the intersection. McRoy said that Bailey came up to her and that she was upset because Bailey was headed to the hospital. McRoy said that she asked Bailey not to leave her, but that the police came and Bailey left. McRoy said that after her husband arrived, he helped her get out of the car and that she had to crawl to the other side to get out because she could not get out on the driver's side.

McRoy testified that she went to the hospital about 3:00 a.m. because she was hurting. She was x-rayed and given pain medication because her shoulder and lower back were hurting. McRoy saw her physician, Dr. Goins, three days later.

McRoy further testified that she had been involved in another car accident, in which she was rear ended, six or seven months prior to the accident with Bailey. She said that after the first accident, her chief complaints were her neck and upper back, as well as some headaches. She denied that she had any complaints about her lower back after the first accident.

McRoy said that her major complaints after the second accident were her lower back and shoulder. She said that Dr. Goins

sent her to Dr. Pearce for her shoulder. She stated that after six months of treatments, she was still having problems with her shoulder, left arm, and hand, and that she could still not lift her children because she had no grip in her left hand.

McRoy testified that Dr. Goins sent her to Dr. Russell in Little Rock for her lower back problems; that she saw him for over a year and a half; and that he helped her. She said that Dr. Russell prescribed a back brace for her and that she wears it all the time, except sometimes at night. She stated that she understood that she might have to have surgery for her lower back. McRoy said that she had already incurred medical expenses of more than $9000.

On cross-examination, McRoy was questioned about inconsistencies between her testimony in the present trial and in prior recorded statements, depositions, and testimony she had given. She did not recall giving a recorded statement on March 7, 2002, in which she asserted that she had been released from the 1999 accident and was not seeing a doctor when the second accident occurred. She did recall that someone took her deposition on November 17, 2003, but she said that she did not recall saying that the therapy for her neck was from the first wreck. However, her deposition indicated that McRoy said that she had physical therapy for her neck as a result of the first wreck. Her deposition also revealed that McRoy had stated that she had injured her low back in the second accident and no other part of her body. McRoy denied having a low-back injury prior to her second accident, and she denied that she had told Dr. Goins about any prior back problems. She also admitted that she had not told Bailey's attorneys about a 1995 incident where she went to the doctor for a low-back injury after she fell down some stairs; she denied that she had an injury but only went to the doctor because she was pregnant and wanted to make sure the baby was okay after a minor fall.

There were other inconsistencies between McRoy's testimony and her depositions and recorded statements. McRoy continued to assert that it was only her upper back that was injured in the first accident, but Bailey's attorney pointed out that McRoy had stated at the trial of her first accident that Dr. Safman had treated her for her lower back, which she now denied. McRoy also testified that she had not been released by Dr. Goins from the first accident when she had the second accident; however, in her recorded statement she said that she had been released. At trial, McRoy denied that she was still having problems from the first accident, stating that she was having pain from the second acci-

dent, but her deposition indicated that she had stated that she was still having pain from the first accident. There were further inconsistencies between McRoy's prior recorded statements and testimony she gave at the present trial, including the fact that she had previously given a recorded statement that she was able to go about all of her regular activities after both of the accidents, including her household chores and childcare duties, and at trial she said that she still could not even pick up her children.

Dr. Dale Goins, McRoy's treating physician, testified that he had been her physician since November 1999 and that he saw her after her second accident. He said that after the second accident, McRoy reported headaches, numbness in her left arm and hand, pain in her left arm, neck, and scalp. Dr. Goins testified that he also treated McRoy after her first accident and that she complained of neck pain and *low-back* pain at that time, which contradicted McRoy's testimony. Dr. Goins said he performed an MRI of her lower back in June 2000, prior to McRoy's second accident, which was normal. Dr. Goins stated that the first accident affected McRoy's neck, upper spine, and lower back, and that the second injury caused damage to her shoulder and exacerbated the problems in the neck and low-back area, making those conditions worse because there was an increase in symptoms. Dr. Goins offered the opinion that McRoy's lower back pain was aggravated as a result of the second accident.

Thomas McRoy testified on behalf of his wife. His testimony on direct examination was very similar to that of McRoy's testimony. On cross-examination, he testified that the only difference he could tell from the first accident to the second was McRoy's shoulder and back, and that she had experienced trouble with her back for the entire time. On redirect, he said that McRoy hurt more in her lower back after the second accident and that it had continued to hurt more than it did after the first accident.

Bailey testified that on the night of the accident, she had just been told that her son had been in a bad ATV wreck and was being transported to the hospital in an ambulance. She said that she had been told that her son was not expected to live. She caught up with the ambulance and was following it. She did not know what color her light was at the time of the accident. She testified that when she got to the intersection, all she remembered was an impact; that her car stopped exactly where the two cars hit; and that she did not remember McRoy's car spinning around. She said that McRoy's car went straight and then stopped down the road. Bailey said that

she did not see McRoy's car before the collision, that all she remembered was getting out of her car from where it had stopped. She said that she went to McRoy's car and asked if she was okay; that McRoy told her yes; that she told McRoy what was going on; and that McRoy told her to go to the hospital. Bailey stayed until the police arrived, and then the police let her go on to the hospital. Bailey said that the damage to her car was to the front left fender.

The jury was instructed that the party with the burden of proof was required to establish such proof by a preponderance of the evidence, which was defined as evidence which, when weighed with that opposed to it, has more convincing force and is more probably true and accurate. The jury was also instructed that if the evidence appears to be equally balanced, or if it cannot be said upon which side the evidence weighs heavier, they must resolve that question against the party who had the burden of proving it. The trial court told the jury that McRoy, as plaintiff, claimed damages from Bailey and that McRoy had to prove that she sustained damages, that Bailey was negligent, and that Bailey's negligence was a proximate cause of McRoy's damages. The jury was further instructed that an Arkansas statute provided that vehicular traffic facing a steady red stop signal shall stop before entering an intersection and shall remain standing until green or go is shown alone, and that a violation of this statute, although not necessarily negligence, is evidence of negligence to be considered with all of the other facts and circumstances in the case.

The trial judge also instructed the jury that the fact that an injury, collision, or accident occurred is not of itself evidence of negligence or fault on the part of anyone, and that in determining whether the driver of a motor vehicle was negligent, the jury could consider the rules of the road that it is the duty of the driver of a motor vehicle to keep a lookout for other vehicles or persons on the street or highway; it is the duty of the driver of a motor vehicle to keep his or her vehicle under control; and it is the duty of the driver of a motor vehicle to drive at a speed no greater than is reasonable and prudent under the circumstances, having due regard for any actual or potential hazard. The trial court also instructed the jury on proximate cause, including comparative fault. The jury was also instructed, among other things, that they were not required to set aside their common knowledge; that they were the sole judges of the weight of the evidence and the credibility of the witnesses; and that they were not bound by an expert opinion as conclusive but were to give it only the weight

they thought it deserved and could disregard any opinion if they found it to be unreasonable. After deliberations, the jury returned a general verdict in favor of Bailey.

Although under our standard of review it is more difficult to show an abuse of discretion when a new trial is granted because the opposing party has another opportunity to prevail, here we hold that there was evidence that supported the jury's verdict and that the trial judge erroneously substituted his own view of the evidence for that of the jury. We agree with Bailey that this case is similar to *Razorback Cab, supra,* in which our supreme court reversed the grant of a new trial. In that case, there were conflicting accounts of how the accident occurred, and the jury resolved the evidence in favor of defendant Razorback Cab. The trial court granted the plaintiff's motion for new trial, but our supreme court reversed, noting that the evidence was equivalent and could reasonably support either side's position.

In this case, both McRoy and Bailey said that they did not see the other one. Although McRoy said that her light was green and Bailey said that she did not know what color her light was, the jury was not required to believe McRoy's testimony. The testimony was conflicting as to how the accident occurred. Furthermore, inconsistencies in McRoy's testimony regarding her injuries were pointed out by Bailey's counsel, and McRoy's testimony conflicted at times with that of her doctor, Dr. Goins. The jury may have believed that the first accident, not the second, was the proximate cause of McRoy's injuries, despite McRoy's and Goins's testimony, or that both Bailey and McRoy were at fault for the accident. It is impossible to know because the jury returned a general verdict. It was McRoy's burden, as plaintiff, to prove that Bailey was negligent, and that her negligence was the proximate cause of McRoy's injuries. In this case, the evidence was conflicting, and the jury resolved the evidence in Bailey's favor. The verdict was not clearly against the preponderance of the evidence, and the trial judge abused its discretion in granting McRoy's motion for new trial.

Bailey also argues that the trial court erred in denying her motion for costs. Of course, as the trial court explained, it did so on the basis of its ruling granting McRoy's motion for new trial. Rule 68 of the Arkansas Rules of Civil Procedure provides, in pertinent part:

> At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and judgment shall be entered. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment exclusive of interest from the date of offer finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer.

In this case, Bailey made an offer of judgment of $5,000 to McRoy on July 20, 2005. In the jury trial, held on March 21, 2006, the jury returned a defendant's verdict. In light of the fact that the trial court erred in granting a new trial, it also erred in denying Bailey's motion for costs. The judgment was not more favorable to McRoy than Bailey's offer; therefore, Rule 68 mandates that McRoy is to be liable for the costs incurred after Bailey's offer was made. Accordingly, the trial court's ruling denying Bailey these costs is reversed as well.

Reversed and remanded.

BAKER and MILLER, JJ., agree.

Martha JONES *v.* John G. VOWELL, DDS,
and Robbie Atkinson, DDS

CA 06-1079 258 S.W.3d 383

Court of Appeals of Arkansas
Opinion delivered June 6, 2007

W. Bruce Leasure, for appellant.

Friday, Eldredge & Clark, LLP, by: *Alan G. Bryan*, for appellee John G. Vowell, DDS.

Angel Law Firm, PLLC, by: *Richard L. Angel*, for appellee Robbie R. Atkinson, DDS.

KAREN R. BAKER, Judge. Appellant Martha Jones appeals from the dismissal of her dental-malpractice case against appellees Drs. John G. Vowell and Robbie Atkinson. We reverse and remand.

Appellant first sued appellees on March 7, 2001. However, she took virtually no action on her case, and it was dismissed

without prejudice on March 15, 2005, for lack of prosecution. On May 12, 2005, appellant refiled her case.

On June 2, 2006, a hearing was held in appellant's refiled case. The subject of the hearing is not stated in the record, and neither appellant nor her counsel were present at the hearing. When the case was called and appellant and her attorney were not present, court personnel "called the hall" three times, with no response. The trial judge then stated: "Okay, hall sounded, no response. Case dismissed." On June 8, 2006, an order of dismissal was entered, stating:

> On this date, Plaintiff and Defendant in the above styled action came on for hearing. The hall was sounded and the plaintiff failed to respond. Pursuant to Rule 41(b) of the Arkansas Rules of Civil Procedure, this case is hereby DISMISSED WITH PREJUDICE.

Appellant now appeals from that order and argues that the dismissal was in error for the following reasons: 1) she received no notice of the hearing and thus her due-process rights were violated; 2) the trial judge failed to inquire as to whether she received notice; 3) the trial judge did not notify her, prior to the dismissal, that he intended to dismiss her complaint, as required by Rule 41(b); 4) she was, at the time of the dismissal, actively prosecuting her case. Our standard of review is for an abuse of discretion. *Wolford v. St. Paul Fire & Marine Ins. Co.*, 331 Ark. 426, 961 S.W.2d 743 (1998).

[redacted] Upon reviewing the parties' briefs and arguments, we agree with appellant that the trial court abused its discretion and that the dismissal of her case violated due process as well as Ark. R. Civ. P. 41(b). Rule 41(b) permits involuntary dismissal "in any case in which there has been a failure of the plaintiff to comply with these rules or any order of court or in which there has been no action shown on the record for the past 12 months." The availability of dismissal for "inaction" or failure to prosecute is a tool for trial courts to dispose of cases "filed and forgotten." *Prof'l Adjustment Bureau, Inc. v. Strong*, 275 Ark. 249, 251, 629 S.W.2d 284, 285 (1982). However, appellant's case did not fall into that category. During the approximately twelve-month period between the filing of her complaint and the dismissal, appellant propounded discovery, responded to motions, answered discovery (although, according to appellees, in an unsatisfactory manner), and sat for a deposition (which was discontinued part-way

through).[1] In fact, her last activity occurred a little more than two weeks before the hearing when she responded to appellee Vowell's motion to compel and filed her own motion to compel. Given these facts, it cannot be said that there was "no action shown on the record for the past 12 months." *See* Ark. R. Civ. P. 41(b).

Rule 41(b) also provides that "the court shall cause notice to be mailed to the attorneys of record, and to any party not represented by an attorney, that the case will be dismissed for want of prosecution unless on a stated day application is made, upon a showing of good cause, to continue the case on the court's docket." No such notice was sent here. Appellees cite cases recognizing a court's inherent power to dismiss for failure to appear or failure to prosecute without prior notice of dismissal, but those cases are distinguishable from the case at bar. *See Link v. Wabash R.R. Co.*, 370 U.S. 626 (1962) (upholding dismissal where the petitioner's counsel failed to attend a pretrial conference that he knew about but which, he contended, he was too busy to attend); *Florence v. Taylor*, 325 Ark. 445, 928 S.W.3d 330 (1996) (dismissing the plaintiffs' complaint when they failed to appear for a jury trial that they knew had been scheduled); *Insurance from CNA v. Keene Corp.*, 310 Ark. 605, 839 S.W.2d 199 (1992) (dismissing where CNA disobeyed the court's order to substitute itself as the real party in interest within ten days); and *Gordon v. Wellman*, 265 Ark. 914, 582 S.W.2d 22 (1979) (dismissing where a case remained pending over thirteen years with only intermittent activity).

Unlike the long period of inactivity in *Gordon*, which the court characterized as a "virtual hibernation," this case had been pending for approximately one year at the time of dismissal, with ongoing activity in the case. And, unlike the willfully disobedient behavior or outright disregard displayed by the parties in *Link*, *Florence*, and *CNA*, the appellant in this case did not pointedly disobey a court order or refuse to attend a hearing about which she had unquestionably been notified. As the Supreme Court recognized in *Link*, the circumstances of a case should be

[1] Appellant unquestionably failed to actively prosecute her case in her first filing, which was ultimately dismissed, but we do not consider her lack of activity in that case as relevant to whether she actively prosecuted this case. We note that appellees' counsel agreed during oral argument that appellant's dilatory conduct in the first case was "water under the bridge."

considered in determining whether to provide advance notice that dismissal is being considered:

> It is true, of course, that "the fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked." *Anderson National Bank v. Luckett*, 321 U.S. 233, 246. But this does not mean that every order entered without notice and a preliminary adversary hearing offends due process. *The adequacy of notice and hearing respecting proceedings that may affect a party's rights turns, to a considerable extent, on the knowledge which the circumstances show such party may be taken to have of the consequences of his own conduct.* The circumstances here were such as to dispense with the necessity for advance notice and hearing.

370 U.S. at 632 (emphasis added). The circumstances in the present case involve a dismissal based upon appellant's failure to attend a hearing. Further, the record does not indicate that the trial court conducted a review of the record or made an inquiry, prior to dismissal, to determine whether appellant had notice, as was done in *Gore v. Heartland Community Bank*, 356 Ark. 665, 158 S.W.3d 123 (2004). We therefore conclude that this case called for the trial court to comply with Rule 41(b) and give notice of its intention to dismiss. *See also S.W. Water Co., Inc. v. Merritt*, 224 Ark. 499, 275 S.W.2d 18 (1955) (acknowledging, in a case decided prior to Rule 41(b), the value of permitting a party to explain the reason for any delay in prosecution).

Appellees urge us however, to consider the possibility that appellant's case was not dismissed under Rule 41(b) for failure to prosecute but was instead dismissed for failure to comply with discovery rules. *See* Ark. R. Civ. P. 37(d) (2007) (listing dismissal among several possible sanctions for certain discovery violations). Clearly, there were pending discovery issues to be resolved in this case. At the time of the hearing, appellee Vowell had filed a motion to compel in which he sought from appellant answers to requests for production and additional answers to interrogatories. Vowell also noted in his motion that both he and Atkinson had attempted, by letter, to obtain further information from appellant about her case, to no avail. The motion requested costs and fees as sanctions, the entry of an order to compel, and, if the order was not complied with, dismissal. However, we see no indication in the court's statements at the hearing or in the court's order that discovery violations were contemplated as a basis for dismissal. Nor do we

believe it is our province to conclude, without benefit of a clear ruling by the trial court, that the "extraordinary" discovery sanction of dismissal was warranted in this case. *See Coulson Oil Co. v. Tully*, 84 Ark. App. 241, 139 S.W.3d 158 (2003) (recognizing that discovery sanctions such as dismissal are extraordinary and should be used sparingly, usually in the case of flagrant violations). We therefore decline to adopt this reasoning as justification for the court's summary dismissal.

We next consider the possibility that the trial court dismissed appellant's case simply because of her failure to appear at the hearing. A trial court has the power to dismiss a case when a party fails to appear, *Florence, supra*. However, unlike the plaintiff in *Florence*, who failed to appear for a trial that her attorney indisputedly knew had been scheduled, this appellant asserts that neither she nor her attorney received notice of the hearing. The record includes no document or letter showing that notice of the hearing was sent to appellant or her attorney, despite appellant's having designated as the record on appeal "all of the Circuit Court record, and the transcript of the hearing held on June 6 [sic], 2006." It therefore appears on this record that appellant's case was dismissed based on her failure to attend a hearing of which she had no notice, which violates one of the basic tenets of due process. *See Florence, supra*.

On this point, appellees argue that appellant's claim of lack of notice is procedurally barred because she has not produced a record showing that she, in fact, did not receive notice. *See generally Jones v. Jones*, 43 Ark. App. 7, 858 S.W.2d 130 (1993) (holding that the burden is on the appellant to bring up a record sufficient to demonstrate error). However, the difficulty faced by appellant in this particular situation is obvious, *i.e.*, proving that something does *not* exist. We believe that, under the circumstances, appellant did what she was required to do to demonstrate error to this court. She ordered the entire circuit court record, which does not show that notice was sent, and she ordered a transcript of the hearing, which likewise offers no indication that notice was sent.[2]

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[2] In *Gore, supra*, which involved an appellant who claimed he had not received notice of a hearing, the appellee supplemented the record to include a copy of a hearing notice sent to the appellant. Appellees in this case supplemented the record but included no notice of the hearing in their supplemented record.

It is further argued by appellees that appellant was not prejudiced by any lack of notice because she had responded in writing to Vowell's motions. This argument misses the point. Appellant is not complaining that she never had the opportunity to respond to Vowell's motions; rather, her complaint is that her case was summarily dismissed on the erroneous premise that she intentionally failed to appear or failed to prosecute her case. The prejudice that she suffered was dismissal of her case, not that she was precluded from addressing Vowell's arguments.

Appellees also claim that appellant is raising her notice argument for the first time on appeal. *See, e.g.*, *Parker v. Perry*, 355 Ark. 97, 131 S.W.3d 338 (2003) (refusing to consider a new argument on appeal as to why summary judgment was improper); *Smith v. Sidney Moncrief Pontiac, Buick, GMC Co.*, 353 Ark. 701, 120 S.W.3d 525 (2003) (refusing to consider on appeal certain arguments that the appellant had not made in her response to the appellees' motion to dismiss); *Oglesby v. Baptist Med. Sys.*, 319 Ark. 280, 891 S.W.2d 48 (1995) (refusing to consider for the first time on appeal the appellant's argument that an affidavit supporting the appellee's motion for summary judgment was improper). However, unlike the appellants in those cases, the appellant here had no opportunity, prior to entry of the court's ruling, to assert her argument. The record supports appellant's contention that she did not know until after the entry of the final order that her case had been dismissed. She therefore had no reason, prior to the dismissal of her case, to apprise the trial court of any argument regarding lack of notice. As for appellees' contention that appellant should have filed a postjudgment motion to inform the court that she had not received notice, we do not believe that such a motion was required. Had the trial court inquired, before dismissing the case, as to whether appellant had been notified of the hearing, or had the court notified appellant that it intended to dismiss her case, as contemplated by Rule 41(b), the question of whether appellant received notice of the hearing would have been before the court. In other words, the trial court had the means to determine the situation regarding notice or lack thereof but instead dismissed the case without inquiry. Although appellant might have explained her circumstances in a postjudgment motion, nothing required that she do so.

For the reasons stated, the trial court's order of dismissal is reversed and remanded.

BIRD and VAUGHT, JJ., agree.

Henry (Hank) James McBRIDE *v.* STATE of Arkansas

CA CR 06-1225 258 S.W.3d 782

Court of Appeals of Arkansas
Opinion delivered June 13, 2007

Robert R. White, for appellant.

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

JOSEPHINE LINKER HART, Judge. Appellant, Henry (Hank) James McBride, contends that the circuit court erred in refusing to grant his petition to expunge his record under Act 346 of 1975, codified in part at Ark. Code Ann. § 16-93-303 (Repl. 2006). He notes that he was placed on probation under Act 346 of 1975, and he argues that because an amendment to the statute, Act 1407 of 1999, which precluded expungement for certain sexual offenses, was not in effect at the time he committed the sexual offenses, the court erred in concluding that he was not entitled to expungement. We reverse and remand for the court to grant his petition.

In an order of probation under Act 346 of 1975 dated June 23, 2000, appellant tendered his plea of guilty to one count of first-degree sexual abuse that occurred on April 24, 1999, and one count of third-degree carnal abuse that occurred between March 1999 and April 1999.[1] The victims were under eighteen years old. Appellant's plea was deferred, and he was placed on probation for five years.

In 2005, appellant filed a petition stating that he had complied with the conditions and orders of the court and sought to have his record expunged. The State objected, arguing that appellant was ineligible for expungement. In support, it noted that prior to appellant's plea in 2000, Ark. Code Ann. § 16-93-303 had been amended by Act 1407 of 1999, which was effective July 30, 1999, to provide that a person who pleads guilty to a sexual offense where the victim was under eighteen is ineligible for expungement. In a response, appellant noted that the "parties have stipulated that [appellant] has satisfactorily complied with all conditions

[1] The order was later amended to reflect that the first-degree sexual abuse count was reduced to a third-degree carnal abuse count.

and orders of this Court." In its order, the circuit court concluded that at the time of appellant's guilty plea, he was ineligible for the application of Ark. Code Ann. § 16-93-303 and that his sentence was illegal and void. Consequently, the court modified his sentence to reflect that he was not sentenced pursuant to Act 346 of 1975 and was ineligible for expungement.

On appeal, appellant argues that the circuit court erred in finding that he was ineligible for expungement of his record. He argues that because Act 1407 of 1999 did not take effect until July 30, 1999, which was after he committed the crimes, he was eligible for expungement.[2]

The State first urges that appellant failed to raise this argument before the circuit court and therefore cannot raise it on appeal. The Arkansas Supreme Court, however, has recently held that an appellant can challenge an illegal sentence for the first time on appeal, observing that "for purposes of appellate review, the issue of an illegal sentence is not solely whether it is within the prescribed statutory range, but whether the trial court had authority to impose the sentence." *Donaldson v. State*, 370 Ark. 3, 5, 257 S.W.3d 74, 77 (2007). In *Thomas v. State*, 349 Ark. 447, 79 S.W.3d 347 (2002), the Arkansas Supreme Court held that a defendant's sentence was illegal because, even though Act 1407 of 1999 made the defendant ineligible for expungement, the circuit court nevertheless placed the defendant on probation under Ark. Code Ann. § 16-93-303 for a sexual offense where the victim was under eighteen. The Arkansas Supreme Court concluded that the sentence was illegal, as the circuit court lacked authority to apply Ark. Code Ann. § 16-93-303, and that the issue could be addressed for the first time on appeal. Similarly to *Thomas*, the question is whether the circuit court lacked authority to impose a sentence in contravention of Ark. Code Ann. § 16-93-303. Consequently, we may address the issue for the first time on appeal.

The State asserts that because appellant was charged and sentenced after the amendment to the statute, and because his probation ended after the amendment, appellant was ineligible for expungement. The Arkansas Supreme Court, however, has noted

[2] Other amendments were also made to Ark. Code Ann. § 16-93-303, but these amendments do not alter the conclusions we reach here.

the "well-established rule that a sentence must be in accordance with the statutes in effect on the date of the crime." *State v. Ross*, 344 Ark. 364, 367, 39 S.W.3d 789, 791 (2001). It has also observed that it "has consistently held that sentencing shall not be other than in accordance with the statute in effect at the time of the commission of the crime." *Donaldson*, 370 Ark. at 7, 257 S.W.3d at 77. Furthermore, we apply an act retroactively only when the General Assembly expressly provides that it will be so applied. *See, e.g.*, *Ross*, 344 Ark. at 368, 395 S.W.3d at 791. Accordingly, we apply the sentencing laws in effect at the time the crime was committed and do not apply an amendment to these sentencing laws if the General Assembly does not expressly provide that the amendment is to be applied retroactively.

At the time appellant committed the sexual offenses, Ark. Code Ann. § 16-93-303 did not prohibit expungement for sexual offenses where the victim was under eighteen. Act 1407 of 1999, which precluded expungement in those circumstances, was not effective until July 30, 1999, and the act did not indicate that it was to be retroactively applied. Thus, the limitation on expungement had no application to appellant. Accordingly, the circuit court erred in concluding that appellant was ineligible for expungement.

We note the circuit court's reliance on *Thomas*, but it is not controlling. There, the Arkansas Supreme Court concluded that a defendant was not entitled to expungement under Ark. Code Ann. § 16-93-303, but in that case, the defendant committed a sexual offense after Act 1407 of 1999 became effective. We further recognize that both parties also discussed whether the denial of expungement would violate the prohibition against ex post facto laws. We need not reach this issue because to fall within the ex post facto prohibition, the law must be retroactive. *See, e.g.*, *McGhee v. State*, 82 Ark. App. 105, 112 S.W.3d 367 (2003). While the circuit court applied the statute retroactively, given that Act 1407 of 1999 did not provide that it was to be applied retroactively, there is no reason to answer the purely abstract question of whether applying the statute retroactively would violate the prohibition against ex post facto laws.

Finally, because the parties stipulated that appellant satisfactorily complied with all conditions and orders of the circuit court,

we reverse and remand for the court to grant his petition. *See* Ark. Code Ann. § 16-93-303(b).

Reversed and remanded.

GRIFFEN and GLOVER, JJ., agree.

James E. FRANKS, Judy Franks, Mark Branscum, Robert F. Lucas & James Alex Franks *v.* MOUNTAIN VIEW PLANNING & ZONING COMMISSION, et al.

CA 06-1234 258 S.W.3d 799

Court of Appeals of Arkansas
Opinion delivered June 13, 2007

Herby Branscum, Jr., for appellants.

Brad J. Williams, for appellees

ROBERT J. GLADWIN, Judge. The Stone County Circuit Court found that James E. Franks and Judy Franks were untimely in their appeal of a decision of the Mountain View Planning and Zoning Commission and the Mountain View City Council (collectively, the City) and granted the City's motion for summary judgment. The Frankses raise four points on appeal. We affirm the circuit court because the appeal to that court was not properly perfected.

The Frankses are the developers of a subdivision in Mountain View. They assert that the subdivision was built in accordance with certain restrictive covenants and the City's zoning ordinance. In October 2003, the City permitted one of the landowners in the subdivision to make curb cuts in front of his home. The cuts were contrary to the development plans' uniform design. The Frankses filed an appeal to circuit court in April 2004 but nonsuited the appeal in September 2004.

On October 5, 2004, the Frankses were some of the eleven owners in the subdivision who submitted a petition to the Planning and Zoning Commission asking that it enforce the subdivision regulations. On October 11, 2004, Jana Richardson, as chair of the commission, and Mayor Crawford Wyatt sent a joint letter to James E. Franks, stating that all issues regarding the subdivision had been addressed but indicating that the matter would be placed on the commission's agenda for the October 18 meeting. The minutes from that meeting indicate that the petitioners' attorney asked the Commission to enforce the ordinances as written and stated that this would require the Commission to undo the action taken in October 2003 allowing curb cuts.

The City Council next considered the issue at its October 25, 2004 meeting. The minutes from that meeting indicate that the appellants' attorney told the Council that the matter before the Council was based on actions taken in October 2003. Counsel also made it clear that they were asking the Council to revisit the commission's October 2003 decision to allow the curb cuts. After a colloquy between Council members, the Mayor, and the city attorney about whether the issue was properly before the Council via a timely appeal, the Council moved on to other business without taking any action.

On November 12, 2004, the Frankses filed a "Complaint and Appeal" with the Stone County Circuit Court. The complaint's prayer sought reversal of the action of both the commission and the City Council, as well as damages for James E. and Judy Franks. The City answered, denying the material allegations and asserting several affirmative defenses, such as statute of limitations, res judicata, lack of subject-matter jurisdiction, and failure to exhaust remedies.

After its motion to dismiss was denied, the City filed a motion for summary judgment. The Frankses responded by filing affidavits in which they both stated that the present action was not

an appeal of the October 2003 action allowing the curb cuts and that the present suit concerned the denial of their right to be heard.

The trial court held a hearing on the motion for summary judgment, at which time the City argued, among other things, that the trial court lacked subject-matter jurisdiction in that the Frankses failed to comply with District Court Rule 9's requirements for the timing and manner of taking an appeal from action by the City Council. The trial court agreed with the City, finding that the issue at hand was the action taken by the City in October 2003 and that the Frankses failed to appeal that decision within thirty days, thereby depriving the court of jurisdiction. A written order was entered on July 24, 2006, and this appeal timely followed.

Appeals to circuit court in cases such as the one before us are governed by Ark. Code Ann. § 14-56-425 (Repl. 1998), which provides:

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

Our supreme court has interpreted section 14-56-425 to incorporate the appeal procedures found in District Court Rules 8 and 9. *Combs v. City of Springdale*, 366 Ark. 31, 233 S.W.3d 130 (2006); *Ingram v. City of Pine Bluff*, 355 Ark. 129, 133 S.W.3d 382 (2003). In particular, Rule 9 provides in part:

> (a) Time for Taking Appeal. All appeals in civil cases from district courts to circuit court must be filed in the office of the clerk of the particular circuit court having jurisdiction of the appeal within 30 days from the date of the entry of judgment. . . .
>
> (b) How Taken. An appeal from a district court to the circuit court shall be taken by filing a record of the proceedings had in the district court. Neither a notice of appeal nor an order granting an appeal shall be required. It shall be the duty of the clerk to prepare and certify such record when requested by the appellant and upon payment of any fees authorized by law therefor. The appellant shall have the responsibility of filing such record in the office of the circuit clerk.

> (c) Unavailability of Record. When the clerk of the district court, or the court in the absence of a clerk, neglects or refuses to prepare and certify a record for filing in the circuit court, the person desiring an appeal may perfect his appeal on or before the 30th day from the date of the entry of the judgment in the district court by filing an affidavit in the office of the circuit court clerk showing that he has requested the clerk of the district court (or the district court) to prepare and certify the record thereof for purposes of appeal and that the clerk (or the court) has neglected to prepare and certify such record for purposes of appeal. A copy of such affidavit shall be promptly served upon the clerk of the district court (or the court) and the adverse party.

In *Combs*, the supreme court addressed a situation similar to the present case and noted that a literal interpretation of Rule 9, which uses terms such as "district courts," "entry of judgment," and "clerk of the district court," is not particularly helpful in the context of the present case. Nevertheless, the court held that Rule 9 requires that the appealing party *file either the record or an affidavit* within thirty days in order to timely perfect an appeal. Here, the Frankses did not comply with Rule 9 by filing either a certified copy of the record from the proceedings before the City Council or an affidavit stating that they could not timely file the record. Instead, they filed a "Complaint and Appeal From the Action of Mountain View[,] Arkansas[,] Planning and Zoning Commission and the City of Mountain View, Arkansas," and attached uncertified copies of the minutes of the commission and City Council meetings to their complaint. Despite the pleading's title, it is clear that the Frankses were seeking review of the City's action on their petition.

Strict compliance with the requirements of Rule 9 is necessary; substantial compliance will not suffice. *See Clark v. Pine Bluff Civil Serv. Comm'n*, 353 Ark. 810, 120 S.W.3d 541 (2003); *J&M Mobile Homes, Inc. v. Hampton*, 347 Ark. 126, 60 S.W.3d 481 (2001). Rule 9's thirty-day limit for filing an appeal is both mandatory and jurisdictional, and the failure to either file the record with the clerk or file an affidavit showing that the record has been requested from the clerk within those thirty days precludes the circuit court from having jurisdiction over the appeal. *Combs*, *supra*; *Velek v. State (City of Little Rock)*, 364 Ark. 531, 222 S.W.3d 182 (2006). The trial court correctly found that the Frankses did not timely perfect their appeal. Therefore, we affirm.

Affirmed.

MILLER, J., agrees.

MARSHALL, J., concurs.

D.P. MARSHALL JR., Judge, concurring. I concur in the court's opinion and judgment that we lack jurisdiction under District Court Rule 9 and our supreme court's precedents applying it. I write separately, however, because this case exemplifies why Rule 9 and the strict-compliance precedents do not adequately address the record issues in appeals from administrative decisions.

As the court notes, the Franks appellants attached unsigned and uncertified copies of all the relevant minutes to their "Complaint and Appeal." They alleged that these minutes accurately reflected the city's actions. The Mountain View appellees answered and admitted that these minutes were correct. All of these steps occurred within Rule 9's thirty-day period for perfecting an appeal by filing a certified record of what happened in the challenged administrative proceeding. There was thus no dispute about the truth of the administrative record filed by the Franks appellants.

If a substantial-compliance standard applied, then we could conclude that this appeal was perfected. As the court holds, however, precedent requires strict compliance with Rule 9. But that Rule needs to be clarified to reflect the realities of appeals to circuit court from decisions by administrative bodies. Where a party challenges administrative action in the circuit court and files all the existing documents about what happened in the administrative proceeding, and the administrative body admits the truth of those documents, all within the thirty-day period, then the purpose of Rule 9 has been satisfied and circuit court jurisdiction should exist.

Kimberly Dawn SYKES *v.* Justin WARREN

CA 06-1002 258 S.W.3d 788

Court of Appeals of Arkansas
Opinion delivered June 13, 2007

[redacted]

Melissa B. Richardson, for appellant.

Justin Warren, for appellee.

JOHN B. ROBBINS, Judge. Appellant Kimberly Dawn Sykes appeals the May 16, 2006 order of the Craighead County Circuit Court that granted custody of her infant daughter, Brooke, to Brooke's biological father, appellee Justin Warren. In this one-brief appeal, appellant contends that the trial judge's decision to grant custody to Warren is clearly against the preponderance of the evidence and must be reversed. Her argument includes the following allegations of error in the consideration of appellee's request for custody: (1) improper consideration of appellant's receipt of governments benefits for her children instead of attaining gainful employment; (2) improper separation of Brooke from her three half-siblings in appellant's custody; (3) insufficient evidence to support the finding that appellee would better facilitate visitation with the non-custodian than appellant; and (4) insufficient evidence to support the finding that appellant's twin daughters with Down's Syndrome caused an undue drain on appellant's parental attention. We are convinced that the trial court clearly erred, and therefore we reverse the change of custody.

The standard of review in child-custody appeals is well settled. We review the evidence de novo, but we will not reverse the findings of fact unless it is shown that they are clearly contrary to the preponderance of the evidence. *Thompson v. Thompson*, 63 Ark. App. 89, 974 S.W.2d 494 (1998). We also give special deference to the superior position of the trial court to evaluate and judge the credibility of the witnesses in child-custody cases. *Hamilton v. Barrett*, 337 Ark. 460, 989 S.W.2d 520 (1999). A finding is clearly against the preponderance of the evidence when, although there is evidence to support it, the reviewing court is left

with a definite and firm conviction that a mistake has been made. *Hollinger v. Hollinger*, 65 Ark. App. 110, 986 S.W.2d 105 (1999); *see also Dunham v. Doyle*, 84 Ark. App. 36, 129 S.W.3d 304 (2003).

Specifically relevant to the current appeal is Ark. Code Ann. § 9-10-113 (Supp. 2005), which sets forth the law on custody of an illegitimate child. The statute provides:

> (a) When a child is born to an unmarried woman, legal custody of that child shall be in the woman giving birth to the child until the child reaches the age of eighteen (18) years unless a court of competent jurisdiction enters an order placing the child in the custody of another party.
>
> (b) A biological father, provided he has established paternity in a court of competent jurisdiction, may petition the circuit court in the county where the child resides for custody of the child.
>
> (c) The court may award custody to the biological father upon a showing that:
>
> (1) He is a fit parent to raise the child;
>
> (2) He has assumed his responsibilities toward the child by providing care, supervision, protection, and financial support for the child; and
>
> (3) It is in the best interest of the child to award custody to the biological father.

See also Harmon v. Wells, 98 Ark. App. 355, 255 S.W.3d 501 (2007) (explaining that in the context of paternity, if the father is given temporary visitation pending the order of paternity, then he is not held to the burden of demonstrating a material change in circumstances prior to a change in custody; however, if the visitation order is permanent, then he is required to show a change of circumstances, in addition to the statutory proof).

The salient facts are these: The parties were never married and never lived together, they had known each other most of their lives, and Brooke was born on March 17, 2005. The parties lived a few miles apart in Jonesboro. Appellant, approximately age thirty, was already the mother of three girls when Brooke was

born; appellee was not their father.[1] Appellee, in his early twenties, was present in the hospital for Brooke's birth, and he purchased a car seat, diapers, and formula for the baby. Appellee also placed Brooke on his health insurance policy the day after she was born, and he signed an Acknowledgment of Paternity.

Difficulties quickly arose between the parties regarding the care and visitation of Brooke. On April 20, 2005, appellee filed a "Petition for Paternity, Petition for Custody or in the Alternative for Visitation Privileges." In that petition, appellee alleged that he was the father; that he had taken responsibility for his daughter, he was a fit parent, and he wanted custody of Brooke because it was in her best interest; and that appellant should pay child support. Appellee alternatively asked for court-ordered visitation because he was being deprived reasonable visitation by appellant.

On May 5, 2005, appellant filed a response stating that appellee was the father; that she was the custodian; that they were unwed parents; that appellee was not a fit parent nor had he assumed responsibility for the child; that appellee should be ordered to pay child support; that appellee's work schedule was incongruent with being a custodian; that she had concerns about appellee's sister being around Brooke; and that appellee should be permitted only supervised visitation until he proved that he was capable of caring for Brooke.

There was an agreed temporary order following a temporary hearing in May 2005 that granted temporary custody to appellant, set forth standard visitation privileges for appellee, and ordered appellee to pay $82 per week in child support. Later that summer, the parties drew up their own temporary agreement regarding visitation pending the final hearing. They agreed that beginning mid-August 2005, appellee would have one or two three-hour evening visits during the week and alternating weekend visitation from 5:00 p.m. Saturday to 12:30 p.m. Sunday.

At the hearing conducted on December 14, 2005, appellee testified that he had been employed for five-and-a-half years as an assistant mill-head operator, and he changed his work shift so that he could exercise visitation with Brooke. Appellee still lived with

[1] Appellant's oldest daughter was fathered by Keith Barnes. Barnes pays child support and visits his daughter. The next two girls are twins, fathered by Gary Killian. The twins' father does not pay child support or visit them. Appellant receives $603 per month for each twin in SSI.

his parents, but he wanted custody and assured the court that he would acquire his own living quarters if he were granted custody. Appellee believed he had a more stable living environment and provided a Christian home. He said he would ensure that Brooke spent a lot of time with his extended family, although he did not rely on his parents to care for the baby unless his work conflicted with his visits. He said he had reliable transportation and always came to pick up his daughter for visits, and he said appellant never sent any supplies with Brooke. Instead, he said he bought all the necessary items and kept them at his parents' house.

Appellee complained that appellant would not keep him informed of any medical issues or provide him any medicine for Brooke. He also complained that appellant would not allow him visitation several times in July and over the Thanksgiving holiday. He agreed that they altered the visitation schedule, although he said it was to accommodate both of their schedules. Appellee stated some concern that appellant's twin daughters, who were about eight years old, might harm Brooke accidentally because they often threw things at play, they were developmentally delayed, and he thought the twins required an inordinate amount of attention from their mother. He also said that appellant's house was always messy, which was a hazard to Brooke. Appellee noted that he worked and paid child support, but appellant did not work and relied on Medicaid and other governmental assistance.

Appellee wanted full custody, but if he were not given that privilege, he thought joint custody would work as well. He assured the court that he would work with appellant to ensure that she enjoyed visitation if he had custody, and that he would be forthcoming with information about Brooke's health-care needs. Appellee did not claim that appellant was an unfit parent; he thought both of them were fit parents, but that Brooke's best interest was to be with him.

Appellant took the stand and testified that she had four daughters, she did not work, and she cared for them in their three-bedroom rent house. She said she received $224 in monthly child support from her oldest daughter's father, she received $1206 per month in SSI for her twin daughters who had Down's Syndrome, and she was currently receiving child support from appellee for Brooke. With that, she said she was able to support herself and her children, and she had the children on Medicaid, except that Brooke was now on appellee's insurance. Appellant

said that the twins received reduced-price lunches at elementary school. Appellant was approved for WIC, which provided Brooke's formula.

Appellant said she spent her time caring for her daughters, taking them to the park, to movies, to rodeos, and to family-oriented concerts. She was a full-time mother, and the older three girls attended school, leaving her available to care for the baby all day. Appellant agreed that there were some issues regarding visitation leading up to this hearing, but she felt justified in refusing when appellee's sister was present because appellant believed her to be a drug user. She believed that Brooke's father was entitled to visitation, but thus far, when there were problems, he would not work it out but would instead scream and cuss at her. She also said that appellee was the one who wanted to make changes in the visitation that ended up reducing his time with Brooke. Appellant believed that appellee was not a fit father, because he had a temper and was verbally and emotionally abusive. She said this was why their relationship deteriorated as her pregnancy with Brooke progressed. Additionally, appellant noted that oftentimes after appellee had Brooke for only a few hours, the baby's diaper would not be changed, which made her question his parenting skills.

She said she and her four daughters, at that time ranging from ten years to nine months old, had a good relationship, and she explained that her twins had only a mild form of Down's. She said she had been made aware through appellee's mother that appellee had all the necessary baby supplies at his parents' house, so that was why she never bothered to send any additional things with Brooke for visits. Appellant testified that she had no problem with appellee's parents but she did have a problem with his sister because of convictions and a drug problem.

In response to questions by the trial court, appellant conceded that her children were born out of wedlock and that she did not work out of her home, but she was steadfast in her belief that she was teaching them good morals, that they benefitted because she was an experienced parent, and that it was best for them to have her present in the home for them every day. She said she was not on food stamps or housing assistance; rather, she lived on child support from the oldest and youngest children, the twins' SSI, and had the twins on reduced-price lunches and Medicaid as well as WIC for baby formula. With that and good management, she was able to provide for the girls' needs and be home full-time. She agreed she had never been married to any of her children's fathers,

and the one man she was married to ended in divorce because he was a drug addict. However, she believed that she provided a fine home, that appellee was not emotionally stable, and that he did not know how to take care of a small child. The trial judge, in remarks and questioning, clearly disapproved of her not working and having children in succession as an unwed mother.

The trial judge stated that she would take the matter under advisement. A letter opinion was issued on March 29, 2006. The four-page letter outlined the testimony discussed above, and made the following relevant findings:

> Ms. Sykes [appellant] was unwed at the time of the birth of this child and therefore the presumption of custody lies with her. To her credit, Ms. Sykes does have her own living quarters, she has other siblings with which the child may spend time and Mr. Warren [appellee] has voluntarily given up large portions of his visitation in the past.
>
> On the other hand, Mr. Warren certainly appears to be the more stable and responsible adult. He has been regularly employed for the past five and one-half (5½) years while Ms. Sykes has not had a job in the last ten (10) years. His concerns regarding the mother's attention for the care of her disabled children seem appropriate and well placed. Mr. Warren appears to have support from his family. He has taken responsibility for the child in filing the appropriate legal proceedings, buying necessities for the child, adding the child on insurance and so forth. The Court believes Mr. Warren is the parent more likely to facilitate visitation with the non-custodial parent, and the parent more likely to provide a stable, wholesome environment for the child. Therefore, this Court finds that Mr. Warren has overcome the presumption of custody with the mother and that the best interest of this child dictate that custody be placed with Mr. Warren.
>
> . . . .
>
> Because of the objections of Ms. Sykes to Mr. Warren's sister and the questions regarding her fitness to care for this child, the child shall not be left alone in her care.

A formal order was filed on May 16, 2006, commemorating this disposition. Appellant filed a timely notice of appeal, challenging the award of custody to appellee. Appellant contends that the

trial court committed reversible error in making this best-interest decision. She expounds on this argument by stating primarily that: (1) the court was improperly influenced by its apparent disapproval of appellant not working and living off government aid; (2) the court should not have separated the siblings absent some exceptional circumstance; (3) the court was wrong to believe that appellee would better facilitate visitation issues; (4) the court was wrong to believe that the twins took undue parenting effort away from Brooke. She adds in her brief that the trial judge erred because she was not found to be an unfit mother, and because more weight should have been given to the fact that appellee relinquished hours of visitation pending the final hearing. Because on the whole, we are left with a definite and firm conviction that an error has been committed, we reverse.

We note at the outset that, contrary to appellant's assertion, the trial court did not have to find her unfit in order to grant custody of Brooke to her father. Once appellee showed to the satisfaction of the trial court that he was a fit parent and had taken responsibility for his child, the trial court was left solely to make a best-interest determination. Ark. Code Ann. § 9-10-113.

Moving to the best-interest determination, we recognize that unless exceptional circumstances are involved, young children should not be separated from each other by dividing their custody. *Johnston v. Johnston*, 225 Ark. 453, 283 S.W.2d 151 (1955); *Vilas v. Vilas*, 184 Ark. 352, 42 S.W.2d 379 (1931). *But see Middleton v. Middleton*, 83 Ark. App. 7, 113 S.W.3d 625 (2003). The trial court noted this fact in the order, but did not give it much weight. No exceptional circumstances were presented to support separation of the siblings.

In addition, we believe it was error to use appellant's lack of employment and receipt of government benefits as a negating factor against appellant. Indeed, appellant lived within her means, was receiving child support due her, was receiving legitimate governmental aid for her disadvantaged daughters, and managed to run an independent household where she could be a full-time parent. Professor Jeff Atkinson in his treatise on child custody states that "financial resources of the parties are normally irrelevant to a custody determination." 1 Jeff Atkinson, *Modern Child Custody Practice* § 4-20, at 4-47 (2d ed. 2002). He adds, though, that "financial resources of the parents have been found to be relevant to the extent that they reflect a parent's ability to provide a stable

home." *Id.* This text was cited with approval in *Taylor v. Taylor*, 353 Ark. 69, 110 S.W.3d 731 (2003). The court in *Taylor* remarked that it knew of no cases where custody was changed merely because one parent had more resources or income than the other. *See id.* We believe this reasoning is especially appropriate here.

Another factor that the trial court deemed relevant in the best-interest inquiry was that the twins took inordinate amounts of attention for care in appellant's household. There is no support for that statement. The twins were school-age and spent their days at school, along with the oldest daughter. This freed appellant to be a full-time parent solely to the baby during the school year. To the extent that the twins took extra time when they were at home, this is to be considered against the preference to keep siblings together, as we discussed above.

The last major concern noted by the trial court was that appellee would be the parent more likely to facilitate visitation with the non-custodian. While certainly we are duty-bound to honor the credibility determinations made by the trial court, we disagree that this sole factor is enough to support a finding that the best interest of this child was better served in her father's custody. Moreover, the trial court acknowledged that the father voluntarily relinquished large amounts of visitation, which we cannot ignore.

On the other hand, the father had held down a full-time job for several years, had his family to support his parenting, and had taken responsibility for the child. Nevertheless, he lived with his parents, he had a sister who could not be left alone with the child due to drug-abuse concerns, and he had no experience in raising a child.

Although there is evidence in the record to support the decision to award custody to the father, we are left with a distinct and firm impression that there was clear error in awarding custody to the father instead of the mother of this child. Therefore, the trial court's decision is reversed and remanded.

HART, GLOVER, and BAKER, JJ., agree.

GLADWIN and MILLER, JJ., dissent.

ROBERT J. GLADWIN, Judge, dissenting. I cannot say that the trial court's findings were clearly contrary to the preponderance of the evidence; therefore, I dissent. The majority opinion adequately states the relevant facts.

In reviewing child-custody cases, we consider the evidence de novo, but will not reverse the trial court's findings unless they are clearly erroneous or clearly against the preponderance of the evidence. *Middleton v. Middleton*, 83 Ark. App. 7, 113 S.W.3d 625 (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.* We also give special deference to the superior position of the trial court to evaluate and judge the credibility of the witnesses in child-custody cases. *Durham v. Durham*, 82 Ark. App. 562, 120 S.W.3d 129 (2003). We know of no cases in which the superior position, ability, and opportunity of the trial court to observe the parties carry as great a weight as those involving children. *Dunham v. Doyle*, 84 Ark. App. 36, 129 S.W.3d 304 (2003). In custody cases the primary consideration is the welfare and best interest of the child involved, while other considerations are merely secondary. *Durham, supra.*

This case simply turns on a best-interest analysis. The trial court found, as a result of the testimony, that the appellee acknowledged paternity of the parties' child and had taken responsibility for her in the face of adverse conditions and increasing objections from appellant. Further, the trial court found appellee to be the more stable and responsible adult. Whether a parent is stable and responsible goes to the best interest of the child. I disagree with the majority's statement that the trial court's finding that appellee would be the parent more likely to facilitate visitation with the non-custodian is the sole factor that supports the finding that custody should be placed with appellee. The trial court considered all the testimony presented. Further, the special needs of the twins is a proper factor for the court to consider when looking toward the best interest of the parties' child. Appellee held a full-time job, had the support of his family, and had taken responsibility for his child.

The trial court was in the superior position to evaluate and judge credibility of the witnesses. Given the special deference that we give to this superior position, I am not left with a distinct and firm impression that the trial court clearly erred.

MILLER, J., joins.

Chad WILCOX *v.* STATE of Arkansas

CA CR 06-1313 258 S.W.3d 785

Court of Appeals of Arkansas
Opinion delivered June 13, 2007

Butler, Green & Boyd, by: *Kris M. Boyd*, for appellant.

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

SAM BIRD, Judge. Chad Wilcox appeals the revocation of his suspended sentence for possession of drug paraphernalia with intent to manufacture methamphetamine. Evidence at the revocation hearing concerned the State's allegation that Wilcox had violated a condition of his probation as shown by a positive drug test of a urine sample. He asserts that speculation and conjecture were required to support the trial court's finding that he had willfully and inexcusably violated a condition of his probation. He argues that his revocation should be overturned because proper guidelines and instructions were not followed so as to ensure accurate testing, and because he was taking a medication documented to show a false-positive. We agree with his first argument; therefore, the revocation is reversed and the State's petition is dismissed.

Evidence at the revocation hearing focused on the positive test results of a urine sample taken from Wilcox on March 29, 2006. The printed directions for the chemical used in the testing process were introduced through the testimony of Wilcox's probation officer, Patrick Langley. Those instructions state that

samples should be at room temperature of 64–77 °F for testing, that urine samples with the normal pH range of 4.5–8 do not require prior adjustment of pH, and that samples outside the normal pH range should be suspected of adulteration.

Langley testified that Wilcox's sample was stored overnight in a refrigerator. Langley said that he tested the sample the next day at the Hot Springs Drug Court on a machine on which he had been trained, following operational instructions to first return the sample to room temperature by setting it out for approximately an hour to an hour-and-a-half. The test produced positive results for methamphetamine. Langley took the sample to the Benton Department of Community Correction, where he observed its retesting on a different machine. Again, the results were positive. Langley admitted that no thermometer was used to determine the temperature at the time of the initial test, that the sample was again refrigerated overnight before being taken to Benton, and that again there was no determination of the temperature before retesting. Langley said that the printed instructions included directions for pH levels outside normal parameters but that no determination was made for the pH level of Wilcox's sample.

Langley also testified that instructions for the testing chemical stated that Zantac, an over-the-counter medication, could cause a false-positive reading. He testified that he did not remember specifically telling Wilcox not to take Zantac but was "positive" that Wilcox had been told by drug-court counselors or the judge not to take it. Langley said that Wilcox had attempted to inform the drug court that he was taking certain medications but had never mentioned Zantac. Langley said that in the previous month an initial test of a sample from Wilcox was positive but was negative upon retesting at St. Joseph's Hospital.

Wilcox testified that he had taken numerous prescriptive medications throughout his life for stomach conditions that began when he was twelve years old. He said that he continued to have gastrointestinal problems such as peptic ulcers and colitis, and in March 2006 had taken Zantac each day for acid reflux. He denied using amphetamines or ever being told not to take Zantac. He stated his belief that Zantac could cause a false-positive test result, and he said that he was never asked to provide a list of substances that he was taking. He testified that he had passed numerous drug tests from his employer from March 30, 2006, until the date of the hearing on July 24, 2006.

In order to revoke probation or a suspension, the trial court must find by a preponderance of the evidence that the defendant inexcusably violated a condition of that probation or suspension. Ark. Code Ann. § 5-4-309(d) (Repl. 2006); *Harris v. State*, 98 Ark. App. 264, 254 S.W.3d 789 (2007). The trial court's findings will be upheld on appeal unless they are clearly against the preponderance of the evidence; because a determination of a preponderance of the evidence turns on questions of credibility and weight to be given to the testimony, we defer to the trial judge's superior position. *Jones v. State*, 355 Ark. 630, 144 S.W.3d 254 (2004).

It was the duty of the trial court, rather than this court, to resolve conflicting evidence regarding whether Wilcox was told not to take Zantac and on the possibility of false-positive readings. However, we agree with Wilcox's argument that the State did not establish that proper procedures were followed to ensure accurate test results. Even if the temperature of the urine sample was somehow within protocol, there was a lack of proof regarding the pH level, and the testing instructions directed that a sample not within a prescribed pH range should be suspected of adulteration. A drug sample that has been handled and tested in an unreliable manner cannot yield a reliable result that will enable a trier-of-fact to determine that it is more likely than not that a person used a controlled substance. *See, e.g.*, *City of Little Rock v. Hudson*, 366 Ark. 415, 236 S.W.3d 509 (2006) (holding that evidence supported the trial court's finding that breathalyzer results were not reliable where the hospital attendant failed to ask whether the firefighter had been eating mints containing sorbitol, a form of alcohol).

We hold that the trial court's finding that Wilcox violated a condition of his probation was clearly against the preponderance of the evidence.

Reversed and dismissed.

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

Robert E. MURPHY *v.* FORSGREN, INC. &
General Accident Insurance Company

CA 06-1190 258 S.W.3d 794

Court of Appeals of Arkansas
Opinion delivered June 13, 2007

Frederick Strawn Spencer, for appellant.

Michael E. Ryburn, for appellee.

SAM BIRD, Judge. In 1998 appellant Robert Murphy sustained a compensable workers' compensation injury in a backhoe accident that required extensive medical treatment and surgeries to his right foot and leg. In 2006, a hearing took place before an administrative law judge on Murphy's subsequent claim for additional benefits, which appellee Forsgren, Inc., controverted. The law judge denied the claim, as did the Workers' Compensation Commission in an opinion of July 31, 2006. Murphy now appeals the Commission's decision: he raises four points challenging the suffi-

ciency of the evidence to support the Commission's findings, and he raises three points concerning constitutional issues. We affirm the denial of the claim.

Sufficiency of the Evidence

Where the sufficiency of the evidence is challenged on appeal, we review the evidence in the light most favorable to the findings of the Commission and will affirm if those findings are supported by substantial evidence. *Cooper Tire & Rubber Co. v. Angell*, 75 Ark. App. 325, 58 S.W.3d 396 (2001); *Ringier Am. v. Combs*, 41 Ark. App. 47, 849 S.W.2d 1 (1993). Substantial evidence is 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). Determinations of credibility and the weight to be given a witness's testimony fall within the sole province of the Commission. *Powers v. City of Fayetteville*, 97 Ark. App. 251, 248 S.W.3d 516 (2007).

Without an initial finding of compensability, a claimant cannot be awarded temporary total disability benefits or additional medical treatment. *Cross v. Magnolia Hosp. Reciprocal Group of Am.*, 82 Ark. App. 406, 109 S.W.3d 145 (2003). The healing period continues until the employee is as far restored as the permanent character of the injury will permit. *Breakfield v. In & Out, Inc.*, 79 Ark. App. 402, 88 S.W.3d 861 (2002).

At the hearing before the administrative law judge, Murphy contended that problems with his neck and back were attributable to his 1998 compensable injury and that he also suffered depression as a result of the accident. He sought payment of medical benefits relating to his neck, back, and depression; payment for a pain pump; and temporary total disability benefits from January 28, 2002, to an undetermined date. The law judge, and subsequently the Commission, found that Murphy failed to meet his burden of proof regarding any of these claims for additional benefits.

As his first point on appeal, Murphy challenges the sufficiency of the evidence to prove compensable injuries to his lumbar spine and cervical spine. The Commission noted that Murphy had been in a motor vehicle accident in 1999, a date that preceded all medical records reflecting the time that he sought medical treatment for any back complaints. The Commission's assessment of the medical evidence was as follows. On May 14, 2001, two-and-one-half years after his injury, an emergency room report indicated

that Murphy's back pain and history of complaints had begun just two weeks earlier. Medical records of Dr. Ruth Thomas dated February 21, 2001, May 23, 2001, and April 25, 2002, did not contain any mention of low-back complaints. Little weight was given to Dr. Tony Raben's opinion that Murphy's back and neck complaints were caused by the 1998 accident for the following reasons: Raben's evaluation was more than three years after the accident, his opinion was based on the history related to him by Murphy and indicated no awareness of the vehicular accident, and there was contradiction between Raben's explanation that an altered gait from the 1998 accident caused the back problems and Murphy's testimony that he injured his neck and back at the time of the 1998 accident. Finally, the Commission noted that although Murphy's back complaints were mentioned in a functional-capacities evaluation, the evaluation did not mention injury as a cause of those complaints.

In his second point on appeal, Murphy challenges the Commission's finding that he failed to prove entitlement to temporary disability benefits for the period from January 28, 2002, until an undetermined date. The Commission pointed to Dr. Thomas's report of September 4, 2001, that Murphy had reached maximum medical improvement for his compensable right-foot injury, and it stated that there was no indication subsequent to that date that he re-entered his healing period or suffered a total incapacity to earn wages as a result of the injury.

Murphy's third point disputes the Commission's finding that he failed to prove that his depression was a result of his compensable right-foot injury. The Commission noted that Murphy's psychological complaints did not appear in medical records until 2002; that Dr. Thomas's clinic note of February 21, 2001, stated that Murphy did not suffer from psychological problems; and that on September 4, 2001, Thomas assigned Murphy a permanent physical impairment rating and stated that he had reached maximum medical improvement with respect to his work-related injury.

Murphy's final challenge to the sufficiency of the evidence is in regard to the Commission's finding that he failed to prove that a pain pump recommended by his treating physician was reasonably necessary for treatment of his compensable injuries. The Commission pointed to Murphy's testimony that he was not sure whether he even wanted the pain pump, and it found that he had

failed to prove that the pump was for treatment of the compensable work-related injury to his right lower extremity.

Murphy bases his sufficiency arguments on the greater weight of the evidence, the preponderance of the evidence, and other grounds that are not within our standard of review. Under the proper standard of review, there is no merit to his arguments. The evidence as summarized in the previous paragraphs of this opinion constitutes substantial evidence to support the four findings that Murphy now challenges.[1]

Constitutional Issues

Murphy's three final points on appeal are these: that his evidence established that the executive branch of the State of Arkansas and private interests have exerted pressure on the administrative law judges and the Commission, which has infringed upon their decisional independence and resulted in actual bias and the appearance of bias; that an administrative quasi-judicial procedure that does not provide safeguards to protect the decisional independence of hearing officers violates the separation of powers doctrine established by the Constitution of the State of Arkansas; and that the external pressure exerted by political and private interests upon the quasi-judicial administrative decision makers violates the due-process rights of the parties appearing before the agency and invalidates and renders void the adjudicative procedure of the agency.

Prior to his hearing date of February 6, 2006, Murphy notified the Arkansas Attorney General and the Workers' Compensation Commission of several constitutional challenges to our workers' compensation law and the Commission's procedure for adjudicating claims. Murphy also filed a motion for recusal of the administrative law judge scheduled to hear this case. Attached to Murphy's motion were affidavits by former administrative law judges William Daniels and Michael White; Murphy maintained that these affidavits were proof that administrative law judges and Commissioners felt pressure from Arkansas's executive branch to rule on issues in a manner favorable to certain private business entities.

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[1] No medical records appear in Murphy's appellate brief. We are allowed to go to the record to affirm, *Smith v. Aluminum Co. of Am.*, 78 Ark. App. 15, 76 S.W.3d 909 (2002), and we have done so in this case.

The three points Murphy now raises and his supporting arguments are identical to points and arguments that were presented to this court in *Long v. Wal-Mart Stores, Inc.*, 98 Ark. App. 70, 250 S.W.3d 263 (2007). The Commission rejected Murphy's constitutional challenge, analogizing his case to *Long* and noting each claimant's failure to demonstrate that the administrative law judge who decided Murphy's case was under pressure or biased in any way against the claimant. We agree with the Commission's analogy. *See id.* (holding in part that Long failed to establish any of the following: bias against him or his attorney resulting from any pressure from the executive branch or private interests, violation of due-process rights concerning the individual parties in the case at issue, violation of separation of powers, and violation of his due-process rights under our workers' compensation law).

Additionally, we note that Daniels was a law judge from April 2000 to May 2003, and White was employed as an attorney for the Commission from November 1990 to September 1995 before serving as law judge from September 1995 to September 2004. Their testimony referred to their perception that, during these periods of time, administrative law judges in Arkansas felt pressure from the executive branch to rule favorably to private businesses. Murphy's hearing, before a different law judge, did not take place until February 2006. Thus, Murphy has failed to establish that the law judge who heard his case was subject to pressures allegedly exerted by the executive branch against law judges at an earlier time.

Just as in *Long*, here we find no merit in the constitutional arguments presented on appeal. Accordingly, this case is affirmed.

Affirmed.

VAUGHT and BAKER, JJ., agree.

CONSUMERS UTILITIES RATE ADVOCACY DIVISION & West Central Arkansas Gas Consumers, Inc. *v.* ARKANSAS PUBLIC SERVICE COMMISSION, et al.

CA 06-379 258 S.W.3d 758

Court of Appeals of Arkansas
Opinion delivered June 13, 2007

[redacted]

Mike Beebe, Att'y Gen., by: *Lori L. Burrows*, Ass't Att'y Gen., and *M. Shawn McMurray*, Sr. Ass't Att'y Gen., for appellant Consumer Utilities Rate Advocacy Division.

Denise Baker and *Brian C. Donahue*, for appellant West Central Arkansas Gas Consumers.

Paul J. Ward and *Connie Griffin*, for appellee Arkansas Public Service Commission.

Chisenhall, Nestrud & Julian, P.A., by: *Lawrence L. Chisenhall, Jr.*, for appellee Arkansas Oklahoma Gas Corporation.

WENDELL L. GRIFFEN, Judge. This appeal concerns a rate application filed by Arkansas Oklahoma Gas (AOG) on February 1, 2005, in which it sought an increase of non-gas rates of

almost $6.9 million. Docket No. 05-006-U was established by the Commission to consider its application. The parties to the proceeding included appellant West Central Arkansas Gas Consumers (WCAGC), appellant Consumer Utilities Rate Advocacy Division of the Attorney General's Office (AG), the general staff of the Arkansas Public Service Commission (Staff), Commercial Energy Users Group (CEUG), and Seminole Energy Services, LLC (Seminole). All of the parties pre-filed direct testimony and surrebuttal testimony. An evidentiary hearing was held on November 8, 2005, and a public-comment hearing was held in Fort Smith on November 17, 2005. On December 1, 2005, the Commission issued Order No. 7, a seventy-two-page document in which the Commission made extensive findings of fact and approved an overall rate increase of $4,404,060. On December 15, 2005, the Commission entered Order No. 8 that approved the revised tariffs submitted by AOG in compliance with Order No. 7. Petitions for rehearing of Order No. 7 were filed by the AG, AOG, CEUG, and WCAGC; the AG and WCAGC also requested rehearing of Order No. 8. The Commission entered Order No. 10 on January 17, 2006, for the sole purpose of further consideration of the rehearing petitions, but, on March 10, 2006, it denied the requests in Order No. 11. The AG and WCAGC have both appealed from the Commission's orders in this docket, raising separate issues for our review.

AG Issue I — Failure to Consider Public Comments

We begin with the issues raised by the AG. The AG argues for its first point that the Commission's failure to consider the Fort Smith public comments before issuing Order No. 7 violated Arkansas law and ratepayers' rights. The AG is referring to a hearing held in Fort Smith to receive public comments concerning AOG's petition for a rate increase, pursuant to Ark. Code Ann. § 23-2-103(b) (Repl. 2002), which provides:

> When a formal proceeding to consider a general change or modification in the rates and charges of a public utility has been initiated before the commission, the commission shall conduct a hearing for the purpose of receiving public comment in an appropriate location or locations within the service territory of the public utility.

The hearing was conducted by Administrative Law Judge Ted Thomas of the Commission on November 17, 2005, and a court reporter

was present to transcribe the hearing. None of the commissioners were in attendance; however, Administrative Law Judge Thomas told those present that the hearing was being transcribed and would be part of the record and available to the commissioners to review. Eight ratepayers testified at the hearing, and a letter from an absent ratepayer was also read. The Commission issued Order No. 7 on December 1, 2005, four days before the transcript of the Fort Smith hearing was filed with the Commission on December 5, 2005.

The AG then petitioned for rehearing of Order No. 7, arguing, among other things, that the Commission's failure to include the public comments in the record before issuing Order No. 7 merited reconsideration of the bases for the substantial residential rate increase. The AG argued that section 23-2-103(b), which requires that a public hearing be held, was designed to give ratepayers an opportunity to present their concerns regarding potential increases in utility bills and that the failure to include these comments in the record violates Arkansas law and discredits the thoughts and opinions of the people who will be most directly impacted by Order No. 7 mandates.

The Commission responded to this argument in Order No. 11:

> The AG implies that Order No. 7 is violative of Arkansas law because it was issued prior to receipt by the Commission of the transcript of a public comment hearing conducted on behalf of the Commission by a Commission Hearing Officer in Ft. Smith, Arkansas on 17 November 2005. Order No. 7 was issued on 1 December, 2005. The transcript of the Ft. Smith public comment hearing was not filed with the Commission until 5 December 2005. Before ruling on the AG's objection on this issue a review is required of the Arkansas laws controlling the Commission's investigation of, conduct of public hearings on, and final ruling on a utility company's application for a general rate increase.
>
> From the date a general rate increase application is filed, in the instant case 1 February 2005, the Commission has a maximum of ten (10) months in which to complete its investigation, conduct all required evidentiary and public comment hearings, and issue its final rate case ruling. Unless the Commission issues an order suspending the operation of proposed new rates within thirty (30) days of the date the proposed new rates were filed by the utility, the proposed new rates will go into effect on the 30th day after they

were filed. However, if the Commission issues an order suspending the proposed new rates within the allowed thirty (30) days then it may take an additional nine (9) months in which to investigate and issue its final rate case ruling on the utility's application for a general rate increase.

In the instant case the Commission timely issued its suspension order on 3 March 2005 and established the procedural schedule for this case. In addition to a schedule for the filing of written testimony and exhibits by the official parties in this case, the suspension order set a public evidentiary hearing on AOG's rate increase application to be conducted in its Little Rock, Arkansas office beginning on 8 November 2005, and a public comment hearing to be conducted in Ft. Smith, Arkansas on 17 November 2005. By operation of law the Commission was required to issue its final rate case order no later than 1 December, 2005. Failing to issue its final rate case order by 1 December 2005 would have allowed AOG the opportunity to immediately place into effect its full rate increase request. AOG had requested an increase in non-gas rate revenues of approximately $7 million. The Commission's final rate case order issued on 1 December 2005 authorized an increase in non-gas rate revenues for AOG of only $4.4 million. Had the Commission not issued its final rate case order on 1 December 2005 AOG could have increased its rates by approximately $2.6 million more that the Commission allowed.

The Commission regrets that the transcript of the Ft. Smith public comment hearing was not available to the Commission until 5 December 2005, four (4) days after the Commission's statutory deadline of 1 December 2005 to issue its final rate case order. Unfortunately in this case the Commission's court reporting contractor failed to deliver the public comment transcript on-time and in accordance with its contract. The transcript should have been delivered to the Commission by the court reporter within ten (10) calendar days of the public comment hearing, i.e. on or before 27 November 2005. Had the transcript been delivered on time the Commission would have had time to read and consider the comments of AOG's customers who spoke at the public hearing prior to the issuance of its 1 December 2005 final rate case order.

However, the Commission did have the benefit of having received and considered the public comments of many of AOG's customers prior to the issuance of its final rate case order on 1 December 2005. Prior to the issuance of its final order the Com-

> mission had received and considered twenty-four (24) public comments regarding this case. Those public comments were similar in both tone and content to the nine (9) public comments offered during the Ft. Smith public comment hearing. Further, on rehearing the Commission has had the opportunity to read the late-filed transcript and consider the additional public comments offered during the Ft. Smith public comment hearing.

Order No. 11 at 6-8 (footnotes omitted).

On appeal, the AG asserts that the Commission's failure to consider the public comments before issuing its decision in Order No. 7 and approving the resultant rate increase was a violation of section 23-2-103(b) and rendered Order No. 7 and the subsequent compliance orders unlawful. It acknowledges the time constraints cited by the Commission in Order No. 11, which it used to explain its decision to issue Order No. 7 before receiving the transcript of the Fort Smith hearing. Nevertheless, it disagrees that the Commission's explanation justifies its decision to disregard the intent of the legislature in passing section 23-2-103(b).

In contrast, AOG argues that, in construing a statute, it is a court's duty to construe a statute just as it reads, *see Jones v. Double "D" Props.*, 352 Ark. 39, 98 S.W.3d 405 (2003), and that section 23-2-103(b) only requires the Commission to hold a hearing for purposes of public comment but does not require that it receive the transcript of the hearing before issuing a rate order. Although the wording of section 23-2-103(b) does not state specifically that the Commission must have the transcript of the public comments before it issues its decision, that was clearly the intent of the statute. Section 23-2-103 was amended in 1999 by Act 1072 to add section (b). The subtitle to the amendment reads: "TO AMEND ARKANSAS CODE 23-2-103 TO REQUIRE PUBLIC HEARINGS TO BE HELD WHEN A UTILITY REQUESTS PSC TO APPROVE A RATE INCREASE." Act of Apr. 5, 1999, No. 1072, 1999 Ark. Acts 4091 (emphasis added). The title of an act, while not part of the law, may be referred to in order to help ascertain the intent of the General Assembly. *Routh Wrecker Serv., Inc. v. Wins*, 312 Ark. 123, 847 S.W.2d 707 (1993); *see also Quinney v. Pittman*, 320 Ark. 177, 895 S.W.2d 538 (1995). Furthermore, a statute will not be given a literal interpretation if it leads to absurd consequences that are contrary to legislative intent, *see AT&T Commc'ns of the Sw., Inc. v. Ark. Public Serv. Comm'n*, 344

Ark. 188, 40 S.W.3d 273 (2001), or defeats the plain purpose of the law, *Weiss v. Cent. Flying Serv., Inc.*, 326 Ark. 685, 934 S.W.2d 211 (1996). We agree with the AG that section 23-2-103(b) requires that the comments of the public hearing be considered prior to the Commission issuing a decision to change a utility's rates. We now must determine whether the Commission's failure to have received the comments from the public hearing before it issued Order No. 7 mandates reversal of Order No. 7.

Our standard of review of appeals from the Commission is provided by the General Assembly in Ark. Code Ann. § 23-2-423(c)(3) and (4) (Repl. 2002):

> (3) The finding of the commission as to the facts, if supported by substantial evidence, shall be conclusive.
>
> (4) The review shall not be extended further than to determine whether the commission's findings are supported by substantial evidence and whether the commission has regularly pursued its authority including a determination of whether the order or decision under review violated any right of the petitioner under the laws or Constitution of the United States or of the State of Arkansas.

See Ark. Gas Consumers, Inc. v. Ark. Pub. Serv. Comm'n, 354 Ark. 37, 118 S.W.3d 109 (2003); *AT&T Commc'ns of the Sw., Inc. v. Ark. Pub. Serv. Comm'n*, 67 Ark. App. 177, 994 S.W.2d 494 (1999); *Bryant v. Ark. Pub. Serv. Comm'n*, 54 Ark. App. 157, 924 S.W.2d 472 (1996). If an order of the Commission is supported by substantial evidence and is neither unjust, arbitrary, unreasonable, unlawful, nor discriminatory, then the appellate court must affirm the Commission's action. *Bryant v. Ark. Pub. Serv. Comm'n*, 46 Ark. App. 88, 877 S.W.2d 594 (1994). Administrative action may be regarded as arbitrary and capricious only where it is not supportable on any rational basis, and something more than mere error is necessary to meet the test. *Bryant*, 54 Ark. App. at 168, 924 S.W.2d 479. To set aside the Commission's action as arbitrary and capricious, the appellant must prove that the action was a willful and unreasoning action, made without consideration and with a disregard of the facts or circumstances of the case. *Id.*

Had the Commission denied rehearing of this issue, we would be compelled to reverse. The Commission, however, had the opportunity to review the public comments after the AG raised

this issue and addressed those comments in Order No. 11. Furthermore, the AG has not argued that the increase in residential rates approved by Order Nos. 7 and 8 was not supported by substantial evidence and, therefore, has failed to show that the residential ratepayers were prejudiced by its orders. In *Arkansas Public Service Commission v. Yelcot Telephone Co.*, 266 Ark. 365, 585 S.W.2d 362 (1979), the appellant argued that the trial court erred in entering its November 1, 1978 order, alleging that it was a final order entered without notice to the appellant and without providing the appellant an opportunity to respond to the petition filed by the appellee. The supreme court held that, even if the trial court was in error in entering the order in the manner in which it did, it would not reverse a judgment for an error that is unaccompanied by prejudice, commonly referred to as "harmless error." *Id.* at 375, 585 S.W.2d at 367. Error is no longer presumed prejudicial. *See Cent. Ark. Tel. Coop., Inc. v. Ark. Pub. Serv. Comm'n*, 61 Ark. App. 147, 965 S.W.2d 790 (1998).

Because the Commission did consider the Fort Smith comments on rehearing, and because the AG has not argued that the residential rates that resulted from Order No. 7 were not supported by substantial evidence, we will not reverse Order No. 7 on this issue. Nevertheless, we stress that the Commission does not have the option to follow at its pleasure the laws enacted for the benefit of the ratepayers and emphasize that we do not expect to confront this action again.

AG Issue II — Order No. 7 Was Not Supported by Substantial Evidence

The AG's second issue on appeal is that Order No. 7 was not supported by substantial evidence because the Commission did not address whether the month of April should have been included in the "winter (peak) usage period" for purposes of determining the costs allocated to gathering and transmission mains, and because it allowed AOG to reclassify 138 miles of gathering and transmission mains to distribution without requiring it to carry over the reclassified mains into its zero-intercept study. We will address the inclusion of April in the winter (peak) usage period first.

In the proceedings leading up to Order No. 7, the parties debated over the portions of AOG's gathering and transmission plant that should be classified as demand related (the firm service the company commits itself to purchase on a daily, seasonal, or annual basis) and the percentage that should be classified as

commodity related (the actual quantities purchased by the company). Initially, most of the parties proposed differing percentages: the AG wanted 100% to be classified commodity related; CEUG and WCAGC wanted 100% to be classified demand related; and AOG and Staff recommended that costs be classified as both commodity and demand. AOG recommended 50% to commodity and 50% to demand, and Staff recommended 31.4% be classified as commodity and 68.5% as demand, explaining that approximately 68.5% of AOG's weather-normalized sales occur during the winter (peak) usage period.

In recommending that 68.5% be allocated as demand-related, Staff witness Adrienne Bradley referenced AOG witness David Heintz's direct testimony that gathering and transmission facilities serve two purposes, delivering gas both during peak periods and on an annual basis. She stated that, based upon her review of AOG's Exhibit E-12, she determined that 68.5% of AOG's weather-normalized sales occurred during the winter (peak) usage period and therefore classified 68.5% of production, gathering, and transmission costs as demand related. She said the 68% allocation was based upon AOG's weather-normalized sales during winter usage months and that the "weather normalized average" is the period from November through April. She also stated that, if April is not included in the weather-normalized average, the demand allocation percentage would be reduced from 68.5% to 61%.

The AG also cross-examined AOG witness David Heintz concerning the inclusion of the month of April in the winter (peak) usage period. The AG presented Heintz with Exhibit AG Cross 1, which consisted of AOG's response to the AG's Interrogatories Nos. 1-7, which asked AOG to provide the total gas throughput and heating-degree days for each day of the most recent twelve months available. The exhibit included the daily-degree days for a twelve-month period supplied by AOG. Heintz explained that heating-degree days are defined as the number of degrees less than sixty degrees of average temperature; that a day when the average temperature is fifty-nine would be called a one heating-degree day; that a below-twenty heating-degree day would be a mean temperature of greater than forty degrees; and that heating-degree days less than five would compute to a mean temperature of greater than fifty-five degrees. He acknowledged that the first page of Exhibit AG Cross 1 listed a summary of the daily-degree days that AOG provided for the months of Novem-

ber 2004 through March 2005 and admitted that, looking at the summary, he did not see any heating-degree days for April that were greater than twenty. In contrast, the summary also showed that the other "winter" months had heating-degree days greater than twenty: November had two days, December and January each had eighteen days, February had seven days, and March had six days. April had no heating-degree days greater than twenty, and it had only four heating-degree days greater than nine, which ranged between eleven and thirteen heating degrees. Relying on Exhibit AG Cross 1 and the testimony of Heintz and Bradley, the AG argued that the evidence proves that April is dramatically different from November through March in terms of how cold it is and that, if April was not included in the winter (peak) usage months, the 68.5% demand figure allocation would be reduced to 61%. The Commission, in Order No. 7, adopted Staff's recommendation to allocate 31.4% to commodity and 68.5% to demand, without addressing the inclusion of April in the calculation. The Commission explained:

> Having determined that AOG's gathering and transmission plant costs are both commodity and demand related, the next step is to determine the portions that are commodity and demand related. Staff witness Bradley demonstrates that AOG's gathering and transmission service relates to the 68.5 percent of normalized sales under winter (peak) conditions and is demand related. The remaining 31.4 percent of gathering and transmission plant relates to annual gas demands or commodity. Allocating 31.4 percent of gathering and transmission facilities on the basis of average demands, and 68.5 percent on the basis of peak demands properly recognizes the annual sustained deliveries over these facilities and deliveries at times of elevated demand. We accept as reasonable Staff's classification of AOG's gathering and transmission facilities.

Order No. 7 at 39-40. The AG again raised the issue of April's inclusion in its petition for rehearing, but it was denied.

On appeal, the AG argues that Order No. 7 should be reversed because the Commission disregarded, without comment, the substantial evidence it presented that April should not be considered a winter (peak) usage month. It stresses the significant disparity in heating-degree days between April and the other five months subject to the Weather Normalization Adjustment period and that no other party provided conflicting evidence. The Commission and AOG respond that the focus should not be on whether

April should be included in the winter (peak) usage calculation but whether there was substantial evidence to support the Commission's decision to allocate the gathering and transmission costs to 68.5% demand and 31.4% commodity. The Commission contends that the AG posed the wrong question and that the question for review is not whether the evidence would have supported a contrary finding but whether it supports the finding made. To establish the absence of substantial evidence, an appellant must show that the proof before the administrative tribunal was so nearly undisputed that fair-minded persons could not reach its conclusion. *Bryant v. Ark. Pub. Serv. Comm'n*, 57 Ark. App. 73, 941 S.W.2d 452 (1997).

The Commission emphasizes Bradley's testimony that her recommended classification percentages were similar to percentages that would be obtained using "the Average and Peak allocation methodology," an alternative methodology that the Commission has accepted as reasonable and used in the Commission's two most recent gas cases to separate demand and commodity related costs. It also relies on the AOG's E-12 schedule to support its finding that approximately 68% of AOG's weather-normalization sales occur during the winter (peak) usage period, the months of November through April. The Commission's argument, however, does not address the issue raised by the AG.

It may be that there was evidence before the Commission to support the 68.5% allocated to demand regardless of whether April is included as a winter (peak) usage month; however, we are not able to determine that from the information supplied. The AG, in its application for rehearing, reviewed the evidence that supported the exclusion of April as a winter month, the fact that its evidence was not controverted by any party during the hearing, and Bradley's admission that the 68.5% demand allocation would be reduced to 61% if April was excluded from the weather-normalized average. Despite this evidence, the Commission chose not to address it.

This court cannot speculate as to whether the month of April should have been included in the winter (peak) usage period that was relied on by the Commission to support the 68.5% demand allocation. This was a finding that should have been made by the Commission. Arkansas Code Annotated section 23-2-421(a) (Repl. 2002) requires that the "Arkansas Public Service Commission's decision shall be in sufficient detail to enable any court in which any action of the commission is involved to

determine the controverted question presented by the proceeding." The Commission's findings must be in sufficient detail to enable the courts to make an adequate, meaningful review; this court must know what the findings of the Commission are before they can be given conclusive weight; and, as between conflicting statements, the Commission must make findings to show which of the evidence it accepts as competent and worthy of belief and that which it rejects. See *Bryant v. Arkansas Public Service Commission*, 62 Ark. App. 154, 969 S.W.2d 203 (1998), where this court remanded a Commission order with directions to render adequate findings because it was unable to address some of the arguments raised by the appellant. In doing so, this court quoted from an earlier opinion in *Bryant v. Arkansas Public Service Commission*, 45 Ark. App. 56, 871 S.W.2d 414 (1994):

> [I]t must be possible for the reviewing court to measure the findings against the evidence from which they were educed. *Southwestern Bell. Tel. Co. v. State Corp. Comm'n*, 192 Kan. 39, 386 P.2d 515, 524 (1963). In *Town of New Shoreham v. Rhode Island Public Utilities Commission*, 464 A.2d 730 (R.I. 1983), the Rhode Island Supreme Court Stated:
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>> This court does not sit as a factfinder; our role is "to determine whether the commission's decision and order are lawful and reasonable and whether its findings are fairly and substantially supported by legal evidence and substantially specific to enable us to ascertain if the facts upon which they are premised afford a reasonable basis for the result reached." *Rhode Island Consumers' Council v. Smith*, 111 R. I. at 277, [302 A.2d 757, 762 (1973)]. However, if the commission fails to set forth sufficiently the findings and the evidentiary basis upon which it rests its decision, we shall not speculate thereon or search the record for supporting evidence or reasons, nor shall we decide what is proper. Instead, we shall remand the case in order to provide the commission an opportunity to fulfill its obligations in a supplementary or additional decision. *Id.* at 278, 302 A.2d at 763.
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> *Town of New Shoreham v. Rhode Island Pub. Util. Comm'n*, 464 A.2d at 732. See also *Petition of New England Tel. & Tel. Co.*, 115 Vt. 494, 66 A.2d 135 (1949), in which the Supreme Court of Vermont held that the requirement that 'the public service commission make its findings of fact imposes upon the commission the duty to sift the evidence and state the facts, and when the essential findings have

> not been made, the court is unable to act as factfinder but must instead remand the case for such findings.

Bryant, 45 Ark. App. at 64, 871 S.W.2d at 418 (quoted in *Bryant*, 62 Ark. App. at 159-60, 969 S.W.2d at 207.

The Commission also attempts to persuade us that the issue of April's inclusion was not properly presented to the Commission because this issue was not listed on the Issue List filed in the docket. The opening paragraph to this exhibit, however, said that, "[i]f an issue is not listed as contested or uncontested, this does not preclude it from being contested at the hearing." Comm. Supp. Add. at 3. Moreover, the AG raised the issue of including April as a peak (usage) month in its cross-examination of Staff witness Bradley and AOG witness Heintz and in its closing argument. Accordingly, we hold that the issue was properly before the Commission and remand with direction to make adequate findings on this issue.

The AG also argues that Order No. 7 is not supported by substantial evidence because the Commission allowed AOG to reclassify 138 miles of gathering and transmission pipe to distribution but did not require AOG to carry over this reclassification into its zero-intercept study, thereby resulting in unreasonable rates. The AG does not challenge the Commission's decision to allow AOG to reclassify the 138 miles of gathering and transmission mains to distribution mains. Instead, it challenges its failure to require AOG to include the reclassified mains in its zero-intercept study on which Staff relied, and the Commission ultimately adopted, to determine how much of AOG's distribution mains should be classified as customer related. The AG argues that too much of the costs of distribution mains were classified as customer cost because the reclassified mains were not considered in the study.

AOG witness David Heintz testified that AOG prepared a cost of service study[1] to be used in determining the customer-cost

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[1] COST OF SERVICE — A term used in public utility regulation to mean the total number of dollars required to supply any total utility service (i.e. revenue requirements); it must include all of the supplier's costs, an amount to cover operation and maintenance expenses, and other necessary costs such as taxes, including income taxes, depreciation, depletion, and amortization of the property not covered by ordinary maintenance. Included

component of its distribution mains and that, where possible, distribution-plant costs were directly allocated to the customer classes based on the data contained in the AOG's plant records. He stated that the zero-intercept study was used to classify the cost of distribution mains, which is one of the two commonly used methods to determine the customer-cost component of distribution mains. He explained that, under the zero-intercept method, a customer-cost component is developed through regression analysis to determine the unit cost associated with the zero-inch-diameter distribution main and that plant records are used to determine the type (plastic and steel), size (diameter), date, cost, and footage of distribution main installed on the system. The unit costs are then regressed against the age of the mains. He admitted that, of the reclassified mains, approximately 136 miles were steel mains and less than two miles were plastic mains, and he agreed that steel mains had a lower customer percentage than plastic mains. He stated that he would expect that the customer component would be lower if all the reclassified mains were included in the zero-intercept study.

AG witness William B. Marcus argued that the Commission should modify the zero-intercept study results obtained by AOG and reduce the customer component, particularly for plastic mains, because the reclassified transmission and gathering mains were not included in the study, either to develop the regressions or to develop appropriate percentages of customer-related costs. He

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also is a fair return in order that the utility can maintain its financial integrity, attract new capital, and compensate the owners of the property for the risks involved.

Bryant v. Ark. Pub. Serv. Comm'n, 57 Ark. App. 73, 80 n.1, 941 S.W.2d 452, 456 n.1 (1997).

A "cost of service study" is made in order to assist in determining the total revenue requirements to be recovered from each of the various classes of service. The [amount] to be recovered from each of the classes of service is determined by the management or a commission after study of the various factors involved in rate design. Cost analysis or cost allocation is an important factor in rate design but only one of several important factors. Cost analysis does not produce a precise inflexible "cost of service" for any individual class of service because cost analysis involves judgment in certain cost areas. Its principal value is in determining the minimum costs attributable to each class of service. Other factors that must be considered in rate design are the value of the service, the cost of competitive services, the volume and load factor of the service and their relation to system load equalization and stabilization of revenue, promotional factors and their relation to the social and economic growth of the service area, political factors such as the sizes of minimum bills and regulatory factors. American Gas Association, *Glossary for the Gas Industry* 13 (4th ed. 1986).

Id. at 80 n.2, 941 S.W.2d at 456 n.2.

stated that additional data had been requested because gathering and transmission mains are larger and made of steel and have a lower customer component than distribution mains, which are generally made of plastic. He recommended a revised zero-intercept study that included the reclassified mains as 14% allocated by customer count.

CEUG witness Timothy Staley also testified that he had specific concerns associated with AOG's zero-intercept method approach to allocating distribution mains because it included a combination of steel and plastic pipe. He proposed conducting the study using plastic pipe because he reasoned that all new piping will be plastic and the existing steel distribution mains eventually will be replaced with plastic mains. He supported distribution mains being allocated 50% to customer function and 50% to demand function.

Staff witness Adrienne Bradley also discussed the effect of classification of distribution mains on customer rates. She stated that AOG initially proposed that distribution-main costs be classified as approximately 28% customer related and 72% demand related based on zero-intercept method analysis but that she proposed classifying approximately 30% of AOG's investment in distribution mains as customer related based on some errors she corrected in AOG's model. She testified that including the reclassified distributions mains in the zero-intercept analysis would require the unit cost data for the reclassified plant but that AOG has stated that this data is not currently available. She therefore recommended excluding the reclassified plant from the zero-intercept regression, although she agreed that the customer-related percentage of AOG's total system likely would be lower after adding 136 miles of steel main and less than two miles of plastic main. She reiterated, however, that the unit cost data was not available and, therefore, only an approximate directional move, and not an exact number, could be inferred from that data. After hearing the evidence, the Commission adopted Staff's classification and allocation of AOG's distribution-main costs as more reasonable.

The AG argues that it presented substantial and unrebutted evidence demonstrating that including the reclassified main in the zero-intercept study would lower the customer component and, therefore, the 30% customer allocation adopted by the Commission was not supported by substantial evidence. The Commission has wide discretion in choosing its approach to rate regulation and this court does not advise the Commission as to how to make its findings or exercise its discretion. *Consumer Utils. Rate Advocacy*

Div. v. Ark. Pub. Serv. Comm'n, 86 Ark. App. 254, 184 S.W.3d 36 (2004); *Bryant*, 57 Ark. App. at 78, 941 S.W.2d at 455. This court has observed that the allocation of gas mains is an area in which it is appropriate to recognize the Commission's experience, technical competence, and specialized knowledge, and the discretionary authority conferred on the Commission. *Consumer Utils. Rate Advocacy Div.*, 86 Ark. App. 254, 184 S.W.3d 36; *Bryant*, 57 Ark. App. at 78, 941 S.W.2d at 455; *Bryant v. Ark. Pub. Serv. Comm'n*, 50 Ark. App. 213, 907 S.W.2d 140 (1995). The burden was on the AG to show that the Commission's holding was not supported by substantial evidence. *Consumer Utils. Rate Advocacy Div.*, 86 Ark. App. at 275, 184 S.W.3d at 50.

> For purposes of determining whether an administrative agency's decision is supported by substantial evidence, the question on review is not whether the testimony would support a contrary finding but whether it supports the finding that was made. To do this an appellant must show that the proof before the Commission was so nearly undisputed that fair-minded persons could not reach the conclusion the Commission did. Evaluation of testimony is for the Commission, not the courts; to hold that testimony does not constitute substantial evidence, this court must find the testimony has no rational basis.

Id. (citations omitted); *see also Bryant*, 57 Ark. App. at 85, 941 S.W.2d at 459.

■ Although the AG did obtain testimony from AOG witness Heintz and Staff witness Bradley that inclusion of reclassified mains would likely lower the customer portion, the AG did not produce evidence to show how much the customer count would be reduced. Staff witness Bradley said that she could not give an exact outcome, but only a directional move, and that Heintz had merely stated that it would be lower. While we recognize that the AG obtained some testimony that the allocation of distribution mains' cost could have been lowered if the relevant data was available, that evidence is not sufficient to convince this court that the Commission's adoption of Staff's customer allocation is not supported by substantial evidence. We affirm on this issue.

WCAGC Issue I — The Commission's Failure to Make Appropriate Findings of Fact

West Central Arkansas Gas Consumers (WCAGC) argues that the Commission's failure to make appropriate findings of fact

on all the issues arising in this proceeding violates Ark. Code Ann. § 23-2-421 (Repl. 2002), which requires that decisions of the Commission be in sufficient detail to enable any court in which any action of the Commission is involved to determine the controverted question presented by the proceeding. Specifically, WCAGC contends that the Commission's orders did not address AOG's proposals to prevent AOG's retail gas transportation customers from getting any portion of their natural gas supply requirements from anywhere other than AOG's system (supply exclusivity); to prohibit AOG's large business transportation customers from resolving natural gas nomination and delivery imbalances through in-kind gas exchanges (monthly cash-out requirement); and to revise its customer deposit policy to require any customer shifting from transportation to sales service to pay a deposit based on an estimated year's worth of bills. Despite the Commission's silence on these proposals, WCAGC argues that the revised tariffs submitted by AOG in compliance with Order No. 7 embodied AOG's proposals on the supply-exclusivity issue and the monthly cash-out requirement.[2] WCAGC argues that it raised these issues in its petitions for rehearing of Orders No. 7 and 8 but that the Commission again failed to address these issues. WCAGC concludes that Orders No. 7, 8, and 11 should be reversed because they contain no factual findings associated with AOG's supply-exclusivity, monthly cash-out requirement, and "deposit refunding/interest requirement" proposals. Although WCAGC treats these proposals as one issue, we will discuss each proposal separately.

AOG's rate application and compliance tariffs adopted by Order No. 8 contained the following provision in its Business Rate Schedule Appendix that WCAGC refers to in its brief as supply-exclusivity issue: "Customer shall receive, through Company's system, Customer's entire gas supply requirements for Customer's facility. Upon Customer's request, Transportation Customer may purchase Reserved Stand-by service pursuant to Company's Rate Schedule WA-8." WCAGC contends that its witness Adrian Moorhead and AOG witness Michael Callan each addressed this provision. It does not discuss the content of either

[2] WCAGC admits that the Commission eventually rejected AOG's third proposal — its attempt to force business transportation customers to pay increased deposits for switching to sales service — but, otherwise, the Commission approved the compliance tariffs in Order No. 8.

witness's testimony, although its footnote states: "WCAGC notes the supply-exclusivity issue was previously referred to in WCAGC's testimony and Petition for Rehearing as fuel exclusivity. WCAGC will use the term 'supply exclusivity issue' for convenience and to prevent confusion in the briefing process."

In his direct testimony, WCAGC witness Moorhead asserted that AOG modified its tariff to require transportation customers to purchase fuel exclusively from AOG; that transportation customers should be able to pursue a least-cost gas-purchasing strategy and purchase fuel from their desired sources where they may be able to purchase gas at a lower cost; and that the provision was anticompetitive and discriminatory. In his surrebuttal testimony, Moorhead also asserted that AOG's fuel-exclusivity provision was eliminated through negotiated settlement in AOG's last rate case and that AOG has not provided any explanation for the change.

AOG argues that the issue WCAGC raised at the hearing on "fuel exclusivity" is different from the "supply exclusivity" issue it is now raising. It contends that the term "fuel," which WCAGC used at hearing, and the term "supply," which it is now using on appeal, have two separate meanings within the gas industry. AOG explains that "fuel" denotes natural gas used by the service provider in the performing of the service, such as the natural gas used to run dehydrators and compressors on a natural gas system and LUFG (lost and unaccounted for gas). The Commission agrees and clarifies that "fuel" does not include the supply of gas sent to customers. The surrebuttal testimony of AOG witness Michael Callan supports AOG's description of WCAGC's argument before the Commission. Responding to a question asking him to address the concerns of Moorhead concerning tariff modifications, he replied:

> First, Mr. Moorhead claims that AOG's proposed tariffs require MBT [medium business transportation] and LBT [large business transportation] customers to purchase "fuel" exclusively from AOG. I assume Mr. Moorhead is referring to LUFG, since AOG does not provide compression; and, therefore, does not require fuel in its operations. Assuming that Mr. Moorhead is referring to LUFG instead of fuel, he is still wrong. Had Mr. Moorhead reviewed the provisions set out in AOG's proposed rate schedules,

> he would have noted that AOG is proposing to allow MBT and LBT transport customers to provide their LUFG contribution in-kind. . . .

Moorhead later responded that AOG's proposals to force transportation customers to receive, through the company's system, the customer's entire gas-supply requirements for customer's facility is an attempt by AOG to bar its transportation customers from taking gas from any source other than AOG's system. He argued that fuel exclusivity was eliminated through the negotiated settlement that resolved AOG's last rate case, APSC Docket 02-024-U, and that there is no explanation in AOG's original application of any need for this change. He argued that AOG had not presented any evidence that it had been harmed by the elimination of the fuel exclusivity provision.

AOG responds that the wording to which WCAGC objected in AOG's tariffs, "Customer shall receive, through Company's system, Customer's entire gas supply requirements," addresses "supply" as opposed to "fuel" requirements. It then quotes language from the Business Rate Schedule in Docket No. 02-024-U that states: "Customer agrees to transport, through Company's system, Customer's gas supply requirements for Customer's facility. . . ." AOG contends that its customers have always been required to utilize AOG's service exclusively for the customers' supply requirements and, therefore, the word "entire" is superfluous and that it has no objection to its removal. It concludes that, even though AOG customers have the option of purchasing gas supplies from a third party on AOG's system, WCAGC apparently mistakenly believed AOG was imposing a requirement that "fuel" be purchased from AOG.

After reviewing the testimony abstracted by the parties, we are unable to determine whether WCAGC was raising issues before the Commission concerning fuel in its narrow sense, gas used to run AOG's system, or supply, the gas used by customers. Its argument on appeal does not end our confusion. At one point in its brief, it argues that AOG's proposal prohibits its retail gas transportation customers from *getting* any portion of their natural gas requirements from anywhere other than AOG's system, but later in its brief, it states that Orders No. 7, 8, and 11 are silent on AOG's proposal to require gas transportation customers to *transport* their entire natural gas supply requirements through AOG's system. WCAGC seems to be making two inconsistent arguments.

We are unable to determine whether WCAGC is complaining about the acquisition of gas or the transporting of gas.

The burden is on WCAGC to adequately explain and argue what it is appealing and point to evidence before the Commission to support its argument. WCAGC admits in its reply brief that its witness Mr. Moorhead may have referred to the exclusivity provision improperly. Not only is its argument unclear on appeal, it also contains no discussion of the evidence or citation to authority[3] and fails to explain how AOG's tariff is anticompetitive and discriminatory. To the extent that WCAGC feels the Commission did not adequately address this issue, we do not find this omission, if any, is reversible error. When an appellant neither cites authority nor makes a convincing argument, and where it is not apparent without further research that the point is well taken, the appellate court will affirm. *Quinney*, 320 Ark. at 188, 895 Ark. at 544; *see also AT&T Commc'ns*, 67 Ark. App. at 186, 994 S.W.2d at 500.

AOG's Proposal that Transportation Customers Cash Out All Imbalances on a Monthly Basis

WCAGC also contends that the Commission's orders allowed AOG to make tariff changes without appropriate findings of fact by not addressing AOG's proposal that would require transportation customers to cash out all imbalances on a monthly basis instead of resolving its natural gas delivery imbalances through in-kind gas exchanges. The record in this proceeding consists of 5467 pages; however, WCAGC's entire argument on this issue is limited to the following statement: "AOG witness Callan addressed AOG's proposal to require transportation customers to cash out imbalances monthly. Mr. Daniel Frey, witness for Seminole Energy Services, also addressed AOG's proposal to require transportation customers to cash out imbalances monthly." This testimony, which WCAGC references but does not discuss, consists of the pre-filed testimony of Michael Callan, who stated that AOG's Business Rate Schedule Appendix contained a number of

[3] WCAGC's citation to *Southwestern Glass Co. v. Arkansas Oklahoma Gas Corp.*, 325 Ark. 378, 925 S.W.2d 164 (1996), offers no authority for its supply-exclusivity argument. In that case, the supreme court reversed the enjoining of the construction of Southwestern's pipeline, holding that AOG had failed to show that Southwestern's proposed pipeline interfered with the city's public use of the dedicated easement and right-of-way.

changes for the safe and economical operation of AOG's system and that one of these changes was to require large and medium business transportation customers to cash out all imbalances that remain at the end of the service month. Daniel Frey, responding to AOG's proposal, argued that AOG had not claimed to have experienced any operating problems related to the current cash-out tolerances. WCAGC concludes that Order No. 7 should be reversed because it contains no factual findings associated with this proposal.

WCAGC has not pointed this court to any testimony to show that it raised this issue before the Commission, nor do we find it mentioned in WCAGC's closing statement. The first time it appears that WCAGC raised this issue was in its Petition for Rehearing of Order No. 7, which was too late to preserve this issue for appeal. In *AT&T Communications*, 67 Ark. App. at 187, 994 S.W.2d at 500, we held that we would not address an issue where the appellants' scant references were insufficient to bring the argument before the Commission and this court. Arguments raised for the first time on appeal are not considered. *Bryant v. Ark. Pub. Serv. Comm'n*, 46 Ark. App. at 101, 877 S.W.2d at 601. Furthermore, even if we found that the issue had been raised, we would still affirm because WCAGC has barely touched upon this issue in its brief. Where appellant does not cite authority, or make a convincing argument, and where it is not apparent without further research that the point is well taken, the appellate court will affirm. *Firstbank of Ark. v. Keeling*, 312 Ark. 441, 850 S.W.2d 310 (1993); *Beverly Enters. Ark., Inc. v. Ark. Health Servs. Comm'n*, 308 Ark. 221, 824 S.W.2d 363 (1992).

AOG's Proposal to Revise Its Customer Deposit Policy

WCAGC's final point under this issue is that the Commission's orders were silent regarding AOG's proposal to revise its customer deposit policy. WCAGC concedes that the Commission rejected AOG's attempt to force its business transportation customers to pay increased deposits merely for switching to sales service but argues that it did not address Moorhead's testimony that AOG should be required to refund and pay interest on its large business customers' deposits. We disagree. In Order No. 7, the Commission did discuss Moorhead's argument, con-

cluding: "Regarding Mr. Moorhead's claim that interest on and return of deposits should be addressed, Mr. Callan asserts that the Commission already has rules in place to address these issues." Order No. 7 at 63. We note that the Commission's General Service Rule 4.06-Refunding Deposits provides that "utilities are not required to refund deposits on business or commercial accounts until the account is closed." WCAGC did not ask for an exemption from this rule. This issue is without merit, and we affirm.

WCAGC Issue II — Commission's Approval of AOG's Compliance Tariffs Violated WCAGC's Right to Due Process

WCAGC's second issue concerns its allegation that the Commission approved AOG's compliance tariffs in Order No. 8 only twenty-three working hours after AOG filed its revised tariffs. WCAGC contends that the brevity of time in which the Commission approved the tariffs violated its due process rights. The time sequence WCAGC complains about is that the Commission issued Order No. 7 approving a rate increase on December 1, 2005. AOG filed its revised tariffs in compliance with the new rates on December 12, 2005; on December 14, 2005, Staff witness Poole filed her compliance testimony and exhibits in support of the tariffs; and Order No. 8 that approved the compliance tariffs was issued on December 15, 2005.

The following day, WCAGC petitioned for rehearing of Order No. 8, making the same arguments that it now makes on appeal plus one additional argument. It argued that Staff had made corrections to AOG's compliance tariffs but that the Commission issued Order No. 8 approving AOG's compliance tariffs without AOG having made Staff's corrections. In Order No. 11, the Commission found WCAGC's petition without merit, explaining:

> On 9 December 2005, in accordance with the Commission's 1 December 2005 final rate case Order No. 7, the Staff filed a recalculated revenue requirement for AOG and the resulting customer class cost of service. On 14 December 2005 the Staff filed a revised customer class cost of service in order to correct an error in its 9 December 2005 filing. Thereafter, on 14 December 2005, the Staff filed the Compliance Testimony of Staff Rate Analyst Peggy Poole recommending approval of the compliance tariffs filed by AOG on 12 December 2005.

The only error or omission of Order No. 8 alleged by WCAGC is "[s]ince the tariffs that were filed on December 12, 2005 were based on Staff's erroneous revenue requirement and cost of service summary filing made on December 9 by evidence [of] ... Staff's own filing on December 14, 2005 filing, these tariffs must be suspended."

> This allegation is without merit as the tariffs filed by AOG on 12 December were based on the correct non-gas revenue requirement and the corrected cost of service study as approved by Order No. 7. Staff's corrected cost of service study filing made on 14 December did not change the non-gas revenue requirement or the revenues allocated to the classes. Staff conducted a full and complete review of the tariffs filed by AOG on 12 December and subsequently filed the Compliance Testimony of Staff witness Poole on 14 December in which she recommended that the Commission approve the tariffs. Ms. Poole testified that, "[b]ased on my review, I have determined that the rates and tariffs are consistent with the provisions of Order No. 7 . . .. [and should] become effective for all gas consumption on and after December 1, 2005."

WCAGC also alleges in its request for hearing of Order No. 8 that it did not have enough time to analyze the tariffs filed by AOG on 12 December before Order No. 8 was issued on 14 December [sic] approving the tariffs. More specifically, WCAGC contends that "[no party can throughly analyze approximately 200 pages in less than sixteen working hours, and have a complete working knowledge ... if the tariffs are in compliance with the order."

> Beyond the above generalized statement WCAGC fails to specifically state how its members were prejudiced by the amount of time allowed for review of AOG's compliance tariffs or to demonstrate that any substantive rights of its members were adversely affected. Additionally, though it could have done so, WCAGC did not request additional time to review these tariffs. Nor did WCAGC proffer any additional substantive pleading or testimony asserting that the tariffs were in error and not in compliance with the Commission's final rate case Order No. 7. To the contrary, the Compliance Testimony of Staff witness Poole specifically reflects that the tariffs are in compliance with Order No. 7.

Order No. 11 at 3-5.

WCAGC argues that to issue Order No. 8, a one-page order that approved AOG's compliance tariffs, in less than three full days when the Commission's Rules of Practice and Procedure give the Commission thirty days to evaluate the tariff filings means that the order was not the result of a reasoned, decision-making process but was instead a rubber stamp of Staff's hasty approval of the tariffs and was calculated to make it impossible to review the tariffs. WCAGC argues that a "fair tribunal" is a basic due process right that applies to proceedings before the Commission. *See Ark. Elec. Energy Consumers v. Ark. Pub. Serv. Comm'n*, 35 Ark. App. 47, 813 S.W.2d 263 (1991). In proceedings before the Public Service Commission, due process must be preserved to all whose legal rights are involved and concluded by the Commission's final order, and a fundamental requirement of due process in matters of public utility regulation is a full and fair hearing. *Id.* WCAGC, in attacking the Commission's procedure as a denial of due process, has the burden or proving its invalidity. *Id.*

WCAGC protests the Commission's haste in reviewing the compliance tariffs; however, it does not allege that it did not have the opportunity to have a full and fair hearing on them or to submit evidence to dispute them. The Commission points out that WCAGC did not ask for additional time to review the compliance tariffs or ask for a stay of the Commission proceeding. It also contends that reviewing compliance tariffs is not as taxing as WCAGC suggests and explains that proposed tariffs are filed with the company's general rate application and that the compliance tariffs are filed after the rate request is decided to ensure the tariffs comply with the order. Although WCAGC argues that the timing of the procedure made it impossible for the parties to analyze the order and be afforded any reasonable opportunity to file rehearing petitions, it has not argued that it was deprived of the opportunity to petition for rehearing of Order No. 8. Indeed, WCAGC did file a petition for rehearing of Order No. 8 the day following its entry, even though Ark. Code Ann. § 23-2-422(a) (Repl. 2002) gives it thirty days to formulate its petition. Nor has WCAGC argued that it has since found error in the tariffs. The error WCAGC asserted in its rehearing petition, that the tariffs approved by Order No. 8 did not take into consideration Staff's corrections, has not been pursued on appeal.

In sum, WCAGC has not identified any property right before the Commission or this court of which it has been deprived. WCAGC has not shown any prejudice. Where error is alleged,

prejudice must be shown. *See Cent. Ark. Tel. Coop., Inc.*, 61 Ark. App. at 154, 965 S.W.2d at 794. In fact, WCAGC's whole argument on this point seems to be an attack on Order No. 7 and its findings. Those specific findings, which WCAGC challenges, are dealt with elsewhere in the opinion. As to the issue under discussion, that WCAGC was denied due process because of the Commission's hurried approval of the compliance tariffs, WCAGC has failed to show that it was harmed by the approval of the compliance tariffs, and we affirm on this point. The simple fact that the WCAGC did not achieve the result it sought is not tantamount to a denial of due process. *See Ark. Elec. Entergy Consumers*, 35 Ark. App at 66, 813 S.W.2d at 274.

WCAGC Issue III — The Commission Orders Prohibited a Fair Hearing on FERC Order No. 63 Service

WCAGC contends that Order No. 7 and Order No. 11 erroneously allow AOG to force its retail customers to subsidize transportation service for its natural gas producers and violate WCAGC's due process rights. It contends that, in *In re Arkansas Oklahoma Gas Corporation's Purchased Gas Cost Practices*, Commission Docket No. 02-179-U, it argued that AOG's FERC Order No. 63 transportation rate discounting practices artificially reduced costs for AOG's Order No. 63 shippers and forced AOG's retail customers to subsidize their service. It states that AOG and Staff objected to the Commission's consideration of this issue in that docket and that the Commission, in Order No. 3, ruled that the issue was not appropriate for consideration in Docket No. 02-179-U and must be raised in a general rate case. WCAGC claims it did not appeal this ruling because it understood that it could raise the issue again in AOG's next rate case, relying on language from Order No. 9 of Docket No. 02-179-U, which says:

> [T]he treatment of revenues derived from AOG's discounted transportation policy within the context of an AOG rate case is jurisdictional to this Commission. Further, it is within this Commission's jurisdiction to determine whether AOG's discounted transportation policy fits prudently within the Commission's *Gas Procurement Plan Rules* and AOG's specific Gas Procurement Plan.

Order No. 9 at 38.

In AOG's present case, WCAGC argues that it again sought review of whether AOG's discounted Order No. 63 rates improperly force AOG's retail customers to subsidize transportation

service for natural gas production but the Commission refused to consider the argument, holding in Order No. 7 that WCAGC's concerns surrounding the discounting of FERC Order No. 63 rates were adequately addressed and decided in Docket No. 02-179-U. WCAGC contends that this ruling completely ignores the fact that it prohibited WCAGC from addressing the issue in Docket No. 02-179-U. It argues that the Commission cannot be allowed to reserve an issue in one case and then conclude in the later case that the issue had already been decided; that such action is arbitrary and capricious; and that it deprived WCAGC of a fair hearing and violated its due process rights.

The Commission, in responding to WCAGC's assertion, explains that FERC Order No. 63 allows AOG to transport surplus gas through its pipeline system to an interstate pipeline at a set rate and allows AOG to discount the transportation charges on this service. It states that, in a previous proceeding, the Commission found that this discounting was in the public interest and benefitted all of AOG's customers and further notes that it lacks jurisdiction to regulate FERC Order 63 service. AOG adds that, while the Commission did determine in Order No. 3 of Docket No. 02-179-U that the rate and revenue impacts of AOG's Order No. 63 transportation service could not be addressed in that docket, the Commission's reasoning in Order No. 3 was different from what WCAGC is arguing.

The Commission begins Order No. 3 by explaining that Docket No. 02-179-U was an outgrowth of Docket 02-024-U that was established to consider AOG's February 12, 2002 application for a rate increase. Order No. 14 of Docket No. 02-024-U severed the purchased-gas cost issues from that docket and transferred all purchased-gas cost issues, with the exception of AOG's Cost of Gas recovery mechanism and LUFG issues, to Docket No. 02-179-U. The other parties to Docket No. 02-024-U, which included WCAGC, did not oppose the severance motion. Thereafter, all the parties, except the AG, filed a Stipulation and Settlement Agreement in Docket No. 02-024-U that was approved by the Commission in Order No. 20 of that docket.[4] A Joint Stipulation and Settlement Agreement (Settlement) was also filed in Docket 02-179-U. WCAGC objected in part to this Settlement because it did not address AOG's policy of discounting

[4] Order No. 20 was subsequently appealed to this court in *Consumers Utility Rate Advocacy v. Arkansas Public Service Commission*, 86 Ark. App. 254, 184 S.W.3d 36 (2004), and

FERC Order No. 63 transportation service. AOG had then urged the Commission to exclude all non-gas issues from further consideration in Docket No. 02-179-U because AOG's Cost of Gas recovery mechanism was addressed in Docket No. 02-024-U. The Commission responded to this argument in Order No. 3:

> AOG correctly points out that WCAGC filed testimony in Docket 02-024-U specifically addressing AOG's discounted transportation rate and associated recall rights on gas. Part of WCAGC's testimony was filed in Docket No. 02-024-U *after* the commission established Docket No. 02-179-U for purpose of addressing AOG's purchased gas cost practices. AOG, therefore, asserts that these issues were addressed as part of AOG's rate case (Docket No. 02-024-U) and were covered by the Joint Stipulation and Settlement Agreement adopted by the Commission on December 11, 2004 in that docket.
>
> AOG's argument is further bolstered by WCAGC's own comments made in opening remarks at the hearing before the Commission in Docket No. 02-024-U. In particular AOG points out the following excerpt from WCAGC's Counsel's opening statement: [Excerpt omitted] Then, on page 15 of the transcript, Counsel for WCAGC acknowledged that these issues remain in the settlement, and that WCAGC is unhappy about these issues being in the settlement agreement because it may be another five years before it gets another chance to address these issues.
>
> . . . .
>
> As evidenced by the Direct and Surrebuttal Testimony of WCAGC witness Moorhead, as well as the opening statements of Counsel for WCAGC, presented in Docket No. 02-024-U, WCAGC fully litigated AOG's discounted transportation policy and associated gas recall rights issues within the contest of AOG's non-gas rate case (Docket No. 02-024-U). Now, almost a full year after the issuance of Order No. 20 in Docket No. 02-024-U, which resolved *all* issues in that proceeding, WCAGC seeks a "second bite at the apple" regarding these issues in Docket No. 02-179-U. Order No. 20 is dispositive of these issues — at least as to the impact that

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this court affirmed the approval of the Stipulation in an opinion handed down on May 26, 2004. The appeal in our court was pending when the Commission issued Order No. 3 in Docket 02-179-U.

> these issues may have had on the revenues and rates established for AOG in Docket No. 02-024-U. Accordingly, the revenue and rate implication of these issues can not and shall not be relitigated in the context of Docket No. 02-179-U.
>
> Notwithstanding the *res judicata* effect of Order No. 20 as to the revenue and rates established for AOG in Docket 02-024-U, the Commission will allow WCAGC the opportunity in Docket No. 02-179-U to revisit, as a matter of prospective gas purchasing policy only, AOG's discounted transportation policy and associated gas recall rights. *Thus the only issue to be considered in Docket No. 02-179-U regarding AOG's discounted transportation policy and associated gas recall rights is whether such policy is in the public interest and should continue as a part of AOG's overall gas purchasing practices.*
>
> Therefore, for purposes of considering the Staff's and AOG's August 29, 2003, Settlement Agreement, including the issue of AOG's discounted transportation policy and gas recall rights *as expressly limited hereinabove,* the following procedural schedule is hereby established: [schedule omitted].

Order No. 3, at 4-7 (footnotes omitted) (emphasis added).

As it stated in Order No. 3, the Commission revisited AOG's discounted transportation policy in Order No. 9 of Docket 02-179-U. It held that AOG's purchase transport program is a useful and necessary component of AOG's gas-procurement process that enhances AOG's ability to meet its statutory and regulatory requirements to provide reliable gas service while minimizing volatility and overall purchased-gas costs to ratepayers and should continue prospectively. WCAGC has not pointed us to any language in this order reserving the issue for its next rate case.

We therefore find no merit to WCAGC's assertion that the Commission reserved WCAGC's concerns for a future docket and further recognize that the Commission, in fact, revisited these concerns in the present case.

> Staff witness Booth notes that in Docket No. 02-179-U, this Commission concluded the AOG's discounting of its FERC Order No. 63 rate is an essential element of AOG's Purchase or Transport Program ("PTP") gas procurement process. Mr. Booth states that in Order No. 9 of Docket No. 02-179-U, the Commission found the PTP to be a "useful and necessary component of AOG's gas

> procurement process and should continue prospectively." He states that the Commission also determined that all of AOG's customers, both sales and transportation, have realized benefits from AOG's discounting of its FERC Order No. 63 service. Mr. Booth states that Mr. Moorhead's concerns surrounding the discounting of FERC Order No. 63 rates have been previously addressed and decided by this Commission, and that Witness Moorhead's testimony presents no additional information or arguments not already considered by the Commission. (T. 712) Mr. Booth also states that the FERC found that AOG's offering of a uniform discount rate for Order No. 63 service not to be unduly discriminatory. (T. 713)
>
> The Commission finds that WCAGC's concerns surrounding the discounting of FERC Order No. 63 rates have been adequately addressed and decided in Docket No. 02-179-U. The Commission agrees with Staff that WCAGC presents no additional information or arguments not already considered.

Order No 7 at 53-54. WCAGC has been given a hearing in three different dockets and has no basis for claiming it was denied due process.

WCAGC Issue IV — AOG's Proposal to Lower the Imbalance Percentages

WCAGC for its final issue contends that the Commission shifted the burden of proof to the consumer concerning AOG's proposal to lower the imbalance percentages. It argues that AOG witness Callan proposed to reduce the balancing penalty threshold percentage applicable to retail transportation service from 10% to 5% based on the potential that transportation customers might "game the system" when gas prices are high. It states that WCAGC witness Moorhead and CEUG witness Timothy Staley opposed the proposal, testifying that, although AOG has proposed to change its monthly imbalance tolerance from 10% to 5% for its transportation customers in order to protect the AOG's sales customers from abuse by its transportation customers, it has not demonstrated that such abuse has historically occurred. Therefore, there is no substantial evidence in the record to support the change.

AOG witness Callan responded to this testimony:

> Mr. Staley takes inconsistent positions with respect to this issue. He notes that the reduction in the balancing tolerance is designed to

> protect the Company's sales customers from abuse by Transportation (MBT and LBT) customers on the AOG system, but then he states AOG has not demonstrated that such abuse has historically occurred. Mr. Staley fails to point out that during times of extremely high natural gas prices, especially times of volatile natural gas prices, abuse by Transportation customers can have a significant financial impact on AOG's Sales customers. Specifically, Transportation customers, which are buying their natural gas from parties other than AOG, have the very real potential to "game" the AOG system during times of wide discrepancy in what the Transportation customer pays for natural gas and what AOG pays for natural gas. Reducing the imbalance tolerance from 10% to 5% insures that Sales customers do not subsidize the natural gas purchases of the transport customers.

The Commission discussed in detail CEUG's witness Staley's testimony and the rebuttal testimony of AOG witness Callan in Order No. 7. It also noted that Staff witness Robert Booth agreed with AOG's proposal and pointed out that none of the parties had offered any evidence that AOG's proposal was unreasonable. The Commission concluded that it accepted as reasonable AOG's proposal to reduce the monthly imbalance tolerance from 10% to 5% and went on to explain its reason for doing so:

> The Commission accepts as reasonable AOG's proposal to reduce the monthly imbalance tolerance from 10% to 5%. Balancing is defined as the act of making deliveries and the receipts of gas into or withdrawals from an interstate pipeline or local distribution company system equal. The balancing tolerance is the amount of imbalance allowed by a pipeline or utility which is not subject to a penalty charge usually stated in a range expressed in percentage terms. AOG witness Callan testified that transportation customers buying their gas from third parties have the potential to "game" the AOG system during times when there is a wide difference between the market price and the price AOG pays for natural gas. (T. 89) With the approach of the winter heating season and with the expectation of higher natural gas prices, there is a real need for AOG to have in place incentives to prevent transportation customers from taking more gas off the system than they deliver. A lower monthly imbalance tolerance will help to impede the disruption of service to the sales customers that AOG is obligated to serve.

Order No. 7 at 60.

The Commission has wide discretion in choosing its approach to rate regulation, and the appellate court may not advise the Commission as to how to make its findings or exercise its discretion. *Consumer Utilities*, 86 Ark. App. at 263, 184 S.W.3d at 42. Here, the Commission found that AOG met its burden of producing sufficient evidence of real potential harm for abuse of AOG's system and WCAGC had not demonstrated that the potential for abuse did not exist. Furthermore, no party offered evidence that the proposal was unreasonable. We therefore affirm on this point.

In conclusion, we remand this case to the Commission to make adequate findings on the issue raised by the AG concerning whether the month of April should have been included in the winter (peak) usage period for the purpose of determining the costs allocated to gathering and transportation mains. All other issues raised by the appellants are affirmed.

Affirmed in part; remanded in part.

PITTMAN, C.J., and HART, GLADWIN, ROBBINS, and BIRD, JJ., agree.

SOUTH ARKANSAS DEVELOPMENTAL CENTER FOR CHILDREN AND FAMILIES *v.* DIRECTOR, DEPARTMENT OF WORKFORCE SERVICES, & Lorella Parker

E 05-300 258 S.W.3d 803

Court of Appeals of Arkansas
Opinion delivered June 13, 2007

Shackleford, Phillips, Wineland & Ratcliff, P.A., by: *Norwood Phillips*, for appellant.

Allan Pruitt, for appellee.

DAVID M. GLOVER, Judge. Appellant, South Arkansas Developmental Center for Children and Families, discharged appellee, Lorella Parker, from her job, alleging that she had mistreated a mentally retarded child at the center on at least two occasions. Parker's claim for unemployment benefits was initially denied by the Department of Workforce Services, and she appealed that determination to the Appeal Tribunal.

A telephonic hearing before the Appeal Tribunal was scheduled for September 13, 2005. Parker appeared by telephone along with a paralegal and a witness on her behalf. Appellant's representatives, Dr. Jim Kennedy and Sonja Eads, also appeared by telephone, but after learning that Parker had a paralegal with her, they advised the Appeal Tribunal that upon advice from their attorney, they would not proceed if the other party had legal representation. The hearing officer offered appellant's representatives the opportunity to contact their attorney, and he denied Kennedy's request for a postponement of the hearing. The hearing officer also advised them that he would proceed with the hearing, and that appellant would receive a copy of his decision in the mail. Appellant's representatives then hung up and did not participate in the hearing. Parker and her witness testified before the hearing officer. The hearing officer reversed the denial of unemployment benefits, finding that there was insufficient evidence that the complaints were factual or that Parker had shown deliberate disregard of the standards of behavior the employer had a right to expect. Appellant timely requested a reopening before the Appeal Tribunal to offer evidence as to why it did not appear at the hearing on September 13, 2005. The sole issue was whether appellant had good cause for failing to appear at the previous hearing and was entitled to have the matter reopened as provided for under Arkansas Code Annotated section 11-10-524(c) (Supp. 2003). The statute provides that the parties shall be promptly notified of the tribunal decision and that decision will be final unless appealed or a request for reopening is made pursuant to subsection (d). Subsection (d) provides, in pertinent part, that if any party fails to appear at the initial tribunal hearing, that party may request that the matter be reopened, and

requests for reopening shall be granted only upon a showing of good cause for failure to appear at the initial tribunal hearing.

At the hearing on appellant's request to reopen, Sonja Eads testified on behalf of appellant. She said that she and Jim Kennedy intended to participate in the last hearing, but that it was company policy that their legal counsel must be present any time a person is represented by legal counsel, and that they had to follow company policy and not participate. She said that there was no other reason why they did not participate in the hearing. Eads stated that she and Kennedy did not make arrangements with an attorney prior to the hearing because they did not know that they would need an attorney. Eads admitted that she did not contact anyone prior to the hearing to see if Parker would have an attorney present. Appellant's counsel, who appeared at the hearing, also noted on the record that factually, appellant's representatives appeared at the initial hearing, but did not participate in it.

The Appeal Tribunal denied appellant's request to reopen the matter, finding that while appellant's policy required its representatives to have legal counsel present whenever the other party had legal representation, appellant had neither contacted the Appeal Tribunal to see if Parker had legal representation nor had its counsel on standby in the event Parker had counsel at the hearing. The Appeal Tribunal reasoned that this was not good cause for failing to appear at the initial hearing.

Appellant appealed the Appeal Tribunal's decisions to the Board of Review. The Board affirmed the Appeal Tribunal's denial of appellant's request to reopen, as well as the grant of unemployment benefits to Parker. Appellant now appeals to this court. Appellant makes no argument on appeal with respect to the sufficiency of the evidence to support the award of benefits to Parker; rather, its only point on appeal is that "the Appeal Tribunal erred as a matter of law by affirming the denial of the hearing officer of the request of appellant for a continuance." We affirm.

The well-settled standard of review in unemployment cases was set forth in *Baldor Electric Co. v. Ark. Employment Sec. Dep't*, 71 Ark. App. 166, 168-69, 27 S.W.3d 771, 773 (2000) (citations omitted):

> On appeal, the findings of fact of the Board of Review are conclusive if they are supported by substantial evidence. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. We review the evi-

> dence and all reasonable inferences deducible therefrom in the light most favorable to the Board's findings. Even when there is evidence upon which the Board might have reached a different decision, the scope of judicial review is limited to a determination of whether the Board could reasonably reach its decision upon the evidence before it.

In affirming the Appeal Tribunal's denial of the request for reopening, the Board of Review found that appellant had not shown good cause for not appearing at the initial hearing, stating:

> The employer chose to appear without counsel and without having counsel on standby, knowing that it would decline to participate if the opposing party was represented, without knowing whether or not the opposing party had counsel, and without knowing whether the Tribunal would be inclined to grant a postponement for it to obtain counsel. The employer should have been better prepared. It was the employer's own choice not to participate. Nothing else prevented the employer from participating in the hearing. The Board does not find that the employer has shown "good cause" for its failure to participate.

Appellant argues that the hearing officer's denial of the request for a continuance was arbitrary and capricious, and that it deprived appellant of the right to stand on an equal footing with Parker by obtaining its own legal counsel. We disagree because appellant was not entitled to have the case reopened. Arkansas Code Annotated section 11-10-524(d)(1) provides, "If any party fails to appear at the initial tribunal hearing scheduled as a result of an appeal, that party may request that the matter be reopened by the tribunal." As pointed out above, appellant's counsel specifically noted at the hearing on reopening that appellant's representatives had actually appeared at, but did not participate in, the initial hearing. The statute clearly states that a party may request a reopening if it *fails to appear* at the initial tribunal hearing. In this case, as appellant's counsel noted, appellant's representatives did not fail to appear at the initial hearing; rather they appeared but declined to participate in the hearing. Appellant is not entitled to have the case reopened because it did not fail to appear at the initial tribunal hearing.

Affirmed.

HART and GRIFFEN, JJ., agree.

Robert Lee FULLER *v.* STATE of Arkansas

CA CR 06-1291 259 S.W.3d 486

Court of Appeals of Arkansas
Opinion delivered June 20, 2007

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

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

JOHN MAUZY PITTMAN, Chief Judge. Appellant was convicted of third-degree domestic battery for hitting and injuring Vonetta Henderson, fined $300, and placed on probation for one year. He argues on appeal that there is no substantial evidence to support his conviction. We affirm.

Arkansas Code Annotated section 5-26-305 (Repl. 2006) provides, in pertinent part, that a person commits domestic battering in the third degree if he purposely or recklessly causes physical injury to a household member. "Family or household member[s]" includes persons who have been in the past or are presently in a dating relationship together. Ark. Code Ann. § 5-26-302(2)(H) (Repl. 2006). "Dating relationship" is defined, in part, as a romantic or intimate social relationship between two individuals, determined by examining the length of the relationship, the type of the relationship, and the frequency of the interaction between the two individuals involved in the relationship. Ark. Code Ann. § 5-26-302(1)(A) (Repl. 2006). Appellant contends that the evidence is insufficient to prove that he and the victim were in a "dating relationship" as defined by the statute.

When the sufficiency of the evidence to support a criminal conviction is challenged on appeal, we view the evidence in the light most favorable to the State, considering only the proof that supports the finding of guilt. *Payne v. State*, 86 Ark. App. 59, 159 S.W.3d 804 (2004). We will affirm if there is substantial evidence to support the decision. *Id.* Substantial evidence is evidence that is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or another. *Id.*

Here, there was evidence that appellant and the victim had been involved in a romantic relationship between September 2004 and February 2005. They spent time outside of work together; they had sexual relations together "multiple times"; they spent the night together; they went to eat and to the movies together; and they spent time together in the presence of the victim's children. The victim broke off the relationship because "it wasn't enough for [her] anyway to have him with another woman all the time and [she] wanted to have another relationship with someone else who could be [her] own." They continued to work together for about eight months at a nursing home, where they interacted as co-workers "except for the fact that while [they] were at work, [appellant] would approach [the victim] and ask . . . [her] to give him one last hug and tell [her] he missed [her] and could we do it again and stuff like that." Appellant knew that the victim was

pregnant by her husband and said "that should have been his child." On October 2, 2005, they became involved in an argument over their work duties that escalated when appellant told the victim that she was "not going to talk to [him] crazy like she talk[ed] to [her] husband . . . and that's probably why he left you." By appellant's account, that remark "hit a nerve and she went bakooz — well, she went, you know, wow," and "came running over." Appellant then struck and bruised the victim.

Appellant contends that the evidence was insufficient to show a dating relationship, arguing that, because the victim was married to another man during their relationship, theirs could not have been a "dating relationship" under Ark. Code Ann. § 5-26-302(1)(A)(ii). Appellant cites neither argument nor convincing authority to show why an adulterous relationship does not come under the purview of a statute intended to curb domestic violence. The legislature has expressly included a broad definition of "family or household member" to include "dating relationships" based on three factors, including "type." Here the relationship was a romantic one that lasted several months and included trips to movies, dinner, overnight visits, and multiple instances of sexual relations. Appellant cites neither law nor reason to support his assertion that persons involved in a relationship of this type do not come under the protection of the statute.

Appellant next argues that there was insufficient evidence of the frequency of the interactions between the victim and appellant during their relationship because the victim failed to state precisely how often she and appellant had sexual relations. We do not agree. A dating relationship need not be sexual; under the statutory language it may be a "romantic *or* intimate social relationship." Ark. Code Ann. § 5-26-302(1)(A) (emphasis added). The testimony was sufficient to show that appellant and the victim had numerous romantic and intimate interactions of various types for a sufficient length of time to support a finding that there was a "dating relationship" under the statute — particularly in light of the evidence that bickering over romantic attachments played a considerable part in the altercation leading to the battery of which appellant was convicted.

Affirmed.

ROBBINS and HEFFLEY, JJ., agree.

Diana VAUGHN *v.* APS SERVICES, LLC;
Hartford Insurance Co.

CA 07-35 259 S.W.3d 470

Court of Appeals of Arkansas
Opinion delivered June 20, 2007

Kenneth E. Buckner, for appellant.

Kilpatrick, Williams, Smith & Meeks, L.P., by: *Gene Williams*, for appellee.

JOSEPHINE LINKER HART, Judge. Appellant, Diana Vaughan, argues that substantial evidence does not support the Arkan-

sas Workers' Compensation Commission's decision that she reached the end of her healing period no later than June 15, 2005, and was not entitled to temporary total disability compensation after that date. Because the Commission expressly relied on erroneous factual findings in reaching its decision, we must reverse and remand for the Commission to fully examine the relevant evidence presented in this case.

In order to be entitled to temporary total disability compensation, a claimant must prove by a preponderance of the evidence that she remains in her healing period and suffers a total incapacity to earn wages. *Ark. State Highway & Transp. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). Our statutes define "healing period" as "that period for healing of an injury resulting from an accident." Ark. Code Ann. § 11-9-102(12) (Supp. 2005). Before the Commission was the question of whether appellant remained in her healing period from an admittedly compensable injury she sustained on September 17, 1997, involving her neck, right shoulder, and right arm. The Commission, in a unanimous decision signed by Chairman Olan W. Reeves, Commissioner Shelby W. Turner, and Commissioner Karen H. McKinney, concluded that appellant reached the end of her healing period no later than June 15, 2005. In support of its decision, the Commission quoted in full and then relied on a medical record of the same date. As argued by appellant, we hold that the Commission erred in relying on this medical record in making its decision, as the medical record is not appellant's medical record.

The medical record, signed by Dr. William E. Ackerman, is accompanied by a letter from appellant's attorney to appellees' attorney, stating that "[e]nclosed is a note on another of my client's (identity obliterated to preserve confidentiality)." According to the letter, the medical record was sent to show that Dr. Ackerman, who also had treated appellant but who had left Arkansas, had intended to refer all of his patients with reflex sympathetic dystrophy (RSD) to a Dr. Amad. The letter indicated that appellant, who we note also had been assessed by Dr. Ackerman as having RSD, "simply fell through the cracks." The accompanying medical record is that of a patient whose complaint was pain in the left ankle — not, as in this case, an injury to the right upper extremity. The medical record indicates that a CAT scan was taken of the patient's ankle; that another physician had placed the patient at

maximum medical improvement; that the patient's RSD was stable; and that Dr. Ackerman recommended that the patient see a Dr. Amad, an expert in RSD, for medication refills.

Citing language from the medical record, the Commission concluded that "the preponderance of the evidence shows that [appellant] continued within her healing period from May 5, 2005, until June 15, 2005, at which point Dr. Ackerman pronounced her RSD condition had stabilized." It found that appellant "reached the end of her healing period no later than June 15, 2005."

Appellee argues that even if the irrelevant medical record is not considered, the Commission's opinion was supported by substantial evidence. But as in *Tucker v. Roberts-McNutt, Inc.*, 342 Ark. 511, 29 S.W.3d 706 (2000), the error is not that substantial evidence was not presented or considered. Rather, as in *Tucker*, the Commission failed to make a proper de novo review of the record, which resulted in it making erroneous factual findings upon which it expressly relied in reaching its decision, thus leaving this court to speculate concerning what evidence the Commission intended to rely on when making its decision. The Commission's erroneous factual findings require our reversal of its decision, and we remand this case to the Commission for its full examination of the relevant evidence presented.

Reversed and remanded.

GRIFFEN and GLOVER, JJ., agree.

J.F. VALLEY *v.* HELENA NATIONAL BANK

CA 06-1075 259 S.W.3d 461

Court of Appeals of Arkansas
Opinion delivered June 20, 2007

[Rehearing denied August 1, 2007.]

Don R. Etherly, for appellant.

Roscopf and Roscopf, P.A., by: *Charles D. Roscopf*, for appellee.

SAM BIRD, Judge. J.F. Valley appeals from an order of the circuit court denying his motion to set aside a default judgment entered against him. Valley claims that the default judgment was void because he was not served in compliance with the Arkansas Rules of Civil Procedure. He argues that the circuit court erred as a matter of law in denying his motion and requests this court to reverse and remand. We agree with Valley's argument, and, accordingly, we reverse the circuit court's denial of his motion to set aside the default judgment.

On May 3, 2003, appellee Helena National Bank filed a complaint against Valley, alleging that Valley defaulted on a promissory note. The Bank served Valley by mailing a summons and complaint by certified mail, return receipt requested, restricted delivery to "Mr. J.F. Valley, 423 Rightor Street, Helena, AR 72342." The "green card" filed with the Bank's affidavit of service reflects two different signatures on the receipt. The box stating "Received by" contains the printed name of L. Danley; the signature box contains the signature of "L. Danley"; and the date next to these boxes is May 27, 2003. Neither the agent nor the addressee box was checked in the signature box. The signature of "J.F. Valley," along with the date May 29, 2003, was scrawled diagonally across the face of the green card but not within either the "Received by" or "Signature" boxes.

On August 22, 2003, the circuit court entered a default judgment against Valley. On October 17, 2003, Valley filed a motion to set aside the default judgment, alleging that service was never perfected because the summons and complaint were never served on him. Thereafter, in January 2006, multiple writs of garnishment were filed against Valley. On January 24, 2006, Valley filed a motion to quash the writs and supplemental motion to set aside the default judgment.

The circuit court held a hearing on March 16, 2006, on Valley's motion to set aside the default judgment. Valley testified that he never received the summons and complaint; that the summons and complaint were apparently delivered to and received by "L. Danley," whom he knew to be a secretary in the office building where he worked, on May 27, 2003; and that Ms. Danley did not work for him, was not his registered agent for service of process, and was not authorized to accept service for him. Valley said that he signed the receipt "somewhere away from the office . . . close to the post office going to check my P.O. Box" when a postal worker with whom he was familiar approached him and asked him to sign it. The postal worker told Valley that he had "messed up" and allowed someone else to "sign this package." Valley testified that he did not receive any papers from the postal worker when he signed the receipt. No other witness testified at the hearing.

On May 4, 2006, the circuit court entered an order denying Valley's motion to set aside the default judgment, finding "when J.F. Valley signed the return receipt on May 29, 2003, which had been signed by L. Danley on May 27, 2003, at the request of a

postal employee, that there was proper service." The trial court also found that Valley failed to comply with the Arkansas Rules of Civil Procedure by failing to file a brief with his motions to set aside the default judgment. Valley appealed.

The issue in this case is whether the circuit court erred in finding that Valley was properly served under Rule 4 of the Arkansas Rules of Civil Procedure. Because default judgments rendered without valid service of process are void, we review the circuit court's denial of the motion to set aside the judgment using a de novo standard. *Nucor Corp. v. Kilman*, 358 Ark. 107, 118, 186 S.W.3d 720, 727 (2004).

Service of process is necessary in order to satisfy the due-process requirements of the United States Constitution. *Meeks v. Stevens*, 301 Ark. 464, 466, 785 S.W.2d 18, 20 (1990). "Service" is defined in *Black's Law Dictionary* as the formal *delivery* of a writ, summons, or other process. *Black's Law Dictionary* 1399 (8th ed. 1999) (emphasis added). It is well settled that service-of-process requirements, being in derogation of common law rights, must be strictly construed and compliance with them must be exact. *See Carruth v. Design Interiors, Inc.*, 324 Ark. 373, 921 S.W.2d 44 (1996). Further, default judgments are void due to defective process regardless of whether the defendant had actual knowledge of the pending lawsuit. *Nucor*, 358 Ark. at 119, 186 S.W.3d at 727.

Rule 4(d), which governs the available methods for effecting service, provides that "[a] copy of the summons and complaint shall be served together." Ark. R. Civ. P. 4(d) (2007). Section (d) states that "service shall be made upon any person designated by statute to receive service or as follows:" and lists the allowable methods of service. In this case, service was attempted under Rule 4(d)(8)(A), which provides in relevant part:

> (8)(A)(i) Service of a summons and complaint . . . may be made by the plaintiff or an attorney of record for the plaintiff by any form of mail addressed to the person to be served with a return receipt requested and delivery restricted to the addressee or agent of the addressee. The addressee must be a natural person specified by name, and the agent of the addressee must be authorized in accordance with U.S. Postal Service regulations. . . .
>
> (ii) Service pursuant to this paragraph (A) shall not be the basis for the entry of a default or judgment by default unless the record contains a return receipt signed by the addressee or the agent of the

> addressee . . . . Any such default or judgment by default may be set aside pursuant to Rule 55(c) if the addressee demonstrates to the court that the return receipt was signed or delivery was refused by someone other than the addressee or the agent of the addressee.

Ark. R. Civ. P. 4(d)(8)(A) (2007).

In *Wilburn v. Keenan Cos.*, 298 Ark. 461, 768 S.W.2d 531 (1989), appellant, a resident of Missouri, had been served by mail. However, contrary to the requirements of Rule 4(e)(3), which governs out-of-state service, the documents were not sent with instructions for "restricted delivery." An unknown person received the summons and signed on the line for the signature of an "agent." The court set aside a default judgment entered by the trial court and held that the service was defective because there was no evidence that the appellee had directed the summons and complaint to be mailed with restricted delivery and there was no evidence that the person *who received the documents* had been duly authorized to be appellant's agent.

In *Green v. Yarbrough*, 299 Ark. 175, 771 S.W.2d 760 (1989), plaintiff attempted to effect service under Rule 4(d)(8)(A) against Richard Green. The documents were accepted by Green's sister, Sharon, who signed the return receipt, "Richard Green by SG." The supreme court vacated the default judgment, holding that there was no evidence that Sharon was her brother's agent appointed pursuant to the applicable postal regulations.

In this case, the package was clearly addressed to J.F. Valley, and the return receipt indicates that the package was delivered to L. Danley, who signed in the "Signature" box on May 27, 2003. This situation would clearly be governed by the supreme court's decisions in *Wilburn* and *Green* but for one additional fact. The fact that was not present in *Wilburn* and *Green* that is present in this case is the fact that the card also contains a signature of Mr. Valley, the intended recipient, two days after the return receipt reflects that the documents were delivered to and received by L. Danley. The supreme court has not addressed this precise situation. *But see CMS Jonesboro Rehab., Inc. v. Lamb*, 306 Ark. 216, 812 S.W.2d 472 (1991) (stating that the object of Rule 4(d)(8)(A) is to give the defendant notice of the plaintiff's suit).

[redacted] The green card indicates that the "Date of Delivery" of the mail was May 27, 2003, and that the mail was "Received by" L. Danley. This service on L. Danley was defective because L.

Danley was neither J.F. Valley nor an agent appointed by him according to the postal regulations as required by Rule 4. *See, e.g., Wilburn*, 298 Ark. at 463, 768 S.W.2d at 532. Absent evidence that he received the summons and complaint — which is not present in this case — Valley's signature across the return receipt two days later did not "cure" this defective service. Accordingly, we reverse the circuit court's denial of Valley's motion to set aside the default judgment.

The dissent suggests that, because "it does not take a lawyer (which Mr. Valley is) to know that if you sign a green card you are acknowledging receipt of something," Mr. Valley's signature on the card constitutes full compliance with Rule 4's service requirements. First, the fact that Valley was a lawyer has no bearing on whether the Bank complied with Rule 4's service requirements. Default judgments are void due to defective process regardless of whether the defendant had actual knowledge of the pending lawsuit. *Nucor*, 358 Ark. at 119, 186 S.W.3d at 727. In addition, Rule 4(d)(8)(A)(i) required "*delivery* restricted to the addressee" — that is, J.F. Valley.[1] The package was not delivered to J.F. Valley but to L. Danley. The dissent's statement that, because Valley signed the green card, "no further inquiry was necessary" improperly places the burden on Valley to prove that he did not receive service. This is simply not the law. The return of service is prima facie evidence that service was made as stated. *Lyons v. Forrest City Machine Works, Inc.*, 301 Ark. 559, 562, 785 S.W.2d 220, 222 (1990). The burden then shifts to the party claiming that service was not valid to overcome the prima facie case created by proof of service. *See Karnes v. Ramey*, 172 Ark. 125, 127, 287 S.W. 743 (1926). In this case, appellee never made a prima facie case. The proof of service proved that L. Danley was served on May 27, 2003. The burden remained on appellee to prove that Valley was properly served with a summons and complaint. Appellee failed to meet its burden.

Therefore, we reverse.

HART, GRIFFEN, GLOVER, HEFFLEY, and BAKER, JJ., agree.

GLADWIN, ROBBINS, and VAUGHT, JJ., dissent.

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[1] No one suggests that L. Danley was an agent of Valley authorized in accordance with the U.S. Postal Service regulations.

LARRY D. VAUGHT, Judge, dissenting. I believe that the decision of the trial court denying the appellant's motion to set aside the default judgment should be affirmed, and therefore, I dissent. The return receipt/green card from the postal service contains two signatures — L. Danley and J.F. Valley. Although the majority reasons that service was complete, and defective, when Ms. Danley signed the green card, I do not believe that we can ignore Mr. Valley's signature.

I have found no cases from any jurisdiction in which service was challenged where the evidence contained a green card with two signatures; one of which was the party to be served. No case cited by the majority involves a finding of defective service when the addressee actually signed the green card. In *Wilburn v. Keenan Cos.*, 298 Ark. 461, 768 S.W.2d 531 (1989), an unknown person signed on the line of an "agent." In *Green v. Yarbrough*, 299 Ark. 175, 771 S.W.2d 760 (1989), the addressee's sister signed the receipt "Richard Green by SG."

Rule 4(d)(8)(A)(i) of the Arkansas Rules of Civil Procedure provides, in part:

> Service of a summons and complaint . . . may be made . . . by any form of mail addressed to the person to be served with a return receipt requested and delivery restricted to the addressee or agent of the addressee. The addressee must be a natural person specified by name, and the agent of the addressee must be authorized in accordance with U.S. Postal Service regulations . . .

Therefore, the service, as attempted, was proper, and the rule was complied with by the appellee. Mr. Valley's signature, albeit dated after Ms. Danley's, completes the requirements of Rule 4 and presents evidence of service. The signature of Mr. Valley means something. It does not take a lawyer (which Mr. Valley is) to know that if you sign a green card you are acknowledging receipt of something — even if someone else has also signed the green card. The majority asserts that the postal service delivered the package to Ms. Danley. This blatant finding of fact is not established by any evidence in the record. Neither the postal worker nor Ms. Danley testified. The only evidence arguably in support of delivery is her signature on the green card, and the signature of someone other than the addressee is of no value when the addressee himself has signed the card. Whatever significance you may give to Ms. Danley's signature, when Mr. Valley

signed the green card there was compliance with Rule 4. The court correctly found that the Rule was satisfied and that Mr. Valley had been served.

Rule 4(d)(8)(A)(ii) provides:

> Service pursuant to this paragraph (A) shall not be the basis for the entry of a default or judgment by default unless the record contains a return receipt signed by the addressee or the agent of the addressee . . .

The return receipt was signed by the addressee, Mr. Valley, therefore, a default judgment was appropriate. Rule 4(d)(8)(A)(ii) further provides:

> Any such default or judgment by default may be set aside pursuant to Rule 55(c) if the addressee demonstrates to the court that the return receipt was signed or delivery was refused by someone other than the addressee or the agent of the addressee.

I interpret this subsection of the rule to be applicable only when the addressee's signature does not appear on the green card. In this case, the signature was there, and no further inquiry was necessary. However, if this subsection is to be considered, it merely sets up a question of fact, which the trial court resolved against Mr. Valley. We do not reverse the trial court on a question of fact unless it is clearly erroneous. Certainly in this case, I am not left with a definite and firm conviction that a mistake has been made. *See Hodge v. Hodge*, 97 Ark. App. 217, 245 S.W.3d 695 (2006). Because I would affirm the trial court, I dissent. I am joined in this opinion by Judges Gladwin and Robbins.

Victor CHIOLAK *v.* Patricia CHIOLAK

CA 06-1217 259 S.W.3d 466

Court of Appeals of Arkansas
Opinion delivered June 20, 2007

Michael U. Sutterfield, for appellant.

No response.

DAVID M. GLOVER, Judge. In this one-brief case, appellant, Victor Chiolak, appeals from an order of protection entered on July 11, 2006, in the First Division of the Circuit Court of Faulkner County. He raises three points of appeal: 1) the trial court lacked subject-matter jurisdiction to enter the order of protection; 2) the issues raised in the petition for order of protection were barred by the doctrine of res judicata; and 3) alternatively, the order of protection was ambiguous and must be interpreted to allow visitation with his son pursuant to any orders by the Second Division of the circuit court. We find no error and therefore affirm.

The parties' agreed divorce decree was entered on June 13, 2006. It contained standard visitation and was handled in the Second Division of the Faulkner County Circuit Court. On June 14, 2006, appellee, Patricia Chiolak, filed a petition for an ex parte temporary order of protection in the First Division of the Faulkner County Circuit Court, and such an order was entered on the same date. The petition alleged that appellant had physically abused the parties' child, Stefan Chiolak. On July 11, 2006, a hearing on the petition was held.

Stefan testified in camera. He stated that he was ten years old; that he had gone on vacation to California with his father; that when they got back, his father accused him of stealing his father's girlfriend's daughter's wallet and money; and that his father slapped him, choked him, put his knee in his chest, and slammed him into the wall, giving him a knot on his head, a black eye, and some bruises. Stefan stated that he had been afraid of his father for years and claimed that his father had done that sort of thing before, just not to that extent. He told the judge that he did not want to go

to his father's house, that his father had told him he better not tell anyone, and that he was afraid he would be in trouble with his father.

Patricia Chiolak testified that Victor called her at 2:00 a.m. Sunday morning, June 11; that he expressed anger at Stefan for breaking up their relationship and that with his girlfriend; and that he did not indicate he had done anything to Stefan. Patricia stated that Victor returned Stefan to her house on the evening of June 11; that she noticed a black eye and bruising on Stefan; and that Stefan begged her not to say anything to Victor because Stefan expressed fear that he would be beaten worse next time.

Patricia explained that she had signed the divorce papers on June 7, approximately a week before Victor and Stefan returned to Conway from California; that Victor signed them when he returned from California; that the decree dealt with all issues concerning visitation "except what would happen if he weren't good to my child"; that there had been issues with violence from his father before; that she wanted to get the divorce "out of the way"; that the decree was entered on June 13 and she filed her petition for order of protection the next day; and that she had filed previous petitions for protection because of harm Victor had done to Stefan but it had never involved "anything as serious as this."

Victor Chiolak testified and denied striking Stefan at any time since he and Patricia had separated; that he had never put his hands on Stefan's neck; that he had received a call telling him that Stefan had stolen money from Denise Colton; that he confronted Stefan about it; that he searched Stefan's room and backpack but found nothing; that he did not discipline Stefan in any way because he was "in a quandary" about what to do; and that he did not cause any bruising to Stefan.

Victor testified that he was not aware of any bruises on Stefan when he took him home; that the only time he saw them was at Patricia's house; that he was upset when his girlfriend called and claimed Stefan had stolen money; that he did confront Stefan about it; and that he did not know how the bruises got on Stefan.

Gary Ash testified that he had witnessed Stefan in incidents that he would consider questionable regarding Stefan's honesty; that he never saw anything to make him question Victor's ability to parent Stefan; and that he knew nothing about the bruises.

At the conclusion of the hearing, the trial court found that the issues turned on credibility; that he found Stefan's and Patri-

cia's testimony to be very credible; and that he was therefore granting the order of protection, to expire in two years. The trial court also stated that "visitation rights with regard to the minor child will be established as provided by a court having divorce/custody jurisdiction. At this point it is stopped." Victor's counsel asked, "Your Honor, I take it that the order can be modified by order of the chancery court?" and the court responded, "It may be, after a hearing or by agreement."

For his first point, appellant contends that the trial court lacked subject-matter jurisdiction because "there was an ongoing divorce proceeding in the Second Division." In making his argument, he acknowledges that pursuant to Arkansas Code Annotated section 9-15-201(f) of the Domestic Abuse Act of 1991, a petition for order of protection may be filed regardless of whether there is any pending litigation between the parties but argues that under *Clark v. Hendrix*, 84 Ark. App. 106, 134 S.W.3d 551 (2003), a court should refrain from exercising its jurisdiction over a petition for protective order when a party's right to visitation is at issue in an ongoing divorce proceeding. His reliance upon *Clark* is misplaced in this case.

In *Clark*, there was an ongoing proceeding in a Pulaski County Circuit Court concerning a visitation dispute between the parties. In addition, the Pulaski County court had available to it the same testimony concerning an alleged abuse incident that occurred in White County. The White County Circuit Court assumed jurisdiction over the matter despite being on notice that the Pulaski County court had either dealt with the specific matter or was in the process of dealing with it. We held that the White County Circuit Court should have refrained from exercising its jurisdiction as a matter of comity because the protective order that it entered dealt primarily with the issue of whether appellant could exercise his right to visitation for another year, which directly affected a valid and ongoing visitation order from the Pulaski County Circuit Court.

Here, on the other hand, at the time appellee filed her petition for a protective order in the First Division, the Second Division circuit court had already entered an agreed upon divorce decree that contained a standard order of visitation. There was no ongoing dispute about anything between these parties in the Second Division, much less about visitation, and the abuse allegation had not been presented to the Second Division. Appellee thus filed her petition for a protective order in the *same* county, albeit in

a different circuit-court division than where the divorce action had been held. At all times, however, Faulkner County Circuit Court had subject-matter and personal jurisdiction over the parties. More importantly, in granting the order of protection, the First Division made it very clear that while it was stopping appellant's visitation pursuant to the protective order, the protective order was subject to modification by the Second Division. That is, far from usurping the Second Division's authority, the First Division deferred to it, specifically stopping visitation only until the Second Division could conduct a hearing and rule on the issue in light of the child's allegations of abuse. Accordingly, we find that the circumstances of the instant case are distinguishable from those presented in *Clark, supra,* and that there was no error in the trial court's exercise of jurisdiction under the circumstances presented here.

For his second point, appellant contends that the issues raised in the petition for order of protection were barred by the doctrine of res judicata. We disagree.

In *Linder v. Linder,* 348 Ark. 322, 339-40, 72 S.W.3d 841, 850 (2002), our supreme court explained that a more flexible approach to the doctrine of res judicata is required concerning child-custody matters:

> Custody matters, however, are different when the doctrine of *res judicata* is called into play. When the matter is a custody issue, our court takes a more flexible approach to *res judicata.* We recognize, for example, that custody orders are subject to modification in order to respond to changed circumstances and the best interest of the child. . . . For example, in *Tucker v. Tucker,* 195 Ark. 632, 636, 113 S.W.2d 508, 508 (1938), we said:
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> > The judgment of a chancery court in this state, awarding the custody of an infant child to one of the parents, or to any other person, is a final judgment, from which an appeal lies, but it is not *res judicata* in the same or another court of this state involving the custody of the same child, where it is shown that the conditions under which the former decree was made have changed and that the best interest of said child demand a reconsideration of said order or decree.

Appellant argues that under the doctrine of res judicata, not only is the relitigation of claims that were actually litigated barred, but also those that *could* have been litigated. That is, he argues that because the facts

that gave rise to the protective order occurred before entry of the divorce decree, those issues could have been raised in the divorce action, and, accordingly, that the trial court erred when it refused to bar appellee's petition for a protective order based on the doctrine of res judicata.

Here, the alleged abuse occurred after the divorce case and its accompanying visitation schedule had been agreed upon by the parties. Appellee had already signed the necessary divorce papers and was merely awaiting appellant's signature, and then approval and entry of the decree by the trial court. The child's allegations of abuse arose just two days before the decree was entered. We find no error in the trial court's refusal to apply the doctrine to bar the petition for a protective order in this case.

For his final point, appellant contends, "In the alternative, the ambiguous order of protection must be interpreted to allow visitation with the parties' son pursuant to any orders by the division of the circuit court with jurisdiction over the parties' divorce." We find no ambiguity and no basis for reversal.

The order of protection provides: "Visitation rights with regard to the minor child(ren) are established as follows: as provided by Court having Divorce/custody Jurisdiction." Moreover, at the conclusion of the hearing on the petition for order of protection, appellant's counsel specifically asked the trial court if the protective order could be modified by order of the chancery court. The trial court responded that it could be modified after a hearing before the other court having such jurisdiction. Visitation is always modifiable, subject of course to a finding of change in circumstances. *Hass v. Hass*, 80 Ark. App. 408, 97 S.W.3d 424 (2003). Consequently, appellant's final point of appeal provides no basis for reversal of the protective order.

Affirmed.

HART and GRIFFEN, JJ., agree.

Barbara FOWLER *v.* STATE of Arkansas

CA CR 06-943 259 S.W.3d 478

Court of Appeals of Arkansas
Opinion delivered June 20, 2007

[Rehearing denied August 1, 2007.]

The Law Offices of J. Brent Standridge, P.A., by: *J. Brent Standridge*, for appellant.

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

LARRY D. VAUGHT, Judge. After her home was destroyed by fire, appellant Barbara Fowler was convicted of arson, a class Y felony, and sentenced to 120 months' imprisonment in the Arkansas Department of Correction. On appeal she argues that the trial court erred in its denial of her directed-verdict motion because the State failed to provide sufficient evidence to rebut the common-law presumption against arson. Specifically, she argues that there was no evidence, other than her confession, that the fire was intentionally set. We agree and reverse and dismiss her conviction.[1]

[1] Fowler also argues that the State failed to prove that the property's value exceeded $100,000; that the jury was improperly instructed; and that her suppression motion should

The evidence supporting Fowler's confession, especially when considered in the light most favorable to the State, is compelling. *See Jones v. State*, 349 Ark. 331, 335, 78 S.W.3d 104, 107 (2002) (requiring that appellate court view evidence in light most favorable to State and only consider evidence that tends to support the verdict). In a statement to police officers, which Fowler recanted at trial, she confessed to setting the fire. She gave officers a detailed description of how she carried out the act, complete with a diagram of the room where she set the fire. Several witnesses at trial testified that Fowler had stated her intentions to burn down the property or confessed her culpability after the fire.

The State also introduced evidence showing that Fowler was in bankruptcy and that her pending divorce would substantially reduce her annual income. The State also established that Fowler had discussed burning the house down for the "insurance money" and that just prior to the fire Fowler had stored many of her personal possessions — especially items of sentimental value — in an off-site storage facility. Further, there was testimony that the night before her home burned she cleaned out her refrigerator and pantry and gave the food to a friend. Finally, there was evidence that, before the fire, Fowler asked her son to remove items that his ex-wife was storing in the Fowler home, so they would no longer be on the property.

In her most compelling argument, Fowler maintains that the State failed to offer corpus delecti proof of arson — proof that she actually set the fire.[2] In arson, there are two components to corpus delicti — the fact of the loss (proof that a fire occurred) and the criminal agency of some person (proof that the fire did not ignite by accident). Further, there is a common-law presumption that an unexplained fire was caused by accident. *See Johnson v. State*, 198 Ark. 871, 131 S.W.2d 934 (1939). Therefore, the State had the added burden of proving that the Fowler home "was burned by the willful act of some person criminally responsible for his acts, and not by natural or accidental causes." *Id.* at 873, 131 S.W.2d at 935.

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have been granted. However, because we reverse and dismiss on her first point of appeal, we do not address these additional allegations of error.

[2] Corpus delecti is a Latin term, meaning "body of the crime," and in a legal vernacular it refers to the "act of the transgression." *See Black's Law Dictionary* 369 (8th ed.).

At first blush, the remaining analysis in this case would appear remedial — it is clear that the home was burned by Fowler's willful act because she admitted as much. However, Arkansas law requires more than Fowler's out-of-court confession. *See Thomas v. State*, 295 Ark. 29, 31, 746 S.W.2d 49, 50 (1988) ("A confession of a defendant, unless made in open court, will not warrant a conviction, unless accompanied with other proof that the offense was committed."). The State was required to provide "other proof" that the offense was committed. *Id.* Thus, we are left to consider whether the State produced sufficient evidence — without Fowler's confession — to overcome the common-law presumption against arson and prove that the fire did not accidentally ignite.

In an attempt to show that the requisite "other proof" was established at trial, the State points us to evidence showing many suspicious acts and circumstances preceding the fire, including Fowler's financial distress, her off-site storage of sentimental items, and her distribution of personal and food items the evening before the fire. However, the State offers no "other proof" showing that Fowler actually undertook the act of igniting a fire. The fire investigator was unable to independently identify the fire's point-of-origin or establish that the fire was intentionally set. The investigator and the electrician who serviced the home were unable to definitively rule out the possibility of electrical malfunction. Further, there was no proof that the fire was fueled by an accelerant or other flammable substance.

Therefore, although we are satisfied that the State presented ample evidence to support a conclusion that Fowler *intended* to burn her house down, without Fowler's supporting confession, the State failed to carry its burden of proving that Fowler *actually* carried out the act. Writing for the *Johnson* court, Chief Justice Griffin Smith questioned the seemingly absurd effect of requiring "other proof" that a fire was intentionally ignited after a defendant had confessed his culpability in the arson. Smith noted that although it was "possible — perhaps probable — that the defendant's confession was true . . . it is more important that the law's symmetry be preserved than that a criminal be punished in a particular case." *Johnson*, 198 Ark. at 871, 131 S.W.2d at 935. Like the *Johnson* court, we too must preserve the law's symmetry. As such, Fowler's arson conviction is reversed and dismissed.

Reversed and dismissed.

BIRD and BAKER, JJ., agree.

Fred R. CALVERT, Jr. *v.* ESTATE of FRED R. CALVERT, SR.

CA 06-1036 259 S.W.3d 456

Court of Appeals of Arkansas
Opinion delivered June 20, 2007

[Rehearing denied August 1, 2007.]

Putman Law Firm, by: *William B. Putman*, for appellant.

Davis, Wright, Clark, Butt & Carithers, PLC, by: *William Jackson Butt, II*, and *Casey Dorman Lawson*, for appellee.

LARRY D. VAUGHT, Judge. This appeal challenges the award of attorney's fees. Appellant Fred Calvert, Jr., contends that the trial court erred in awarding attorney's fees to appellee, the Estate of Fred Calvert, Sr., deceased. We disagree and affirm.

On October 17, 1972, Felix F. Calvert and his wife Ethyl F. Calvert, appellant's grandparents, created an irrevocable trust known as "The Fred R. Calvert 1972 Trust." The trust appointed Fred Calvert, Sr. (the son of Felix and Ethyl and appellant's father), Pat Anderson (the daughter of Felix and Ethyl and appellant's

aunt), and Robert J. Austin as trustees. Felix and Ethyl deeded several parcels of real estate to the trustees to be held in trust for their son, Fred Calvert, Sr., as the primary beneficiary of the trust. The trust provided that the principal of the trust could be distributed at any time, at the discretion of the trustees, as necessary for the primary beneficiary's health, education, support or other expenses of maintenance. The trust also provided that upon the death of Fred Calvert, Sr., his interest in the trust would terminate, but the trust would continued for the benefit of his children. Finally, the trust contained a choice-of-law provision that provided:

> In the administration of this trust the Trustee shall act independent of control by any court and shall be under all of the duties and shall have all of the powers conferred upon trustees by the Texas Trust Act, and by any amendments to the Texas Trust Act subsequent to the date hereof, except for any instance in which the Texas Trust Act may conflict with the express provisions of the Trust Agreement, in which instance the provisions hereof shall control.

In October 1977, the trustees filed a warranty deed conveying real property from the trust to Fred Calvert, Sr., who subsequently sold various parcels to third parties. Fred Calvert, Sr., died on June 21, 2003.

In 2004, appellant, the only child of Fred Calvert, Sr., and his wife, Sharon Calvert, filed this action against appellee in the Circuit Court of Madison County alleging that the 1977 conveyance of property from the trustees to Fred Calvert, Sr., was invalid and that appellant was entitled to any property still remaining in the estate as well as any cash or other estate assets derived from the sale of such property. The claim was denied by the personal representative of the estate.

On December 9, 2005, a hearing was held on appellant's claims against the estate, and, thereafter, the trial court issued an opinion finding that Texas law applied to the dispute and, that under the trust agreement, there was no breach of fiduciary duty, fraud, bad faith, or negligence on the part of the trustees, nor any rights of appellant to recover as a beneficiary of the trust. The estate then filed a motion for attorney's fees pursuant to the Arkansas Trust Code, Ark. Code Ann. § 28-73-1004 (Supp.

2005),[1] and, alternatively, pursuant to Arkansas Code Annotated section 16-22-308 (Repl. 1999).[2] The trial court found that the attorney's fees issue was governed by section 16-22-308, and our supreme court's holding in *Bailey v. Delta Trust & Bank*, 359 Ark. 424, 198 S.W.3d 506 (2004);[3] granted the estate's motion; and issued an order awarding attorney's fees, along with costs, witness fees and mileage, to the estate in the amount of $21,800.57. Appellant has appealed from this order.

Appellant contends that the trial court erred in awarding attorney's fees because his claim against the estate sounded in tort rather than in contract, and therefore section 16-22-308 is inapplicable. Appellant further argues that *Bailey* does not apply because in *Bailey* the award of attorney's fees was reversed not because of a challenge to the nature of the cause of action (tort or contract) but because the party that was awarded fees was not the prevailing party below.

Attorney's fees are not allowed except where expressly provided for by statute. *Harris v. City of Fort Smith*, 366 Ark. 277, 234 S.W.3d 875 (2006). An award of attorney's fees will not be set aside absent an abuse of discretion by the trial court. *Id.* While the decision to award attorney's fees and the amount awarded are reviewed under an abuse of discretion standard, we review factual findings by a circuit court under a clearly erroneous standard of review. *Id.*

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[1] Section 28-73-1004 provides that "[i]n a judicial proceeding involving the administration of a trust, a court, as justice and equity may require, may award costs and expenses, including reasonable attorney's fees, to any party, to be paid by another party or from the trust that is the subject of the controversy."

[2] Section 16-22-308 provides in pertinent part that "[i]n any civil action to recover on a . . . breach of contract, unless otherwise provided by law or the contract which is the subject matter of the action, the prevailing party may be allowed a reasonable attorney's fee to be assessed by the court and collected as costs."

[3] *Bailey* involved the interpretation of a trust agreement. A dispute arose between the primary beneficiary of the trust and the trustee/remainder beneficiaries concerning the settlor's intent of the trust. 359 Ark. at 428, 198 S.W.3d at 510. The primary beneficiary prevailed and was awarded attorney's fees. *Id.* at 431, 198 S.W.3d at 512. This issue was not appealed. The trial court also awarded attorney's fees to the remainder beneficiaries, but the award was conditional on the outcome of the appeal. *Id.* The primary beneficiary appealed the award of attorney's fees to the remainder beneficiaries, and the supreme court reversed the award, holding that, under Arkansas Code Annotated section 16-22-308, the remainder beneficiaries were not the prevailing party and therefore were not entitled to attorney's fees. *Id.* at 442, 198 S.W.3d at 520.

We need not address the issue of whether the trial court erred in awarding appellee attorney's fees under section 16-22-308 and/or *Bailey* because we affirm the award of attorney's fees for other reasons. *See State v. Hatchie Coon Hunting & Fishing Club*, 98 Ark. App. 206, 254 S.W.3d 11 (2007) (holding that we may affirm where a trial court reaches the right result for the wrong reason).

We affirm the award of attorney's fees based on Texas law pursuant to the Texas Trust Code. As previously stated, the trust agreement in the instant case expressly stated that the Texas Trust Act governed administration of the trust except in any circumstance where the Texas Trust Act conflicted with the trust agreement. Appellant, in his amended claim alleged that the application and interpretation of the trust should be governed by the applicable laws of the State of Texas. The trial court applied Texas law in reaching its decision on the substantive claims, and this decision was not appealed by the parties. Likewise, the trial court should have applied Texas law and the Texas Trust Code to answer the attorney's fees question.

The Texas Trust Code provides that "[i]n any proceeding under this code the court may make such award of costs and reasonable and necessary attorney's fees as may seem equitable and just." Tex. Prop. Code Ann. § 114.064 (Vernon 1995). This statute authorizes the award of attorney's fees in cases involving a trust-agreement dispute. *See Texarkana Nat'l Bank v. Brown*, 920 F. Supp. 706 (E.D. Tex. 1996) (holding that Texas Trust Code applied to beneficiaries' counterclaim, which was based on allegations that trustee breached terms of trust and/or was negligent in management of trust, and provided an independent basis for an award of attorney's fees); *Lyco Acquisition 1984 Ltd. v. First Nat'l Bank of Amarillo*, 860 S.W.2d 117 (Tex. App. 1993) (holding that original suit of appellant, which included allegations that appellee/trustee breached its fiduciary duty to appellant/beneficiary of trust, constituted a proceeding under the Texas Trust Code and that attorney's fees under the Code could be awarded).

Although filed in Arkansas, there is no question that this was a proceeding brought pursuant to, and decided by, Texas law, namely the Texas Trust Code. As such, the attorney's fees statute found in the Texas Trust Code was applicable and sup-

ported the trial court's award of attorney's fees to the estate. Therefore, we hold that the award of attorney's fees to the appellee was proper, and we affirm.

If we were to apply Arkansas law to this case, our result would remain the same — we would affirm. However, we would affirm for different reasons than those stated by the trial court. *See Hatchie Coon Hunting & Fishing Club, supra.*

The Arkansas Trust Code has a provision, which is similar to that found in the Texas Trust Code, that provides: "In a judicial proceeding involving the administration of a trust, a court, as justice and equity may require, may award costs and expenses, including reasonable attorney's fees, to any party, to be paid by another party or from the trust that is the subject of the controversy." Ark. Code Ann. § 28-73-1004. The case at bar was a judicial proceeding that involved the administration of a trust.[4] Therefore, the Arkansas Trust Code also supports the award of attorney's fees to appellee.

Affirmed.

BIRD, J., agrees.

HEFFLEY, J., concurs.

SARAH J. HEFFLEY, Judge, concurring. I agree with the majority in affirming the trial court's decision to award attorney's fees; however, I believe Arkansas law governs the issue of attorney's fees and would therefore affirm using Arkansas law.

As the majority states, there is no question that the substantive issue in this case was decided pursuant to the Texas Trust Code as dictated by the provisions of the trust in question. The use of Texas law to decide the substantive issue, however, does not imply that Texas law applies to a procedural issue as well. *See Norton v. Luttrell*, 99 Ark. App. 109, 257 S.W.3d 580 (2007) ("Under traditional conflicts-of-law analysis, procedural matters are governed by the law of forum, which, in this case, was the State of Arkansas."); *see also John Hancock Mut. Life Ins. Co. v. Ramey*, 200 Ark. 635, 140 S.W.2d 701 (1940) (holding that while Michigan law applied to determine the rights and liabilities of the parties

[4] The Restatement (Second) of Trusts § 178 (1959) states that a trustee has the duty to defend actions against the trust, which may result in a loss to the trust estate, and this duty is included within the general heading: "Administration of a Trust."

under a contract, all procedural matters would be determined by the law of forum). Our case law has established that "[t]he allowance of attorney's fees is penal in nature, and is a procedural matter governed by the laws of the State of Arkansas." *BAAN, U.S.A. v. USA Truck, Inc.*, 82 Ark. App. 202, 209, 105 S.W.3d 784, 789 (2003); *see also Am. Physicians Ins. Co. v. Hruska*, 244 Ark. 1176, 428 S.W.2d 622 (1968); *New Empire Life Ins. Co. v. Bowling*, 241 Ark. 1051, 411 S.W.2d 863 (1967); *City of Ozark v. Nichols*, 56 Ark. App. 85, 937 S.W.2d 686 (1997).

The case of *New Empire Life Ins. Co. v. Bowling, supra*, is particularly instructive in this instance. In *New Empire*, the trial court applied Missouri law to the interpretation of a provision in a life-insurance contract, which was the substantive issue of the case. The case was decided by a jury in the plaintiff's favor, and the plaintiff asked the court for attorney's fees under Arkansas statutory law. The trial court rejected the request, holding that Missouri law also governed the issue of attorney's fees, and that the plaintiff had not met its burden of showing the insurance company's actions were "vexatious" as required by Missouri law. Our supreme court reversed, holding that the question of attorney's fees was a procedural one to be governed by the law of the forum state.

In the case at bar, the trial court applied Texas law to the substantive issue, the interpretation of the trust, but applied Arkansas law to the issue of attorney's fees. This decision was correct and in accord with established precedent. And, notably, neither party has argued on appeal that Texas law should have been applied to the attorney's fee issue. The trial court cited Ark. Code Ann. § 16-22-308 (Repl. 1999) and *Bailey v. Delta Trust & Bank*, 359 Ark. 424, 198 S.W.3d 506 (2004), as authority for its decision to award attorney's fees in this case, and while appellant argues to the contrary, I believe the trial court's interpretation of, and reliance on, *Bailey* and its use of Ark. Code Ann. § 16-22-308 was justified, and this court should affirm on that basis.

Alternatively, I agree with the majority that the award of attorney's fees would be justified in this case under Ark. Code Ann. § 28-73-1004 (Supp. 2005), which authorizes the court to award costs and expenses, including reasonable attorney's fees, "in a judicial proceeding involving the administration of a trust." Whichever statutory provision is applied, I believe Arkansas law governs the issue of attorney's fees in this case, and I see no need to

apply, nor authority that justifies the use of, Texas law to decide this issue. For these reasons, I concur with the conclusion reached by the majority.

Teresa ALLEN *v.* Chad ALLEN

CA 06-823 259 S.W.3d 480

Court of Appeals of Arkansas
Opinion delivered June 20, 2007

Hilburn, Calhoon, Harper, Pruniski & Calhoun, Ltd., by: *Traci LaCerra*, for appellant.

The Law Offices of Gary Green, P.A., by: *Randy Hall*, for appellee.

SARAH HEFFLEY, Judge. Appellant Teresa Allen appeals from a post-decree order holding that she has no marital interest in appellee Chad Allen's full retirement benefits that vested during the marriage. We agree that the trial court erred and reverse and remand.

The parties' seven-year marriage ended with the entry of a divorce decree that was filed of record on August 30, 2004. The decree contained several interrelated provisions regarding the division of marital property. As pertinent to this appeal, the decree fixed appellee's marital interest in appellant's business at $40,000. Appellant was entitled, however, to deduct from that sum her marital share of equipment appellee had sold and her share of appellee's retirement benefits. Specifically, the decree provided:

> 5. The parties have agreed that the [Appellant] shall retain her business, All For Pets Veterinarian Clinic, as her sole and separate property free from any right, title or claim by the [Appellee]. The [Appellant] shall assume all debt associated with the business and shall refinance any debt which is held jointly by the parties. The [Appellant] shall hold the [Appellee] harmless on the debt associated with the business.
>
> The [Appellant] shall pay the [Appellee] the sum of $40,000 for his marital interest in the business. The [Appellant] shall have the right to make the payment after the sale of the marital residence from the proceeds from the sale of the residence. The parties further agree that the [Appellant] shall be entitled to use as a set-off her one-half of the sale proceeds from the equipment and her one-half interest in the [Appellee's] retirement. After application of the sale proceeds from the sale of the home and equipment and the retirement proceeds, if there remains any money owed to [Appellee], the [Appellant] shall pay the remaining amount at the rate of $500 per month until paid in full.
>
> 6. The parties each have retirement. The parties shall divide equally the retirement which accrued during the marriage. Said retirement shall be divided pursuant to a Qualified Domestic Relations Order.
>
> Date of marriage August 23, 1997
> Date of divorce June 24, 2004
>
> 7. The [Appellee] has sold certain items of equipment which was marital property. The [Appellee] shall pay the [Appellant] one-half of the sale proceeds from the sale of the equipment upon entry of the decree.

The date-of-marriage and date-of-divorce recitals in paragraph six are in a font that is different from the rest of the decree and were inserted and initialed by appellee's attorney. The date of divorce referred to in this insertion is the date that the divorce hearing was held, June 24, 2004, rather than the date the divorce decree was entered, August 30, 2004. Appellant's attorney signed her approval of the decree.

After the decree was entered, the parties could not come to terms over the dollar amount of the deductions appellant was allowed to subtract from the $40,000 that represented appellee's

interest in appellant's business. This dispute prompted appellee to file a "Motion to Enforce the Decree" on December 15, 2005. At the hearing held on March 2, 2006, appellee took the position that appellant was not allowed to calculate her half of the equipment that was sold from the total proceeds of the sale. He contended that she was only entitled to one-half of the net proceeds, after the debt on the equipment was satisfied. Appellee also asserted that appellant was not entitled to share in his full retirement benefits. Appellee put on evidence that, as of June 24, 2004, he was only vested in his retirement in the amount of the contributions that he had made, but that it was not until July 1, 2004, that he became fully vested in his retirement plan. Appellee argued that, because the decree recited that the date of the divorce was June 24, 2004, appellant was not entitled to share in the contributions made by his employer that vested on the subsequent date of July 1, 2004. At the hearing, appellee's attorney candidly admitted that he had not disclosed the vesting date to appellant prior to the divorce.

The trial court ruled in favor of appellee on both of his arguments. The trial court permitted deductions of $13,000 for the equipment, representing appellant's one-half share of the net proceeds from the sale, and $5,721 for appellee's retirement, as limited to one-half of appellee's contributions. After other deductions not relevant here, appellant was ordered to pay appellee $16,283.25. Appellant appeals from the order setting out the trial court's decision, challenging only that part of the order concerning appellee's retirement benefits.

We review traditional equity cases on both factual and legal questions de novo on the record, but we will not reverse a finding by the trial court unless it is clearly erroneous. *Crosby v. Crosby*, 97 Ark. App. 316, 249 S.W.3d 144 (2007). We do not defer to the trial court's determinations of law. *Pittman v. Pittman*, 84 Ark. App. 293, 139 S.W.3d 134 (2003).

Appellant is entirely correct in her argument that marital property is to be divided as of the time of the divorce. *Skokos v. Skokos*, 344 Ark. 420, 40 S.W.3d 768 (2001). Moreover, the decree provided that the parties were to "divide equally the retirement *which accrued during the marriage*." Thus, we agree with appellant that the trial court clearly erred in its decision. The decree erroneously recited June 24, 2004, as the date of the divorce. However, that was the date of the divorce hearing, not the date of the actual divorce. It is firmly established, both by rule and our case law, that a judgment or decree is not effective until it

is entered as provided in Ark. R. Civ. P. 58 and Administrative Order No. 2. *Price v. Price*, 341 Ark. 311, 16 S.W.3d 248 (2000); *Standridge v. Standridge*, 298 Ark. 494, 769 S.W.2d 12 (1989); *see also Shackelford v. Ark. Power & Light Co.*, 334 Ark. 634, 976 S.W.2d 950 (1998); *Blaylock v. Shearson Lehman Bros., Inc.*, 330 Ark. 620, 954 S.W.2d 939 (1997); *Clayton v. State*, 321 Ark. 217, 900 S.W.2d 537 (1995); *Gen. Motors Acceptance Corp. v. Eubanks*, 318 Ark. 640, 887 S.W.2d 292 (1994); *Nance v. State*, 318 Ark. 758, 891 S.W.2d 26 (1994); *Kelly v. Kelly*, 310 Ark. 244, 835 S.W.2d 869 (1992); *Filyaw v. Bouton*, 87 Ark. App. 320, 191 S.W.3d 540 (2004); *A-1 Bonding v. State*, 64 Ark. App. 135, 984 S.W.2d 29 (1998); *Morrell v. Morrell*, 48 Ark. App. 54, 889 S.W.2d 772 (1994); *Brown v. Imboden*, 28 Ark. App. 127, 771 S.W.2d 312 (1989). A judgment, decree, or order is "entered" when it is stamped or marked by the clerk. *Price v. Price, supra;* Ark. Sup. Ct. Admin. Order No. 2. The purpose of this law is to provide a definite point at which a judgment, be it a decree of divorce or other final judicial act, becomes effective. *Standridge v. Standridge, supra.* It is also meant to eliminate disputes between litigants. *Price v. Price, supra.* It follows that, by law, the parties' marriage did not end until the decree was filed on August 30, 2004. Consequently, appellant is entitled to share in all of appellee's retirement benefits that accrued prior to that date in accordance with paragraph six of the decree. In our view, the settled law establishing a definitive point in time when a judgment or decree becomes effective cannot be subverted by a recital in a decree. We thus reverse the trial court's order.

We also reject appellee's assertion that acceptance of appellant's argument violates the provisions of Ark. R. Civ. P. 60 by modifying the decree past the rule's ninety-day deadline. Rather, our holding is an interpretation of the decree that is consonant with the law and the undisputed facts of this case. Also, there is no improper modification at work here. In *Tyer v. Tyer*, 56 Ark. App. 21, 937 S.W.2d 667 (1997), the case appellee cites, we did hold that under Rule 60 the trial court lacked jurisdiction to modify a divorce decree to include the distribution of marital property that was not mentioned in the divorce decree. However, that holding presupposes that the decree of divorce was a final order. That is not the case here.

For a judgment to be final, it must dismiss the parties from the court, discharge them from the action, or conclude their rights to the subject matter in controversy. *Roberts v. Roberts*, 70 Ark.

App. 94, 14 S.W.3d 529 (2000). An order is not final and appealable merely because it settles the issue as a matter of law; to be final, the order must also put the court's directive into execution, ending the litigation or a separable branch of it. *Morton v. Morton*, 61 Ark. App. 161, 965 S.W.2d 809 (1998). The amount of the judgment must be computed, as near as may be, in dollars and cents, so as to be enforced by execution or some other appropriate manner. *Thomas v. McElroy*, 243 Ark. 465, 420 S.W.2d 530 (1967); *accord Office of Child Support Enforcement v. Oliver*, 324 Ark. 447, 921 S.W.2d 602 (1996); *White v. Mattingly*, 89 Ark. App. 55, 199 S.W.3d 724 (2004); *see also Hastings v. Planters & Stockmen Bank*, 296 Ark. 409, 757 S.W.2d 546 (1989); *Morton v. Morton*, *supra*; *Meadors v. Meadors*, 58 Ark. App. 96, 946 S.W.2d 724 (1997).

In *Thomas v. McElroy*, *supra*, the supreme court discussed the formal requirements of a judgment in the context of deciding what constituted a final judgment. There, McElroy had filed suit against Thomas for unpaid rent. After a hearing, the trial court entered an order finding that Thomas owed $40 a month during the period between December 9, 1963, and July 8, 1964. About a year later, the trial court entered an order that granted judgment against Thomas in the amount of $760. Thomas argued on appeal that the first order was a final judgment and that the trial court had no authority to modify it a year later. The supreme court disagreed, enunciating the rule that to be final, a judgment for money must state the amount that the defendant is required to pay. The supreme court thus held that the trial court did not err by entering judgment at a later date because the first order was not a final judgment since the amount owed for rent was not stated in dollars and cents. *See also Villines v. Harris*, 362 Ark. 393, 208 S.W.3d 763 (2005) (holding that, although a previous order set out a formula for calculating damages, the order was not final because it did not establish the amount of damages); *Office of Child Support Enforcement v. Oliver*, *supra* (holding that an order was not final where an arrearage in child support was found but the amount of the arrearage was not determined); *Hastings v. Planters & Stockmen Bank*, *supra* (holding that an order of summary judgment was not final where the amount owed was not specified in dollars and cents).

In this case, the decree provided that appellant owed appellee $40,000 for his interest in appellant's business, but that sum was to be reduced by set-offs in unstated amounts. The decree was not self-executing, as it did not state with specificity the amount of money appellant was required to pay. The decree was

not a final order, and obviously so, since its omissions and lack of certainty gave rise to further litigation.

We also disagree with appellee's contention that appellant is guilty of unclean hands because she did not pay what was owed under the decree. The clean-hands doctrine bars relief to those guilty of improper conduct in the matter as to which they seek relief. *Nationsbanc Mtg. Co. v. Hopkins*, 87 Ark. App. 297, 190 S.W.3d 299 (2004). As is evident by our decision, the amount appellant owed was subject to legitimate dispute. We see no basis for the application of the clean-hands defense here.

To conclude, we reverse and remand for proceedings consistent with this opinion.

Reversed and remanded.

HART, GRIFFEN, MILLER, and BAKER, JJ., agree.

MARSHALL, J., concurs in part and dissents in part.

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

D.P. MARSHALL JR., Judge, concurring in part and dissenting in part. I would reverse and remand for the circuit court to explain why it construed this final, but ambiguous, decree in the way it did.

DAVID M. GLOVER, Judge, dissenting. I respectfully dissent from the majority opinion in this case regarding the effect of paragraph 6 of the parties' divorce decree, which included the following provisions:

> 6. The parties each have retirement. The parties shall divide equally the retirement which accrued during the marriage. Said retirement shall be divided pursuant to a Qualified Domestic Relations Order.
>
> Date of marriage August 23, 1997.
> Date of divorce June 24, 2004.

The specific property addressed in paragraph 6 was retirement accounts, and, as acknowledged in the majority opinion, the date-of-marriage and date-of-divorce recitals inserted beside this paragraph were 1) typed in a different font and 2) inserted and initialed by

appellee's attorney. However, along with appellee's counsel, appellant's attorney sometime thereafter signed her approval on the decree, which was then signed by the court and entered on August 30, 2004. No appeal was taken from the decree, and neither was a motion filed pursuant to Rule 60 of the Arkansas Rules of Civil Procedure. Instead, this appeal arose from an April 25, 2006 order that was entered by the trial court following a March 2, 2006 hearing on appellee's motion to enforce decree.

The majority concludes that the trial court clearly erred in holding that appellant had no marital interest in appellee's retirement benefits that vested after June 24, 2004, reasoning that the decree provided that the parties were to "divide equally the retirement which accrued during the marriage," that marital property is to be divided as of the time of the divorce, and that the divorce decree did not become effective until it was entered on August 30, 2004. Accordingly, the majority interprets paragraph 6 of the divorce decree as entitling appellant to share in all of appellee's retirement benefits that accrued prior to August 30, 2004, rejecting the June 24, 2004 date inserted into paragraph 6 by appellee, which was agreed to by both parties and approved by the trial court. I disagree.

The majority characterizes the parties' recitation of the June 24, 2004 date as error. In my opinion, however, the reasonable inference to draw from this date is that it was inserted for purposes of valuation of the retirement accounts. Arkansas Code Annotated section 9-12-315(a) ties *distribution* of marital property to the time a decree is entered. The statute does not prohibit *valuation* of marital property at an earlier, agreed upon date, which occurred here.

Appellant's counsel confirmed in her reply brief, though not referenced by the majority opinion, her realization, albeit "after-the-fact," that "[i]t is now clear why Appellee's trial counsel argued to put June 24, 2004 in the decree. . . ." The majority opinion notes that when the issue was first addressed (which was at the hearing on appellee's motion to enforce the decree), appellee's attorney candidly admitted that he had not disclosed to appellant the vesting date of the retirement account. The issue raised by appellant on appeal addresses the burden of disclosure. The admission of appellee's counsel at the post-trial hearing and the issue now raised by appellant together suggest the need for a review of what relevant information was produced in the trial process. First, the appellate record before us does not include any exhibits offered

by appellant at the June 24, 2004 final hearing confirming the dollar amount, accrued time, or vesting date of appellee's retirement plan. Neither does the record disclose that appellant utilized any standard discovery techniques — depositions, interrogatories, and requests for admission and production of documents — to obtain relevent information from appellee concerning his retirement information. What the record does include are three retirement-related exhibits, all introduced at the March 2, 2006 post-divorce hearing, and only one of which was by appellant, from which this appeal originated. Significantly, on March 2, 2006, appellant first produced for consideration by the trial court some documentation of appellee's entitlement to retirement benefits. That sole exhibit, however, was the March 31, 2003 quarterly report of appellee's retirement account, disclosing only limited information about its value as of that date.

PITTMAN, C.J., and ROBBINS, J., join in this dissent.

Richard Glenn BELL, Jr. *v.* STATE of Arkansas

CA CR 06-1286 259 S.W.3d 472

Court of Appeals of Arkansas
Opinion delivered June 20, 2007

Bill E. Bracy Jr. for appellant.

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

KAREN R. BAKER, Judge. Appellant Richard Bell, Jr., challenges his conviction for domestic battery in the first degree alleging that the trial court erred by misinterpreting the proof required for the culpable mental state and consequently in failing to grant his motion for directed verdict, and that the verdict is not supported by substantial evidence. We find no error and affirm.

At a bench trial, testimony established that appellant had been living with his girlfriend and her two sons at her residence for approximately seven to eight months. At the time of the incident,

her younger child, who was the victim in this case, was fifteen months old. The older child was three years old. Neither child was appellant's biological child.

The first witness for the State was Detective Steven Caudill with the Blytheville Police Department. He testified that on August 24, 2005, he received a call to proceed to the hospital in Blytheville where he met Officer Justin Moody and observed the injuries to the younger toddler. His testimony initially focused on the introduction of photographs. While a few photographs showed evidence of scarring from previous injuries suffered by the child, the majority of the photographs depicted, as the detective stated, that the "skin had been burned off the feet" of the child. Officer Moody further described how he collected from the bathroom of the home what he believed to be the skin that had been burned from the child's feet. He gathered skin from one foot lying by the wall on the edge of the tub, and the skin from the other foot he retrieved from between the bathtub and the toilet. He also testified that he observed about an inch to an inch and a half of water still in the tub.

The photographs graphically depict the gruesome degloving of the child's feet. The admission of the photographs was not challenged at trial nor is it challenged on appeal. The depiction of the child's injuries evidenced in the photographs obviated the need for more extensive testimony regarding the severity of the injuries or the fact that the seriousness of the injuries was plain to an observer. This photographic evidence exemplifies the reasons underlying the admissibility of photographs to aid the fact finder in reaching its determinations. Our supreme court has explained the assistance that photographs may afford the trier of fact as follows:

> Even the most gruesome photographs may be admissible if they assist the trier of fact in any of the following ways: by shedding light on some issue, by proving a necessary element of the case, by enabling a witness to testify more effectively, by corroborating testimony, or by enabling jurors to better understand the testimony. Other acceptable purposes are to show the condition of the victims' bodies, the probable type or location of the injuries, and the position in which the bodies were discovered.

O'Neal v. State, 356 Ark. 674, 686, 158 S.W.3d 175, 184 (2004) (citations omitted).

In the case before us, the photographs were helpful in explaining Detective Caudill's testimony regarding the child's skin

being burned off and Officer Moody's description of his gathering the separated skin. The evidence further assisted the trial judge in evaluating appellant's recitations of the events leading to the child's injuries and in reaching its determination that the State had met its burden regarding the requisite mental state.

An evaluation of appellant's accounts of the facts and circumstances was particularly necessary because appellant provided different versions of the events surrounding the harm suffered by the child. His first story was conveyed to the court by Detective Bobby Trump with the criminal investigation division of the Blytheville Police Department. This statement was given after a waiver of appellant's Miranda rights with Detective Caudill present. Appellant said that he had started the water and put both children into the tub, then went to the kitchen to fix himself something to eat, and subsequently sat down in the living room to watch television and fell asleep for approximately half an hour. When he awakened, the older child was out of the tub. When he checked on the younger child, appellant noticed that the child's feet were red.

Appellant's second version of the events was taped and was played to the court. In this rendition, appellant described how he smelled the victim's dirty diaper and he did not "really like to smell that in the morning." He prepared the bath water, and specifically stated that he made sure that the bath water was not hot or too cold. He placed both children in the tub with toys. He then dozed off momentarily, and the cries of both children that made him return to the bath. Later in this same story, he stated that he woke up to the victim's screams. He described how one child was screaming and the other was in another room playing with toys. In this second telling, he said that he knew that the water was just warm because when he retrieved the child he pulled the plug to let the water out, he suffered no injuries to his hand in pulling the plug, and felt the temperature of the water to be just warm.

After appellant gave this version of events, Detective Trump confronted appellant about discrepancies in appellant's accounts regarding the incident. In response to Detective Trump's question, "So during the first interview, you were not being truthful at all?" appellant responded, "No sir. I want to be truthful about it. I need to start from the top and tell what happened."

In appellant's next version of events, appellant placed more emphasis on the unpleasantness of the dirty diaper and stated that it was only six to seven minutes before he went to remove the child

from the tub. This account included appellant's statement that the child did not start screaming when appellant placed him into the water. However, appellant did admit that the child was crying before he left the room and by the time appellant had made it to the kitchen, the victim had "really started to scream." Appellant acknowledged that he ignored the child's screams, got something to eat and drink, and walked to the living room. He stated that he finally returned to the bathroom because of the child's incessant screaming. In this version, he recanted his earlier assertions that he had checked the water temperature prior to placing the toddler into the water and claimed that he did not check the water until he returned to the room. He also retracted his original contention that he placed both boys into the tub. He described how he stuck his hand into the water and pulled it right back out because the water was hot. He further said that, despite the child's crying, he waited for an hour before taking the child to the hospital. He described his anger during this wait and stated that he punched a hole in the wall and threw a chair in response to his emotion. He apologized, saying he was sorry for hurting the baby but did not intentionally hurt him.

At trial, appellant testified in his defense. On direct-examination, he explained that prior to the bath that resulted in the injuries to the child, appellant had on other occasions bathed the children with no problems. In this account, he described the child's cries as normal and comparable to when the child just did not want to take a bath. He said that the child did not scream. In this version, he said he dozed off and spontaneously awoke recognizing that he had left the child unattended. He returned to check on the child because he realized he had forgotten the child. He explained that the child liked to be in the bath, but that appellant would always check on him every little while. He asserted that he did not do anything on purpose to hurt the child. He acknowledged that he had seen the photographs and that they were painful to see. He denied that he caused the harm to the child's feet saying that the hot water caused the injuries.

On cross-examination, appellant repeated his statement that the victim was not crying when he went back to the bathroom and asserted that the child did not cry during the wait before leaving for the hospital. Appellant stated that the child's silence scared him because the child wasn't doing or saying anything, just staring.

At the close of the evidence, the trial court found appellant guilty of domestic battery in the first degree and sentenced

appellant to ten years' imprisonment in the Arkansas Department of Correction, with four of those years suspended and credit for time served. On appeal, appellant asserts that the trial court erred by misinterpreting the proof required for the culpable mental state and consequently in failing to grant his motion for directed verdict, and that the verdict is not supported by substantial evidence.

A motion for a directed verdict or dismissal is a challenge to the sufficiency of the evidence. *Green v. State*, 79 Ark. App. 297, 87 S.W.3d 814 (2002). The test for determining the sufficiency of the evidence is whether the verdict is supported by substantial evidence, direct or circumstantial. *Killian v. State*, 60 Ark. App. 127, 959 S.W.2d 432 (1998). Evidence is substantial when it is forceful enough to compel a conclusion and goes beyond mere speculation or conjecture. *Britt v. State*, 334 Ark. 142, 974 S.W.2d 436 (1998).

Appellant sought dismissal below, disputing the State's proof that he acted under circumstances manifesting extreme indifference to the value of human life under Arkansas Code Annotated section 5-26-303(a)(3) (Repl. 2006). That section provides as follows:

> (a) A person commits domestic battering in the first degree if:
>
> . . .
>
> (3) The person causes serious physical injury to a family or household member under circumstances manifesting extreme indifference to the value of human life.

Id.

Serious physical injury is defined as "physical injury that creates a substantial risk of death or that causes protracted disfigurement, protracted impairment of health, or loss or protracted impairment of the function of any bodily member or organ." Ark. Code Ann. § 5-1-102(21) (Repl. 2006). Expert medical testimony is not required to prove serious physical injury, as the finder of fact may use its common knowledge to determine whether such injury occurred. *Johnson v. State,* 26 Ark. App. 286, 764 S.W.2d 621 (1989). Similarly, it is not necessary that the impairment be permanent, but merely "protracted." *See Britt v. State*, 83 Ark. App. 117, 118 S.W.3d 140 (2003) (holding that an injury resulted in a "protracted" loss of mobility where the victim was unable to

walk upon arrival at the emergency room, was still unable to walk at the time of her release from the hospital several days later, and required a course of physical therapy to prevent her injuries from resulting in a permanent loss of mobility).

Appellant does not dispute the extent of the child's injury but instead argues that the State failed to prove the culpable mental state required to find that he acted "under circumstances manifesting extreme indifference to the value of human life." A person acts "purposely" with respect to his conduct or a result thereof "when it is his conscious object to engage in conduct of that nature or to cause such a result." Ark. Code Ann. § 5-2-202(1) (Repl. 2006). Intent or state of mind is seldom capable of proof by direct evidence and must usually be inferred from the circumstances of the crime. *Taylor v. State*, 77 Ark. App. 144, 72 S.W.3d 882 (2002). A presumption exists that a person intends the natural and probable consequence of his acts. *Id.* Furthermore, a defendant's improbable explanation of suspicious circumstances may be admissible as proof of guilt. *Alexander v. State*, 78 Ark. App. 56, 77 S.W.3d 544 (2002).

Appellant relies upon *Tigue v. State*, 319 Ark. 147, 889 S.W.2d 760 (1994), to challenge the sufficiency of the evidence regarding his mental state. The *Tigue* case also involved the scalding of a young child. The hands of the five-year-old child in that case were scalded by forcible immersion by the perpetrator. *Tigue* was a first-degree battery case interpreting the phrase "under circumstances manifesting extreme indifference to the value of human life" as used in section 5-13-201, in the context of the first degree battery statute, not in the context of the domestic battery statute at issue here. Interpreting the first degree battery statute, the supreme court held that the phrase "under circumstances manifesting extreme indifference to the value of human life" is "what distinguishes conduct constituting first degree battery from that of second degree battery. Giving the phrase its plain meaning, the circumstances of first degree battery must by necessity be more dire and formidable in terms of affecting human life." *Tigue*, 319 Ark. at 151, 889 S.W.2d at 761-62. Relying on precedent and commentaries to the statutes, the court held that "first degree battery involves actions which create at least some risk of death and which, therefore, evidence a mental state on the part of the accused to engage in some life-threatening activity against the victim." *Tigue*, 319 Ark. at 152, 889 S.W.2d at 762. The supreme court held that while the injuries in that case constituted serious physical injury that they could ascertain no evidence that the child

was injured under circumstances manifesting extreme indifference to human life. Given this lack of evidence, the supreme court modified the conviction to second degree battery.

Neither the State nor appellant discusses the development of the law as it is codified in our domestic battery statute. Neither party suggests that the "value of human life" in the context of the domestic battery statute requires a different interpretation than that articulated by our supreme court in the context of our statute of battery in the first degree. Despite this lack of developed argument, appellant recognizes that distinctions between the two statutes exist and specifically that our domestic battery statutes contemplate a higher degree of accountability for the perpetrator. He argues, "The salutary desire to deal more readily or harshly with family injury must still be consistent with the mens rea culpable mental states or you not only leave gaps in enforcement, but speculation in the quantum of proof leading to injustice." It is unnecessary for us under the facts and arguments of this case to determine what distinction exists in the requisite mental states in the first-degree domestic battery statute and the first-degree battery statute. Appellant's conduct clearly supports the trial court's finding that the child in this case suffered injuries under circumstances manifesting extreme indifference to human life in accordance with the standard appellant claims is applicable.

In support of his contention that the trial court erred in finding that the evidence supported a finding of extreme indifference, appellant cites *McCoy v. State*, 347 Ark. 913, 69 S.W.3d 430 (2002). In *McCoy*, a case involving a charge of murder, our supreme court explained the phrase in question as follows:

> The phrase "under circumstances manifesting extreme indifference to the value of human life" is found in numerous criminal offenses involving injury or death to persons. Regardless of the offense in which it appears, however, this court has consistently viewed that phrase as part of the proof of the actor's mental state. . . . [T]he definition of "purposely" encompasses the culpable mental state of acting knowingly with extreme indifference, which requires deliberate conduct with a knowledge or awareness that one's actions are practically certain to bring about the prohibited result. The combination of knowledge and extreme indifference requires proof that the defendant acted with more than mere knowledge, but less than purposeful intent.

Id. at 347 Ark. 913, 922-24, 69 S.W.3d 430,435-37 (2002) (citations omitted) (holding that it was error for the trial court to refuse to instruct the jury on attempted second-degree murder because second-degree murder under section 5-10-103(a)(1) is a lesser-included offense of first-degree murder under section 5-10-102(a)(2), as it differs from the greater offense only to the extent that it requires a lesser kind of culpable mental state).

Appellant relies upon *Tigue, supra,* to argue that the injuries to the child in this case were accidental and that there was no evidence of restraint to dispute his contention that the injuries were anything other than accidental in nature. Appellant cites no cases to support his contention that evidence of restraint of a child during the infliction of the harm must be presented in order to support a finding that the injury was suffered under circumstances manifesting extreme indifference. We reject the argument that restraint is required. Nevertheless, such restraint is present in this case. Appellant admittedly placed this child in a tub of water so hot that it severed the skin from his feet. It takes no leap in logic for the fact finder to conclude that if this fifteen-month-old child could have crawled away from the bathtub, rather than suffer the pain endured as he suffered this injury, that he would have.

Equally unavailing are appellant's arguments that he was not knowingly aware that it was practically certain that his conduct would result in the child's injury or that he consciously disregarded a substantial and unjustifiable risk that the child would be injured. Throughout appellant's various renditions of the circumstances culminating in the degloving of this child's feet, he stated that he was familiar with the procedures required to bathe the child in a safe manner and he knew that ensuring that the bath was safe included a conscious effort of checking the temperature of the water. He knew that supervising the child was one requirement for maintaining the child's safety. In one version of the injury, appellant acknowledged that the child was screaming before he left the room, but he ignored the screams choosing to prepare food and drink for himself and returning only because the screams were incessant. In another version, he was frightened by the child's silence, where he described the child as staring and unmoving. His own statements, although inconsistent, support the conclusion that he knew that it was his responsibility to properly supervise the child during a bath and to ensure a safe water

temperature and that he consciously disregarded the risks involved. Even applying the risk of death analysis in first-degree battery cases that appellant claims is required, whether the risk is drowning, the severing of skin, or shock, the risk was indisputably present in this case. On these facts we find the trial court did not err in finding this child's serious physical injuries were inflicted by appellant under circumstances manifesting extreme indifference to the value of human life.

Affirmed.

GLOVER and MILLER, JJ., agree.

CAVALRY SPV, LLC *v.* Fairl ANDERSON

CA 06-1370 260 S.W.3d 331

Court of Appeals of Arkansas
Opinion delivered June 27, 2007

Hosto & Buchan, PLLC, by: *Paul A. Prater*, for appellant.

Gary Vinson, for appellee.

JOHN B. ROBBINS, Judge. Cavalry SPV appeals from an order striking its amended complaint and granting summary judgment to Fairl Anderson. We reverse and remand.

In January 2002, Midfirst Bank sued Mr. Anderson for $4344.77 due on a Discover credit card account. Several exhibits were attached to the complaint: an affidavit of account; a 1990 Discover credit card application bearing Mr. Anderson's and his wife's purported signatures with an address of 465 Allen Chapel Road in Batesville, Arkansas; a collection agency statement sent to Mr. Anderson at the same address in November 2001; a Discover card member agreement; and three account statements bearing Mr. Anderson's name, with the latest showing a balance of $4344.77. Cavalry purchased the account from Midfirst in June 2002 and filed an amended complaint substituting itself as plaintiff. Mr. Anderson generally denied the allegations in the complaints.

In December 2003, Cavalry moved for summary judgment. Mr. Anderson opposed the motion, arguing that Cavalry failed to produce copies of individual charge slips signed by him. At a hearing, the trial judge stated that the charge slips were the best evidence of Mr. Anderson's liability and that Ark. R. Civ. P. 10(d) required Cavalry to attach the slips to its complaint. Because Cavalry had not done so, the judge denied Cavalry's motion for summary judgment and gave it thirty days to produce copies of the charge slips.

Within thirty days, a Cavalry employee submitted an affidavit stating that the individual charge slips "if any" were not in its possession, custody, or control.[1] Mr. Anderson then moved for summary judgment based on Cavalry's inability to furnish the charge slips. Cavalry responded that the charge slips were unnecessary because it had produced a signed credit-card application, an affidavit of account, and account statements "evidencing the fact that this is the Defendant's debt." Cavalry also filed an amended complaint attaching the same application, account statements, and card-member agreement that were attached to the initial complaint, plus three account invoices bearing Mr. Anderson's name and the Batesville address. These invoices reflected purchases and payments made on the account in 1999 and 2000. Mr. Anderson asked the court to strike the amended complaint because it had been filed "some four years after the filing of the original complaint." The trial court did so and granted Mr. Anderson's motion for summary judgment. Cavalry filed this appeal.

Striking the Amended Complaint

Arkansas Rule of Civil Procedure 15(a) permits liberal amendments to pleadings at any time without leave of the court. *Nat'l Sec. Fire & Cas. Co. v. Shaver*, 14 Ark. App. 217, 686 S.W.2d 808 (1985). A trial court is vested with broad discretion in allowing or denying amendments to pleadings. *Turner v. Stewart*, 330 Ark. 134, 952 S.W.2d 156 (1997). But, a court abuses its discretion in striking an amended pleading where no prejudice is found and no undue delay is caused by the amendment. *See Ultracuts Ltd. v. Wal-Mart Stores, Inc.*, 343 Ark. 224, 33 S.W.3d 128 (2000); *Travis v. Houk*, 307 Ark. 84, 817 S.W.2d 207 (1991). Failure of the opposing party to seek a continuance is a factor to be considered in

[1] Cavalry's counsel had stated at the hearing that he did not believe the slips were available and had possibly been destroyed.

determining whether prejudice is shown, as is the ability of the opposing party to have a fair opportunity to defend after the amendment. *See Turner v. Stewart, supra.* Where neither a continuance is requested nor a demonstration of any prejudice resulting from an amendment is shown, the amendment should be allowed. *Id.*

Here, there was no showing of prejudice or undue delay to warrant striking Cavalry's amended complaint. No new cause of action was pled, so no delay was needed to allow Mr. Anderson to acquaint himself with the substance of the amendment. *See City of Marion v. Guar. Loan & Real Estate Co.*, 75 Ark. App. 427, 58 S.W.3d 410 (2001) (holding that the appellants in an annexation case failed to prove prejudice when the appellees added signatures and additional maps to their petition, but the petition's property description of the area to be annexed remained the same); *compare Davenport v. Lee*, 348 Ark. 148, 72 S.W.3d 85 (2002) (holding that the trial court did not abuse its discretion in striking an amended pleading that raised a new issue). Further, the amendment was filed contemporaneously with Cavalry's response to the motion for summary judgment, which gave Mr. Anderson sufficient opportunity to respond and defend. Additionally, the exhibits attached to the amended complaint had been attached to previous complaints or Cavalry's motion for summary judgment and were thus no surprise to Mr. Anderson.

Based on these considerations, we conclude that Cavalry's amended complaint should not have been stricken. We will therefore look to that complaint and its exhibits in considering the remaining issue.

Grant of Summary Judgment

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.*

The trial court's order stated no reason for granting summary judgment. However, the court's earlier remarks concerning Ark. R. Civ. P. 10(d) lead us to believe that its ruling was based, at least in part, on Cavalry's failure to attach individual charge slips as exhibits to the complaints. Rule 10(d) reads:

> *Required Exhibits.* A copy of any written instrument or document upon which a claim or defense is based shall be attached as an exhibit to the pleading in which such claim or defense is averred unless good cause is shown for its absence in such pleading.

We disagree that Cavalry violated this rule. Its complaints were accompanied by numerous documents on which its claim was based: a signed credit card application;[2] invoices that bore Mr. Anderson's name and showed charges and payments made on the account; other statements of account; a card-member agreement containing contractual terms of usage and payment; and an affidavit of account. *See* Ark. Code Ann. § 16-45-104 (Repl. 1999). These exhibits gave Mr. Anderson ample notice of the contract being sued upon. *Compare Ray & Sons Masonry Contr. v. U.S. Fidelity & Guar. Co.*, 353 Ark. 201, 114 S.W.3d 189 (2003) (holding that, where numerous subcontracts were at issue in the case, no cause of action was stated against a particular subcontractor until a copy of his contract was appended to the complaint). Further, Rule 10(d) does not require a party to attach to its complaint each and every document that may lend support to its claim. *See generally Harrison v. Harrison*, 82 Ark. App. 521, 120 S.W.3d 144 (2003) (holding that a party's failure to attach exhibits supporting his claim did not render the exhibits inadmissible at trial).

We also disagree with the implication that Cavalry cannot, as a matter of law, prove its case in the absence of the charge slips. In a similar collection case, *Danner v. Discover Bank*, 99

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[2] Arkansas Code Annotated section 16-46-102 (Repl. 1999) provides that, where a writing purporting to have been executed by one of the parties is referred to in and filed with a pleading, it may be read as genuine against that party unless he denies its genuineness by affidavit before the trial is begun.

Ark. App. 71, 257 S.W.3d 113 (2007), we noted that, under the Truth In Lending Act, a credit-card issuer has the burden of proving that any disputed use of a credit card was authorized. *See* 15 U.S.C. § 1643(b) (2005). But we did not hold in *Danner* that such burden may only be met by producing copies of individual charge slips. There, the card issuer provided an affidavit that an account had been opened as the result of a telemarketing sale; showed that the person who applied provided Danner's name and address; and produced billing statements purporting to reflect Danner's debt. The trial court ruled in favor of the card issuer, but we reversed and stated:

> Here, there was no evidence to verify [the card issuer's] statements of accounts. It would, for example, have been possible to prove that the "Discover Card Telemarketing Sale" by which the account was opened was in fact made to [Danner's] home, or that [Danner] had executed a credit application, a cardholder agreement, or sales slips in connection with the disputed account so as to identify [Danner] as the cardholder and the charges as authorized.

Id. at 72, 257 S.W.3d at 115. We clearly did not hold that sales slips were the sole means of proving authorized charges; in fact, we recognized that there might be other avenues of proof. Moreover, even with the modicum of information supplied by the card issuer in *Danner*, we remanded for a new trial because "we cannot say here that the record affirmatively shows that there could be no recovery." *Id.*

For these reasons, the summary judgment is reversed and the case remanded for further proceedings.

Reversed and remanded.

HEFFLEY and MILLER, JJ., agree.

JIM RAY, INC. *v.* Duane WILLIAMS

CA 06-789 260 S.W.3d 307

Court of Appeals of Arkansas
Opinion delivered June 27, 2007

Stockland & Trantham, P.A., by: *Thomas D. Stockland*, for appellant.

Walters, Hamby, and Gaston, by: *Troy Gaston* and *Bill Walters*, for appellee.

D.P. MARSHALL JR., Judge. This case arises out of Duane Williams's purchase of a new Nissan Titan pick-up truck from a dealership owned by Jim Ray, Inc. The jury returned a ten-person verdict and awarded Williams $4,425.87 in compensatory damages and $75,000.00 in punitive damages on his fraud and deceptive-trade-practices claims against the dealer. Jim Ray appeals, arguing insufficiency of the evidence, inadmissibility of expert testimony, and excessive punitive damages.

I.

We view the proof in the light most favorable to Williams. *Stewart Title Guaranty Co. v. American Abstract & Title Co.*, 363 Ark. 530, 540, 215 S.W.3d 596, 601 (2005). And we give the jury's verdict the benefit of all reasonable inferences from that proof. *Ibid.*

In February 2005, Williams bought a 2004 Nissan Titan pick-up from Jim Ray. After driving the truck off the lot, he realized that it had about 3000 miles on it and an invoice price higher than the sticker. Williams acknowledged that he acted unwisely by signing the invoice and odometer statement without reading them. A few days later he returned to the lot, convinced Jim Ray to set the deal aside, and picked out another 2004 Titan pick-up.

This truck had a sticker price of $29,700.00. In completing the paperwork, however, Williams noticed an invoice price of $34,125.87. He pointed out the discrepancy to Austin Cauthron, Jim Ray's finance manager. Cauthron assured Williams that the figure reflected "points or credits . . ., it does not mean dollars" and that the price was $29,700.00. Based on this representation, Williams signed the invoice. He also purchased an extended warranty or maintenance agreement, which Cauthron told Williams he was required to buy, but could cancel within thirty days. Williams later determined that he had in fact paid $34,125.87 for his pick-up. He tried to cancel the warranty; Jim Ray, however, never responded.

Williams's experts testified that a year-old vehicle is not ordinarily sold above sticker price, that requiring a customer to purchase an extended warranty constitutes fraud, and that the

entire structure of Williams's deal with Jim Ray resulted in an unconscionable profit for the dealer.

All this testimony constitutes substantial evidence that Jim Ray knowingly misrepresented the price of the vehicle and the necessity for a warranty, intending to defraud Williams, who justifiably relied on these misrepresentations to his detriment and suffered damages. Ark. Code Ann. § 4-88-107(a)(10) (Supp. 2005); *Wheeler Motor Co. v. Roth*, 315 Ark. 318, 324, 867 S.W.2d 446, 449 (1993). This evidence is substantial even if, as Jim Ray suggests, Williams had to prove his case by clear and convincing evidence. *Ballard v. Carroll*, 2 Ark. App. 283, 290, 621 S.W.2d 484, 487-88 (1981). Jim Ray's contention that Williams could have discovered the true price of the vehicle by doing the math from other sales documents is no reason to set aside the judgment. The jury may have determined that Jim Ray's misrepresentations stopped Williams from digging into the numbers. As tempered by our common law and statutes, the salutary principle of *caveat emptor* is not a license for deceit.

II.

The circuit court did not abuse its discretion by admitting the testimony of Williams's two experts. *Coca-Cola Bottling Co. v. Gill*, 352 Ark. 240, 261, 100 S.W.3d 715, 728 (2003). The experts were veterans of the car-sales business and knew more about that business than the average individual. *Coca-Cola*, 352 Ark. at 261-62, 100 S.W.3d at 728-29. Any weakness in their testimony was a matter of credibility or for cross-examination. *Coca-Cola*, 352 Ark. at 264, 100 S.W.3d at 730. The testimony was not irrelevant and unreliable, as Jim Ray claims, simply because the experts were not present at the time of the alleged misrepresentations. Expert witnesses need not have first-hand knowledge of the facts and usually do not. Their task is to assist the jury in understanding the evidence and deciding the disputed facts. Ark. R. Evid. 702 (2007). No reversible error occurred on this issue.

III.

We turn, finally, to the main issue in this case: punitive damages. When Jim Ray challenged those damages below, the circuit court held that the $75,000.00 award did not shock the

court's conscience. This is the excessiveness standard under state common law, *Union Pacific R.R. v. Barber*, 356 Ark. 268, 300, 149 S.W.3d 325, 346 (2004), although our supreme court has also used the "shock the conscience" formulation in its federal constitutional evaluation of punitive damages. *E.g.*, *Advocat, Inc. v. Sauer*, 353 Ark. 29, 58, 111 S.W.3d 346, 363 (2003). Jim Ray does not press the state-law point on appeal. Instead, Jim Ray argues that the circuit court erred by not addressing its further argument that the award offended the Due Process Clause of the United States Constitution. Jim Ray argues further that the punitive damages are indeed unconstitutionally excessive.

As its bench ruling shows, the circuit court considered both the reprehensibility of Jim Ray's actions and the compensatory/punitives ratio in evaluating the alleged excessiveness of the award. But the trial court explicitly declined to consider comparable penalties, and it is unclear whether the court gave the punitives verdict the searching review required by the Constitution. The circuit court should have made a thorough and independent evaluation of the amount of punitive damages using all three constitutional guideposts. *BMW of North America v. Gore*, 517 U.S. 559, 574-75 (1996); *Honda Motor Co. v. Oberg*, 512 U.S. 415, 434-35 (1994). Any error here, however, is not dispositive. We, too, are duty-bound to undertake a *de novo* review of the punitive damages awarded by the jury. *Cooper Indus. Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 436 (2001).

We apply familiar legal principles. Punitive damages punish and deter. Their premise is that the compensatory damages have made the plaintiff whole, but further sanctions are justified to punish the defendant for its conduct in the case and to deter future, similar conduct by the defendant and others. In evaluating whether the jury's verdict violated due process, we follow three guideposts: the reprehensibility of Jim Ray's conduct; the ratio between compensatory and punitive damages; and the available penalties for similar conduct and prior awards in similar cases. *BMW*, 517 U.S. at 574-75; *Aon Risk Servs. v. Mickles*, 96 Ark. App. 369, 378-79, 242 S.W.3d 286, 294 (2006). Our analysis is fluid rather than exact. *Ibid.* As Judge Posner has put it, we are called to police a constitutionally acceptable range, not a fixed point. *Mathias v. Accor Economy Lodging, Inc.*, 347 F.3d 672, 678 (7th Cir. 2003).

Reprehensibility. Jim Ray deceived Williams into paying more for his Titan pick-up truck than the sticker price and tricked him into buying a warranty he might not have bought had no

misrepresentation occurred. This was not an isolated incident. Jim Ray committed the same deceit about the price of the first truck, although the dealer took that vehicle back when Williams complained. One of Williams's experts had worked at Jim Ray for a few weeks in 2002. This expert testified that Jim Ray had sold vehicles for more than their sticker price on other occasions and that the same employee Williams dealt with told him in 2002 that he sold lots of warranties by misleading consumers into thinking that their lender required one. Jim Ray's similar conduct involving others is material to the issue of reprehensibility, but this conduct may not be used as a basis for punishing Jim Ray in this case. *Philip Morris USA v. Williams*, 549 U.S. 346, 353-54, 127 S. Ct. 1057, 1063 (2007); *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 421-22 (2003).

■ We apply the settled criteria for evaluating the degree of reprehensibility of Jim Ray's conduct. *Superior Federal Bank v. Mackey*, 84 Ark. App. 1, 20-21, 129 S.W.3d 324, 337 (2003). The harm to Williams was purely economic, not physical. *Compare Advocat*, 353 Ark. at 55, 111 S.W.3d at 360-61. Jim Ray's conduct did not show indifference to Williams's health or his safety. *Compare Arrow Int'l, Inc. v. Sparks*, 81 Ark. App. 42, 55-56, 98 S.W.3d 48, 57 (2003). Williams was not vulnerable, financially or otherwise. Williams was an older gentleman, but he was experienced in financial matters: after a military career, he was the operations officer of the police department at Fort Chaffee, where he handled budgeting and procurement. *Compare Aon*, 96 Ark. App. at 379, 242 S.W.3d at 294. Jim Ray's conduct involved one transaction with Williams, not a course of dealings with him involving many bad acts during an extended period of time. *Compare Superior Federal Bank v. Jones & Mackey Construction* Co., 93 Ark. 317, 325-26, 219 S.W.3d 643, 650 (2005). The dealer's conduct toward Williams, however, tracked similar behavior involving other consumers. *Compare Mathias*, *supra*. The harm to Williams was neither accidental nor malicious: it represents the middling situation — harm resulting from trickery. *Wheeler*, *supra*.

■ The reprehensibility of Jim Ray's conduct is the most important guidepost. *BMW*, 517 U.S. at 575. Overall, the criteria indicate that Jim Ray's conduct was not highly reprehensible. All material things considered, we conclude that Jim Ray's conduct justified punitive damages but was not particularly egregious. Unless "reprehensible" is to mean nothing more than "bad" or

"tortious," then we must follow the Supreme Court's teaching and decide how reprehensible Jim Ray's conduct was. We conclude that Jim Ray's deception of Williams falls, both in quality and quantity, at the lower end of the range of reprehensible behaviors.

Ratio. The $75,000.00 in punitive damages is approximately seventeen times the $4,425.87 in compensatory damages. The compensatory figure is, to the penny, the difference between the Titan's sticker price and the purchase price. In *BMW*, the Supreme Court traced the long history of exemplary damages and noted that sanctions of double, triple, or quadruple damages have been commonplace. 517 U.S. at 580-81. In *Campbell*, the Court expressly declined to identify a rigid constitutional limit on the ratio between actual or potential harm to the plaintiff and the punitive damages. The Court noted, however, that few awards exceeding a single-digit ratio would satisfy due process. 538 U.S. at 425. At the same time, the Court indicated that "a particularly egregious act" resulting in only a modest amount of economic damages might justify a higher ratio, while substantial compensatory damages might justify a lower ratio. *Ibid.*

We have approved ratios greater than a single digit in cases of extreme emotional distress or humiliation, a significant disparity of bargaining power, ongoing racial animus that destroyed a business, and a "nightmarish" situation involving an improper arrest. *See, e.g.*, *Routh Wrecker Serv. v. Washington*, 335 Ark. 232, 241-42, 980 S.W.2d 240, 244-45 (1998); *Aon*, 96 Ark. App. at 379, 242 S.W.3d at 294; *Superior Federal Bank*, 93 Ark. App. at 326-27, 219 S.W.3d at 650-51. "The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." *Campbell*, 538 U.S. at 425.

After our *de novo* review, we are firmly convinced that this case falls within the mine-run of disputes where a single-digit ratio best comports with due process. Jim Ray's actions were not particularly egregious. None of the dire scenarios represented in our prior cases mirror what happened here. Unlike in *Aon*, for example, we do not face a situation involving a significant disparity in bargaining power, an unsophisticated consumer, and a mother's right to insurance benefits after the death of her young-adult son. 96 Ark. App. at 372-73, 242 S.W.3d at 289-90. This case is about

fraud in buying a pick-up. Williams suffered approximately $4,500.00 of purely economic harm from a routine commercial transaction, which he initiated.

This record, moreover, contains only sketchy proof about Jim Ray's financial situation. No balance sheets, tax returns, or other such documents were admitted. There was some disputed testimony about approximately how much net profit Jim Ray made each month. But this evidence fell short of demonstrating that the defendant's overall financial condition and the other circumstances would support an extraordinary ratio to achieve deterrence. *Compare Mathias*, 347 F.3d at 677-78; *Superior Federal*, 93 Ark. App. at 329-30, 219 S.W.3d at 652-53. This inquiry must be pursued with care in any event: a defendant's financial condition is a material fact, but it "cannot justify an otherwise unconstitutional punitive damages award." *Campbell*, 538 U.S. at 427. Jim Ray's actions deserve punishment, but all the material circumstances do not move this case beyond the single-digit-ratio continuum.

Comparable Sanctions. Finally, we assess the difference between the $75,000.00 punitive award and the applicable statutory penalties and comparable cases. These comparable sanctions represent the notice component of our due-process review. *Superior Federal*, 93 Ark. App. at 330, 219 S.W.3d at 653.

The State may impose criminal penalties of up to $1,000.00 for a violation of the Deceptive Trade Practices Act. Ark. Code Ann. § 4-88-103 (Repl. 2001); Ark. Code Ann. § 5-4-201(b)(1) (Repl. 2006). The Act also provides for civil penalties of up to $10,000.00, a reasonable attorney's fee, and an enhanced penalty of up to $10,000.00 in cases involving persons age sixty or older. Ark. Code Ann. § 4-88-113(a)(3) and (f) (Repl. 2001); Ark. Code Ann. § 4-88-202(a) (Repl. 2001). Our legislature has also authorized the Attorney General to seek suspension or forfeiture of the violator's license or other authorization to do business. Ark. Code Ann. § 4-88-113(b) (Repl. 2001). In similar fraud cases, the punitive awards have been between $5,000.00 and $10,000.00. *Firstbank of Ark. v. Keeling*, 312 Ark. 441, 850 S.W.2d 310 (1993); *Wheeler Motors, supra*; *Ray Dodge, Inc. v. Moore*, 251 Ark. 1036, 479 S.W.2d 518 (1972). After adjusting these awards upward for inflation, they are far less than the $75,000.00 awarded by this jury.

We see the range of comparable sanctions as between approximately $15,000.00 and approximately $40,000.00. This range reflects the adjusted awards in similar cases and the statute. In evaluating the comparable sanctions, we put to one side the purchase of the first truck for two reasons: Jim Ray unwound that deal, and we conclude it was all part of the same overall transaction in any event. The comparable civil penalty for misrepresenting the purchase price and warranty requirement on the second truck would be no more than $10,000.00, doubled to no more than $20,000.00 because of Williams's age. Attorney's fees were possible, but not mandatory. (We note that Williams pleaded his entitlement to fees, but did not seek them after the verdict.) This was a straight-forward case. The pre-trial hearing, the trial, and the post-trial hearing were all done in less than two work days. The fact that the circuit court could have awarded fees, or that the State could have fined Jim Ray something for the first truck sale, leads us to conclude that $40,000.00 best represents the top of the comparable-penalties range.

It was possible, of course, for the State to stop Jim Ray from doing business for a period or forever for violating the Deceptive Trade Practices Act. For several reasons, we conclude that the business-closure possibility has no application in this case. First, we have it on good authority that, absent proof this extraordinary sanction was justified because lesser sanctions had not succeeded in changing Jim Ray's conduct, the business-closure possibility is inapplicable. *BMW*, 517 U.S. at 584-85. No such proof appears of record. Second, we have held that Jim Ray's actions were not highly reprehensible. This is not a case where the record demonstrates conduct so egregious and so widespread that the civil penalty of business-closure was a real prospect. Finally, one piece of one aspect of our due-process review should not be outcome determinative in any case.

Considering all three guidelines and the entire record, we conclude that Jim Ray's conduct deserved a punitive award, but not one that conspicuously exceeded a single-digit ratio, as well as the available penalties and awards in comparable cases. We hold that the jury's award was unconstitutionally excessive. We therefore remit the punitive damages award to $30,000.00. This award represents a ratio of about seven to one. Even though Jim Ray's conduct was not particularly reprehen-

sible, we conclude that this higher ratio is justified in light of the modest compensatory damages awarded and the need to deter similar, future conduct.

If, within eighteen days, Williams accepts the remitted award, then the judgment will be affirmed as modified. Otherwise, the judgment will be reversed and the case remanded for a new trial on liability and damages. If there is a new trial, then all the issues should be re-tried because the proof supporting liability and both kinds of damages was inextricably intertwined. *Shepherd v. Looper*, 293 Ark. 29, 31, 732 S.W.2d 150, 152 (1987).

Affirmed as modified on condition of remittitur.

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

HART, ROBBINS, GRIFFEN, and BAKER, JJ., dissent.

WENDELL L. GRIFFEN, Judge, dissenting. I join Judge Baker's dissent because I would affirm the jury's award of punitive damages in this case. However, I write separately to highlight two areas of the majority's opinion that I find disquieting.

First, the majority concludes that Jim Ray's "purely economic" behavior was "not highly reprehensible" and was "not particularly egregious." The jury, who was the trier-of-fact, obviously disagreed. Jim Ray's general manager testified that, whereas the dealership customarily makes a $300-$400 profit on the sale of a vehicle, it made a profit of $3500 on the sale to Williams — *approximately ten times* its customary profit. It is bewildering to me how a double-digit profit that resulted from repeated and deliberate fraudulent behavior is not egregious enough to support a double-digit award of punitive damages.

Second, the fact that there were no personal injuries in this case does not mean that Jim Ray's conduct was not wanton and willful. The United States Supreme Court clearly recognizes that a higher punitive-to-compensatory damages ratio may be justified where a particularly egregious act has resulted in only a small amount of economic damages. *See State Farm. Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003). Because that is precisely what happened in this case, I cannot join the majority's opinion, which treats "purely economic" loss as the stepchild in the punitive damages lexicon.

KAREN R. BAKER, Judge, dissenting. The only issue that the other dissenting judges and I cannot join in the

majority's opinion is its decision to remit the punitive-damages award finding that the award violates due process as unconstitutionally excessive. The role of judicial review in a punitive damages case requires adherence to our supreme court's admonition that we defer to the jury's judgment by focusing on whether the evidence *could* support the jury's verdict:

> Punitive damages are to be a penalty for conduct that is malicious or done with the deliberate intent to injure another. We have also held that "where, in light of the evidence, the jury could have concluded that appellants displayed a conscious indifference for appellee and that their acts were done with the deliberate intent to injure her, the amount of punitive damages did not shock our conscience." When conducting our review of an award of punitive damages, we view the evidence in the light most favorable to the appellee.

Bank of Eureka Springs v. Evans, 353 Ark. 438, 456-57, 109 S.W.3d 672, 683 (2003) (internal citations omitted).

A jury set the punitive damages award; the trial judge who heard all of the evidence and observed the witnesses found the award acceptable and refused to remit the damages. Four of the nine members of this court considering the case would also refuse to disturb the jury's verdict. However, evaluation of an award of punitive damages is not merely an independent review and substitution of judgment by majority. A judicial substitution of opinion concerning a jury award of punitive damages is not the standard to which we must adhere.

Instead, our focus on review is, as the majority notes, "to police a constitutionally acceptable range." *See Mathias v. Accor Economy Lodging, Inc.*, 347 F.3d. 672, 678 (7th Cir. 2003). One aspect of policing that range is reviewing the ratios of punitive and compensatory damages. Our court recently reviewed the range of ratios in punitive damages cases and, according to this court's analysis, the verdict before us falls within the range of expected verdicts:

> Further, in reviewing several of our most recent cases decided since the *Campbell* opinion involving punitive damages imposed in connection with economic injury, we observe that the punitive-to-compensatory ratios have generally run between 1-to-1 and 17-to-1. *See, e.g., Stewart Title v. Am. Abstract*, 363 Ark. 530, 215

> S.W.3d 596 (2005); *Bank of Eureka Springs v. Evans*, 353 Ark. 438, 109 S.W.3d 672 (2003); *Hudson v. Cook, supra*; *Superior Federal Bank v. Jones & Mackey Constr., supra.* (factors mentioned). Overall, we have little difficulty sustaining a substantial punitive award against Aon. Its conduct in this case, which we may consider in total, *see Superior Federal Bank v. Jones & Mackey Constr. Co.*, 93 Ark. App. 317, 219 S.W.3d 643 (2005), was highly reprehensible in its dishonesty and outright fraud, particularly in light of appellee's financial vulnerability.

Aon Risk Servs. v. Mickles, 96 Ark. App. 369, 379, 242 S.W.3d 286, 294 (2006).

Regarding the ratio of punitive to compensatory damages, the ratio in this case is just under 17 to 1. In *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003), the United States Supreme Court held that, while it would not impose a bright-line ratio of punitive to compensatory damages, in practice, few awards exceeding a single-digit ratio will satisfy due process. However, our courts have not been reluctant to exceed the single-digit ratio where the circumstances warrant. *See Aon Risk Servs., supra* (25 to 1); *Superior Fed., supra* (17.6 to 1); *Routh Wrecker, supra* (75 to 1). The ratio in this case is certainly not comparable to the 500 to 1 ratio that the United States Supreme Court found unconstitutional in *BMW of North America v. Gore*, 517 U.S. 559 (1996), or the 145 to 1 ratio in *Campbell*..Moreover, the Court recognized in *Campbell* that a higher ratio may be upheld where a particularly egregious act has resulted in only a small amount of economic damages. That is the situation here, where appellant's deliberate fraud resulted in compensatory damages of a little less than $4500.

The due process aspect of our review requires a determination of whether the punitive damages unconstitutionally exceed the notice of potential penalties to which appellant was subjecting itself by its actions. When we consider how the punitive damages awarded by the jury compare with applicable statutory penalties, the ratio between the punitive damages awarded and the statutory penalties to which appellant was subject drops considerably. The Arkansas Deceptive Trade Practices Act, at Ark. Code Ann. § 4-88-103 (Repl. 2001), provides that one who knowingly and willingly violates the ADTPA may be guilty of a Class A misdemeanor, which carries a maximum fine of $1000. Ark. Code Ann. § 5-4-201(b)(1) (Repl. 2006). The ADTPA also provides that a violator may be assessed a penalty of up to $10,000, Ark. Code Ann. § 4-88-113(a)(3) (Repl. 2001), and that a person who suffers

actual harm or injury as a result of a violation has an independent cause of action for reasonable attorney's fees. Ark. Code Ann. § 4-88-113(f) (Repl. 2001). Given the fact that appellant violated the act in two transactions with appellee, appellant was on notice that the penalties under those statutes could be $22,000 plus attorney's fees and the costs of recovery expended by the State. In addition, appellee was sixty-nine years old at the time appellant fraudulently obtained its profits from appellee. Subchapter 2 of the Deceptive Trade Practices Act provides for enhanced penalties for practices targeting the elderly. Section 4-88-201 defines the elderly as anyone over the age of sixty. The enhanced penalty is an additional amount up to $10,000 for each violation. Ark. Code Ann. § 4-88-202 (Repl. 2001).

Accordingly, appellant had notice that, under the statutory scheme for penalties, it was subject to $42,000 plus fees and costs in addition to the compensatory damages. Given that appellant had notice under the statutory structure that it could be liable for the mandatory attorney compensation, the $42,000 statutory penalties, plus the compensatory damages, the ratio between the awarded punitive damages and clearly identified penalties to which appellant had notice is less than 2 to 1. The statute further provides that appellant was subject to a suspension or forfeiture of its charter, franchise, or suspension of the company's authorization to do business in this state. The forfeiture or suspension of the company's authorization to conduct business in this State would necessarily result in a loss of all future profits.

Although the majority holds that the jury's award of punitive damages fails to comport with federal due process, an independent review shows that the punitive-damage award unswervingly comports with due process. Not only did appellant have ample notice through our statutory scheme that its action could result in such a penalty, it had notice that its use of deceptive practices subjected it to a loss of all future profits in this State by a forfeiture of its license to do business in this State. Additionally, as the majority notes, the purpose of punitive damages is both to punish and to deter. Given the testimony in this case that appellant made a considerable, unconscionable profit as the result of its fraudulent conduct, and that this conduct was carried out as a course of business, it is reasonable that a jury would impose a punitive award large enough to act as an economic deterrent to future, similar conduct. The remitted award allowed by the majority will make this course of conduct once again profitable

when appellant has sold seven cars in this manner. It was not unreasonable of the jury to require that seventeen cars be sold in this manner before this method of operation once again became profitable. If we are merely policing a constitutionally acceptable range, as the majority asserts, the jury's award should stand.

HART, ROBBINS, and GRIFFEN, JJ., join.

Duke DONAHUE *v.* ARKANSAS DEPARTMENT of HEALTH and HUMAN SERVICES

CA 07-181 260 S.W.3d 334

Court of Appeals of Arkansas
Opinion delivered June 27, 2007

Dodds, Kidd, Ryan & Moore, by: *Stephanie A. Chamberlin*, for appellant.

Gray Allen Turner and *Melissa Anne Greenslade*, Office of Chief Counsel, for appellee.

Scott Christopher Bles, attorney ad litem for the minor child.

D.P. MARSHALL JR., Judge. In 2004, Suzanne and Duke Donahue underwent a contentious divorce. According to Suzanne, the divorce was due to Duke's drug, alcohol, and verbal abuse. The circuit court granted Suzanne custody of their then four-year-old daughter, J.D. The court gave Duke visitation every other weekend and one day each week. In 2006, the circuit court adjudicated J.D. dependent-neglected and found that Duke had sexually abused her. Duke appeals, arguing that the court erred in admitting as evidence a "Report to Prosecuting Attorney" and in finding that he sexually abused his daughter.

The Department of Health and Human Services first contends that we have no jurisdiction to review the adjudication order because it did not result in out-of-home placement, and therefore

is unappealable pursuant to Arkansas Rule of Appellate Procedure – Civil 2(c). By its terms, however, Rule 2(c) is subordinate to new Supreme Court Rule 6-9(a)(1), which allows an appeal from any adjudication order. We have jurisdiction.

Duke argues that the circuit court erred in admitting the Report into evidence for two reasons: it contains hearsay and the results of a computerized voice stress analysis — what the parties call a "CVSA" and what laymen know as a polygraph. As the parties stipulated on appeal, the circuit court admitted the Report into evidence over Duke's objection. The court held "[Ark. Code Ann. § 12-12-514 (Repl. 2003)] says that all the information in the prosecutor's report shall be admitted. And frankly, I want her to admit it."

Duke's hearsay argument is correct but waived. The statute provides that the Report is admissible in any child-maltreatment proceeding. Ark. Code Ann. § 12-12-514. And it specifies the contents of the Report and discusses the supporting documents. But the statute does not say that the supporting documents, which contain hearsay, shall be a part of the Report or are admissible into evidence. Because Duke did not make a specific hearsay objection to the Report, however, he waived this error. *Howard v. State*, 348 Ark. 471, 493, 79 S.W.3d 273, 286 (2002); *Acme Brick Co. v. Missouri Pacific R. Co.*, 307 Ark. 363, 366-67, 821 S.W.2d 7, 9 (1991).

Duke's second argument against this Report has merit. After the abuse allegations arose, Duke volunteered to take two computerized voice stress tests because he wanted to clear his name. The expanded Report stated that Duke passed the first test, but "he failed on question number 6 in the second test which asked 'other than what you told me, have you ever placed your mouth on your daughter's vagina[?]' " Duke testified that he was nervous because Suzanne's father appeared right before he took the tests. In any event, the circuit court erred by admitting this Report into evidence because it contained the results of Donahue's CVSAs.

Our code prohibits the admission into evidence of psychological stress evaluation results in all courts of this state. Ark. Code Ann. § 12-12-704 (Repl. 2003). Unless the parties agree or circumstances justify their admission, neither the CVSA results nor testimony that directly or indirectly apprises the court of the results is admissible. *Wingfield v. State*, 303 Ark. 291, 296, 796 S.W.2d 574, 576 (1990). Duke did not agree to the CVSA results'

admission. No argument is made that the circumstances justified their admission. Our statute embodies the wisdom that polygraph results are explosive because, as the supreme court has noted, they have an aura of scientific accuracy even though they are inherently unreliable. *Misskelley v. State*, 323 Ark. 449, 473, 915 S.W.2d 702, 715 (1996). We therefore hold that the circuit court abused its discretion by admitting the CVSA results into evidence and that their admission prejudiced Duke. *Jackson v. Buchman*, 338 Ark. 467, 471, 996 S.W.2d 30, 33 (1999).

The Department of Health and Human Services contends that, even without the CSVA results, sufficient evidence supports the circuit court's finding that J.D. was dependent-neglected. The burden of proof in a dependency-neglect proceeding is only a preponderance of the evidence, Ark. Code Ann. § 9-27-325(h)(2)(B) (Supp. 2005), and we will not reverse the circuit court's findings unless they were clearly erroneous. *Phillips v. Arkansas Department of Human Services*, 85 Ark. App. 450, 452, 158 S.W.3d 691, 693 (2004). In addition, we defer to the circuit court's evaluation of the credibility of the witnesses. 85 Ark. App. at 453, 158 S.W.3d at 693.

Here, however, the circuit court made no specific factual findings about the witnesses' credibility or the weight of the evidence. Therefore we do not know exactly what evidence drove the court's decision to adjudicate J.D. dependent-neglected. We do know that the circuit judge was very interested in the CVSA results and hearsay because she stated that she wanted this over-inclusive Report in evidence. In the absence of specific findings, and in light of the highly prejudicial voice stress results, we decline to let this order stand. We therefore reverse and remand for the circuit court to make specific factual findings based only on the admissible evidence.

Reversed and remanded.

GLADWIN and MILLER, JJ., agree.

MAGIC TOUCH CORPORATION *v.* Alice HICKS

CA 06-944 260 S.W.3d 322

Court of Appeals of Arkansas
Opinion delivered June 27, 2007

Mark Rees, for appellant.

Mixon Parker & Hurst, PLC, by: *Donn Mixon*, for appellee.

SARAH HEFFLEY, Judge. Appellant Magic Touch Corporation brings this appeal from a $5,000 judgment awarded to appellee Alice Hicks on her complaint for wrongful discharge. Appellant argues on appeal that the trial court erred in concluding that there was no just cause for terminating appellee's employment. We agree that the trial court erred by not finding that appellee committed acts of insubordination, and we reverse and dismiss.

Appellant corporation owns apartment complexes and operates coin laundry and dry cleaning businesses in the Jonesboro area. Robert Rees is the president of the corporation. Appellee was hired by appellant effective May 13, 2004, at a salary of ten dollars an hour. Rees and appellee entered into an employment agreement that set out the terms of hire, which included a "guarantee" that appellee would work for appellant for at least thirty-six months. The contract further provided:

> It is agreed that Employee will not be fired without just cause as set out in the Employee Handbook. If Employee should be discharged, without such cause, she shall be paid a $5,000.00 fee for such wrongful discharge. If Employee should fail to work for Employer for this 36 month period, she shall pay to the Employee [sic] a $5,000.00 fee for breaking this agreement.

Appellee worked in the main office as a secretary. In that capacity, it was her primary responsibility to manage the apartments. She was to handle telephone inquiries concerning apartment openings, and she filled out applications and leases. Appellee was also required to assign cleaning crews and to make sure that the apartments were ready for occupancy.

Rees fired appellee on July 14, 2004, after two months of employment. Appellee then filed this suit for wrongful discharge, claiming that she had been fired without just cause as set out in the employee handbook. Appellant responded that it had good cause for terminating appellee's employment, citing multiple infractions of the employee handbook. After a hearing, the trial court found that the employee handbook was ambiguous in certain respects. The court then construed the provisions most strongly against the appellant as the drafter of the agreement and concluded that appellee was fired without just cause. In accordance with the agreement, the trial court awarded appellee $5,000. This appeal followed.

In Arkansas, an employer may fire an employee for good cause, bad cause, or no reason at all under the employment-at-will doctrine. *Cisco v. King*, 90 Ark. App. 307, 205 S.W.3d 808 (2005). While a contract for an indefinite term is terminable at will, a contract for a definite term may not be terminated before the end of the term, except for cause or by mutual agreement, unless the right to do so is reserved in the contract. *See Griffin v. Erickson*, 277 Ark. 433, 642 S.W.2d 308 (1982). There are two other exceptions

to the at-will doctrine: (1) where an employee relies upon a personnel manual that contains an express agreement against termination except for cause; and (2) where the employment agreement contains a provision that the employee will not be discharged except for cause, even if the agreement has an unspecified term. *Ball v. Arkansas Dep't of Community Punishment*, 340 Ark. 424, 10 S.W.3d 873 (2000).

In the case at bar, the employment contract was for a definite term and specifically provided that appellee would not be discharged except for good cause as set out in the employee handbook. The parties are thus in agreement that the contract was not terminable at will. For reversal, appellant argues that it had good and just cause for firing appellee because she violated a number of rules found in the handbook, including excessive absenteeism, requests for unauthorized vacation leave and holiday pay, the violation of a standards-of-conduct provision, the violation of a confidentiality-of-pay provision, the violation of the availability-for-work provision, and insubordination.

The standard of review of a circuit court's findings of fact after a bench trial is whether those findings are clearly erroneous. *First Nat'l Bank v. Garner*, 86 Ark. App. 213, 167 S.W.3d 664 (2004). 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.*

At the hearing, it was disclosed that appellee's personnel file documented ten excused absences in her two months of employment. The employee handbook contained a provision that stated "[i]f you are absent 4 times, either excused or unexcused, in a 3 month period you will be terminated." By contrast, the absence reports filled out by appellee and a manager contain the statement "over three unexcused absences can result in your termination."

The handbook also directed employees not to discuss their salaries with one another and stated that "[i]f we find that someone else knows what you make we will either terminate you or reduce your pay." Appellee admitted she had violated this provision by discussing her earnings with another employee. That employee, however, was the payroll clerk, who by virtue of her position, already had knowledge of appellee's salary.

The record also discloses that appellee requested a week of vacation during the month of July, and appellee testified as to her belief that she should have been paid for the Memorial Day and

Fourth of July holidays. Mr. Rees advised appellee that she was not yet eligible for vacation leave or paid holidays. He also testified that he overheard appellee telling another employee that she was going to take a week of vacation whether Rees approved it or not. On these subjects, the handbook provided that an employee would receive five working days of vacation at half pay after working for the company for fifteen months. Requests for vacation leave were required to be made forty-five days in advance. Full-time employees were also eligible for paid holidays, such as Memorial Day and the Fourth of July, if the employee had worked for the company for six months and had not been late or absent during the thirty days preceding the holiday.

The employee handbook contained another provision stating that "[e]mployees must be available for work during normal business hours." It further stated that "[a]t times you may be needed to fill in for another employee that is not at work during their work schedule. You will be expected to be available to do this when needed. This is something that you may not want to do today but tomorrow when you need someone to work for you, you will be glad you did."

In her testimony, appellee maintained the position that her work schedule was confined to week days from 8:00 a.m. to 5:00 p.m. She acknowledged that she had been called upon outside of that time frame. Appellee testified that she received numerous phone calls at home on the weekends. She had once delivered coins to one of appellant's laundromats. She also showed an apartment to a friend's son one weekday after work. On another occasion, she was required to visit an apartment to see if it was ready for a couple who was moving from Memphis. Appellee's testimony reflects that she was compensated for delivering the coins and for the work associated with the apartments.

On the morning of Saturday, July 9, 2004, Mr. Rees telephoned appellee and asked her to go to the office to get a key out of the safe and lay it on a desk for another employee to retrieve. Rees said that he was out of town with his family and that the key was needed for a man who had just decided to lease an apartment. Appellee initially agreed to take care of this matter, a task which she estimated would have taken five minutes. When she finished speaking with Rees, appellee called another employee, Linda Brady. Appellee then called Mr. Rees back. As a result of their conversation, appellee did not honor Rees' request to get the key.

The employee handbook also provided that insubordinate behavior was grounds for immediate dismissal. The handbook further identified "being unpleasant to your Co-Employees and disrupting work" as a violation of policy that could cause termination.

In regards to the second phone conversation between appellee and Rees on July 9, appellee testified that she called Rees back and told him that she was "mad as hell" at him for asking her to get the key. She said that she could not understand how Rees had leased an apartment when he was not in town or why another employee could not have gotten the key. Appellee testified that she was respectful when speaking to Rees and that she was laughing toward the end of the conversation. Rees testified, however, that he discerned no laughter in appellee's tone and that he "nearly fell out of his chair" when appellee stated that she was mad as hell. He decided to make other arrangements for getting the key.

Linda Brady was the employee appellee called between conversations with Rees. Brady stated that appellee was complaining about Rees's request and that she was very angry and speaking in a loud tone of voice. Brady felt that appellee was trying to persuade her to go get the key.

Mr. Rees also spoke of an incident that happened the following Thursday. On this day, Rees had a discussion with appellee and other secretaries about a form that was supposed to be placed in files. He said that appellee "unloaded on me" and then accused the other women of conspiring against her and trying to make her look bad. Linda Brady was present and said that appellee was quite belligerent and that the argument between Rees and appellee lasted around thirty minutes. Appellee said that she did not recall this incident and that she did not become irate with Mr. Rees.

In his oral ruling from the bench, the trial judge found that the terms of the employee handbook were largely ambiguous. Although the trial judge observed that he would have fired appellee because of her behavior on July 9, he determined that insubordination did not satisfy the requirement of just cause for terminating appellee's employment because that term was not defined in the handbook. Appellant contends that the trial court's ruling was clearly erroneous. We agree.

It is the duty of courts to enforce contracts as written and in accordance with the ordinary meaning of the language used and

the overall intent and purpose of the parties. *Dugal Logging, Inc. v. Arkansas Pulpwood Corp.*, 66 Ark. App. 22, 988 S.W.2d 25 (1999). Language is ambiguous if there is doubt or uncertainty as to its meaning and it is fairly susceptible to more than one equally reasonable interpretation. *Ison v. Southern Farm Bureau Casualty Co.*, 93 Ark. App. 502, 221 S.W.3d 373 (2006). The fact that a term is not defined does not automatically render a contract ambiguous. *Zulpo v. Farm Bureau Mutual Insurance Co. of Arkansas*, 98 Ark. App. 320, 255 S.W.3d 494 (2007).

The determination of whether ambiguity exists is ordinarily a question of law for courts to resolve. *Murphy Oil USA, Inc. v. Unigard Security*, 347 Ark. 167, 61 S.W.3d 807 (2001). We do not defer to the trial court's determinations of law. *Pittman v. Pittman*, 84 Ark. App. 293, 139 S.W.3d 134 (2003).

We find no ambiguity in the word insubordination, even though that term was not defined. Its meaning is not uncertain, nor is it susceptible to more than one reasonable interpretation. In construing any contract, we must consider the sense and meaning of the words used by the parties as they are taken and understood in their plain and ordinary meaning. *Coleman v. Regions Bank*, 364 Ark. 59, 216 S.W.3d 569 (2005). The best construction is that which is made by viewing the subject of the contract, as the mass of mankind would view it, as it may be safely assumed that such was the aspect in which the parties themselves viewed it. *Id.* The word "insubordinate" is defined as unwilling to submit to authority; disobedient or mutinous. *Webster's New International Dictionary* (3d ed. 1993). *Webster's* also states that "insubordinate" applies to disobedience of orders, infraction of rules, or a generally disaffected attitude toward authority. *Id.*

The employee handbook provides that insubordination is grounds for immediate dismissal. Considering the plain meaning of the word, we now must determine whether appellee's conduct was insubordinate. Whether justification exists for termination of the contract under the facts and circumstances of a particular case is usually a question of fact. *Joshua v. McBride*, 19 Ark. App. 31, 716 S.W.2d 215 (1986). In this, we are persuaded by the trial judge's comment that he would have fired appellee based on her behavior on July 9. In that episode, appellee angrily confronted Mr. Rees about a minor task he asked her to perform, which the testimony revealed was not out of the ordinary. Her attitude of hostility and disrespect was open and obvious, as she admittedly told Rees that she was "mad as hell" about his request. Appellee further under-

mined Rees' authority by complaining to another employee. Also, within a few days, appellee exhibited another outburst of belligerence and pugnacity when she "unloaded" on Rees and accused her fellow workers of conspiring against her. In addition to these two episodes, appellee was previously heard to state her intention to take a vacation whether Rees approved it or not.

In *Caldwell v. Blytheville School District No. Five*, 23 Ark. App. 159, 746 S.W.2d 381 (1988), we reviewed a school board's decision not to renew a teacher's contract for insubordination. We said that it was not irrational for a principal to expect teachers to comply with his directives and to act in a respectful, courteous, and professional manner. We also observed, "This is not to say that a teacher may not disagree with school policy; however, a teacher should not expect to be able to shout at his supervisors, call them liars, accuse them of conspiring against him, and walk out on conferences without action being justified by the board." In like fashion here, appellee's behavior need not have been tolerated by Rees. We are left with a definite and firm conviction that a mistake was made in this case, and we hold that appellant had just cause for firing appellee on the ground of insubordination. Because we are reversing on this basis, it is not necessary for us to examine the other reasons appellant offered to justify its decision to discharge appellee.

Reversed and dismissed.

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

Ricky D. IVY, Jr. *v.*
OFFICE of CHILD SUPPORT ENFORCEMENT

CA 06-1165 260 S.W.3d 328

Court of Appeals of Arkansas
Opinion delivered June 27, 2007

Murphy, Thompson, Arnold, Skinner, Castleberry, by: *Tom Thompson* and *Casey Castleberry*, for appellant.

J. Shane Baker, Office of Child Support Enforcement, for appellee.

KAREN R. BAKER, Judge. Appellant, Ricky D. Ivy, Jr., appeals from the denial of a motion to set aside a default judgment entered against him in St. Francis County Circuit Court. On appeal, appellant argues that "the trial court erred in denying his motion to set aside the default judgment because service of process was completely failed." Since "no notice was obtained, in derogation of due process, the default judgment obtained against him was void *ab initio*, and all proceedings founded upon that judgment are likewise void." Appellant also argues that "even if service of process was merely insufficient, and not completely failed, he never waived his objection to jurisdiction because he never filed any responsive pleading under Ark. R. Civ. P. 7." We agree with appellant that the judgment was void *ab initio*, and we reverse and remand with instructions to enter an order setting aside the default order and judgment.

Angela Flenoy filed a complaint on August 6, 1991, alleging that appellant was the biological father of her minor child and requesting that the court enter an order setting child support. After no responsive pleading was filed, the trial court entered a default order and judgment against appellant. The default order and judgment specifically stated that the court had jurisdiction over appellant and that he was ordered to pay child support in the amount of $15 per week.

Over the next twelve years, Angela Flenoy filed numerous motions for citation against appellant for failure to pay child support. As a result, appellant was held in contempt approximately eight times for non-payment of child support and ordered to spend a total of 390 days in jail. Appellant first retained counsel in 2002, and on December 2, 2002, filed a motion for paternity testing pursuant to Ark. Code Ann. § 9-10-115(e)(1)(A) (Repl. 2002).

This was the first document filed by appellant. Appellee, Office of Child Support Enforcement (OCSE), filed a response to the petition for paternity testing. The court granted appellant's petition for paternity testing and ordered a paternity test. The test conclusively established that appellant was *not* the biological father of Angela Flenoy's child.

On December 2, 2005, appellant filed a motion to set aside default order and judgment, based on the fact that the proof of service revealed that the complaint and summons were served upon Derrick Ivy, appellant's brother, and contained a note that appellant was living in Springfield, Missouri. A hearing was held on January 17, 2006, and his motion was denied. From that ruling, comes this appeal.

In *Raymond v. Raymond*, 343 Ark. 480, 484-85, 36 S.W.3d 733, 735 (2001), our supreme court stated:

> Arkansas law is long settled that service of valid process is necessary to give a court jurisdiction over a defendant. *Tucker v. Johnson*, 275 Ark. 61, 628 S.W.2d 281 (1982) (citing *Halliman v. Stiles*, 250 Ark. 249, 464 S.W.2d 573 (1971), and *Southern Kansas Stage Lines Co. v. Holt*, 192 Ark. 165, 90 S.W.2d 473 (1936)). Moreover, a summons is necessary to satisfy due process requirements. *Thompson v. Potlatch Corp.*, 326 Ark. 244, 930 S.W.2d 355 (1996). It is also mandatory under Arkansas law that *service of process must be made within 120 days* after the filing of the complaint unless there is a motion to extend, and if service is not obtained within the 120 day period and no such motion is made, dismissal is required upon motion or upon the court's own initiative. *See* Ark. R. Civ. P. 4(i); *Lyons v. Forrest City Machine Works, Inc.*, 301 Ark. 559, 785 S.W.2d 220 (1990) (under Rule 4(i), the trial court's dismissal of the case for failure to make service of summons was mandatory); *see also Southeast Foods, Inc. v. Keener*, 335 Ark. 209, 979 S.W.2d 885 (1998); *Dougherty v. Sullivan*, 318 Ark. 608, 887 S.W.2d 305 (1994); *Lawson v. Edmondson*, 302 Ark. 46, 786 S.W.2d 823 (1990).
>
> Our case law is equally well-settled that statutory service requirements, being in derogation of common-law rights, must be strictly construed and compliance with them must be exact. *Carruth v. Design Interiors, Inc.*, 324 Ark. 373, 921 S.W.2d 944 (1996) (citing *Wilburn v. Keenan Cos.*, 298 Ark. 461, 768 S.W.2d 531 (1989), and *Edmonson v. Farris*, 263 Ark. 505, 565 S.W.2d 617 (1978)). In *Carruth*, this court held that the same reasoning applies to service requirements imposed by court rules, and that proceedings con-

> ducted where the attempted service was invalid renders judgments arising therefrom void *ab initio*. The *Carruth* court, quoting from *Tucker v. Johnson, supra,* further held that actual knowledge of a proceeding does not validate defective process. *Carruth*, 324 Ark. at 375, 921 S.W.2d 944. Stated in different terms, the general rule is that a judgment entered without jurisdiction of the person or the subject matter or in excess of the court's power is void. *Neal v. Wilson*, 321 Ark. 70, 900 S.W.2d 177 (1995).

Here, service on appellant was unquestionably defective. Angela Flenoy indisputably failed to serve appellant with a copy of the complaint or summons. There was no service on appellant within the 120-day time frame required by Ark. R. Civ. P. 4(i), which states that "if service of summons is not made upon a defendant within 120 days after the filing of the complaint, the action *shall* be dismissed as to that defendant without prejudice upon motion or upon the court's initiative." (Emphasis added.) Angela Flenoy also failed to file a motion to extend the time or obtain a waiver and entry of appearance whereby appellant waived service of summons or process. Under such circumstances, the circuit court had jurisdiction over this matter only to the extent needed to dismiss the case as required by Ark. R. Civ. P. 4(i) and nothing more. *See Boyd v. Sharp County Circuit Court*, 368 Ark. 566, 247 S.W.3d 864 (2007). In going beyond that point, the circuit court clearly exceeded its jurisdiction and its failure to enter an order dismissing the case constituted a plain, manifest, clear, and gross abuse of discretion. *Id.* Any judgment entered without jurisdiction of the person or the subject matter or in excess of the court's power is void *ab initio*. *Raymond, supra* (citing *Carruth, supra*).

OCSE concedes that service was invalid, but argues that appellant waived jurisdiction under Ark. R. Civ. P. 12(h) both by making an appearance and by filing a responsive pleading (the petition for paternity testing). OCSE cites three cases in support of the argument that appellant waived jurisdiction: *Burrell v. Ark. Dep't of Human Servs.*, 41 Ark. App. 140, 850 S.W.2d 8 (1993) (father's failure to raise claim of defective service before the middle of the second hearing amounted to a waiver and precluded him from thereafter taking advantage of the defect); *Blankenship v. Office of Child Support Enforcement*, 58 Ark. App. 260, 952 S.W.2d 173 (1997) (putative father's failure to assert defense of lack of personal jurisdiction until halfway through the second trial amounted to a

waiver of defense); and *Hamm v. Office of Child Support Enforcement*, 336 Ark. 391, 985 S.W.2d 742 (1999) (father's failure to timely file a motion raising the insufficiency-of-service-of-process defense or failure to raise the defense in the answer that he filed, amounted to a waiver of the defense under the terms of Rule 12). However, each of these cases is distinguishable because in these cases the defendants' appearance and participation occurred before the entry of the judgment; therefore, the defense of lack of personal jurisdiction was waived prior to the entry of the judgment, and the trial court could rely on that waiver in entering judgment against the defendant. In contrast, the trial court here did not have personal jurisdiction over appellant, and appellant had not waived the issue at the time the judgment was entered.

Although the appellant was required to participate in subsequent enforcement proceedings on the judgment, his participation could hardly be construed as voluntary, nor could it cure the void judgment. Likewise, the fact that appellant filed a petition for paternity testing did not validate the void judgment. *See Raymond*, 343 Ark. 480, 488, 36 S.W.3d 733, 737-38 (finding that where it was undisputed that the former wife was never served with process or received a copy of the complaint for divorce, thus rendering the divorce decree void *ab initio*, a reconciliation agreement signed by the former wife prior to the entry of the decree did nothing to validate defective service). For the foregoing reasons, we reverse and remand with instructions to enter an order setting aside the default order and judgment.

BIRD and VAUGHT, JJ., agree.

Sylva CRONEY and Jacqueline Croney *v.* Buddy LANE

CA 06-904 260 S.W.3d 316

Court of Appeals of Arkansas
Opinion delivered June 27, 2007

R. H. "Bud" Mills, P.A., by: *R. H. "Bud" Mills*, for appellants.

Herby Branscum, Jr. and *Elizabeth Branscum Burgess*, for appellees.

BRIAN S. MILLER, Judge. Appellants, Sylva and Jacqueline Croney, are appealing the Perry County Circuit Court's dismissal of their action to quiet title and the court's grant of attorney's fees. The trial court dismissed appellants' case because it was barred by

the doctrine of res judicata and because appellants failed to join indispensable parties. We reverse and remand.

Background

In 1998, appellants purchased property on Taylor Loop Road in Perry County. Appellants filed suit on October 13, 2000, to enjoin the City of Bigelow and Perry County from improving Taylor Loop Road. The circuit court ordered appellants, on August 24, 2001, to amend their complaint to clearly specify the relief sought and to join in the lawsuit "all landowners that may use the subject road to access their property." Appellants failed to comply and, on February 4, 2003, the court dismissed the case with prejudice.

On July 28, 2004, appellants filed this action to quiet title to their property, subject to a public easement by prescription across Taylor Loop Road, and to enjoin the City from installing utility lines under the roadway. In response, the City asserted that appellants' lawsuit was barred by the doctrine of res judicata. Appellants amended their petition on June 6, 2005, to allege that appellee Buddy Lane destroyed appellants' trees and was continuing to trespass on their property. The petition was amended again on August 24, 2005, to allege that Joseph and Katherine Hooten owned the property on which Lane resided.

The City moved for summary judgment on January 11, 2006, relying on its res judicata argument, and the trial court denied the motion, finding that there were material issues of fact in dispute.

The Trial Court's Ruling

Although the trial focused primarily on the width of Taylor Loop Road and the uses to which the City has made of it, there was also testimony regarding the lack of records in the clerk's office indicating how the road has been used; regarding the ever-increasing width of the road; and regarding the City's placement of culverts and water lines under the road. At the close of the testimony, both Lane and the Hootens moved for directed verdicts. Appellants did not object, and the motions were granted.

The City then moved for a directed verdict and incorporated the arguments made in its earlier motion for summary judgment. Over appellants' objections, the court dismissed the

case because it found that appellants failed to join two indispensable parties. The court entered its order on March 31, 2006, dismissing appellants' complaint for failing to join all of the landowners on Taylor Loop Road. The court also found that the current action was barred by res judicata because appellants had previously filed suit against the City on the same issues and that the previous suit had been dismissed with prejudice. Finally, the court declared Taylor Loop Road a public road.

Appellants moved for reconsideration, which was denied on May 2, 2006. On the same date, the court awarded both Lane and the Hootens $2500 in attorney's fees.

Appellants timely appealed, raising five points for reversal. They contend that the trial court erred in summarily dismissing their complaint on the basis of res judicata; that the City had no right to bury utilities under, or to widen, Taylor Loop Road; that appellants are entitled to a decree describing appellee's easement with specificity; that the trial court erred in awarding attorney's fees to Lane and the Hootens; and that the trial court erred in dismissing appellants' petition to quiet title.

Res Judicata

The trial court erred in dismissing appellants' action on grounds of res judicata. In reaching this conclusion, we specifically hold that the court's February 4, 2003 order of dismissal does not have a res judicata effect on this case because to hold otherwise would give that order an effect contrary to what is prescribed in Ark. R. Civ. P. 41(b).

The purpose of the res judicata doctrine is to put an end to litigation by preventing the re-litigation of a matter when a party has had one fair trial on the matter. *Cox v. Keahey*, 84 Ark. App. 121, 133 S.W.3d 430 (2003). The test to determine whether res judicata applies is whether matters presented in a subsequent suit were necessarily within the issues of the former suit and might have been litigated therein. *Id.* The key question is whether the party against whom the earlier decision is being asserted had a full and fair opportunity to litigate the issue in question. *Id.*

Appellants have not had a full and fair opportunity to litigate their case. This is true because appellants' October 13, 2000 lawsuit was involuntarily dismissed pursuant to Rule 41(b) of the Arkansas Rules of Civil Procedure. The court dismissed the first

action because appellants failed to comply with the court's August 22, 2001 order requiring appellants to amend their complaint to clearly specify the relief sought and to join all parties owning land adjacent to Taylor Loop Road.

Although the February 4, 2003 order dismissed the earlier case "with prejudice," we hold that it did not operate as a bar to the present case. Usually, a dismissal with prejudice is as conclusive of the rights of the parties as if there had been an adverse judgment as to the plaintiff after a trial. *Cox*, supra. There are, however, limitations to the doctrine of res judicata, and we believe the court erred in failing to apply an exception to that doctrine under the circumstances of this case. *See id.* This is true because Rule 41(b) provides that the court may involuntarily dismiss a case where "there has been a failure of the plaintiff to comply with these rules or any order of the court or in which there has been no action shown on the record for the past 12 months." It further provides that

> [a] *dismissal under this subdivision is without prejudice* to a future action by the plaintiff unless the action has been previously dismissed, whether voluntarily or involuntarily, in which event such dismissal operates as an adjudication on the merits.

Ark. R. Civ. P. 41(b) (emphasis added). For this reason, the trial court's February 4, 2003 dismissal order directly conflicts with Rule 41(b).

Moreover, the Restatement (Second) of Judgments § 20(1) provides:

> (1) A personal judgment for the defendant, although valid and final, does not bar another action by the plaintiff on the same claim:
>
> (a) When the judgment is one of dismissal for lack of jurisdiction, for improper venue, or for nonjoinder or misjoinder of parties; or
>
> (b) When the plaintiff agrees to or elects a nonsuit (or voluntary dismissal) without prejudice or the court directs that the plaintiff be nonsuited (or that the action be otherwise dismissed) without prejudice; or
>
> (c) When by statute or rule of court the judgment does not operate as a bar to another action on the same claim, or does not so operate unless the court specifies, and no such specification is made.

In explaining subsection (c) above, comment d provides that, although a court, in dismissing on any of these grounds, may specify that its decision is "with prejudice" or "on the merits," a "judgment may not have an effect contrary to that prescribed by the statutes, rules of court, or other rules of law operative in the jurisdiction in which the judgment is rendered." This reasoning is sound and we adopt it.

Dismissal for Failure to Join Indispensable Parties

The dismissal for failure to join indispensable parties was improper for two reasons. First, nothing in the record indicates that the nonjoined property owners could not be joined to the lawsuit. Second, the dismissal leaves appellants without an adequate remedy. Rule 19 provides in pertinent part:

> (a) Persons to Be Joined if Feasible. A person who is subject to service of process *shall* be joined as a party in the action if . . . (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter, impair or impede his ability to protect that interest, or, (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations by reason of his claimed interest. If he has not been joined, the court *shall* order that he be made a party. . . .
>
> (b) Determination by Court Whenever Joinder Not Feasible. If a person as described in subsection (a)(1)-(2) hereof cannot be made a party, the court shall determine whether . . . the action should proceed among the parties before it, or should be dismissed . . . The factors to be considered by the court include: . . . (2) *the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided*; (3) whether a judgment rendered in the person's absence will be adequate; (4) *whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.*

Ark. R. Civ. P. 19 (2007) (emphasis added).

As a predicate to dismissing a case pursuant to Rule 19(b), the trial court must determine that the indispensable, nonjoined, parties cannot be made parties to the litigation. Consequently, before dismissing appellants' case, the trial court was required to determine that the nonjoined parties, who relied on Taylor Loop

Road to access their properties, were not amenable to process. Here, there is nothing in the record indicating that these other parties could not be joined.

Further, even if the circuit court had determined that the adjacent landowners could not be joined, the court was then required to consider certain other factors before dismissing appellants' case. One such factor is whether appellants would have an adequate remedy if the action was dismissed. This consideration is key because appellants' 2000 case, which is similar to the one presently on appeal, was dismissed for failure to join indispensable parties. Consequently, the dismissal of this case would be a true dismissal with prejudice, pursuant to Ark. R. Civ. P. 41. For that reason, appellants would have no remedy if the action were dismissed for nonjoinder.

We, therefore, hold that the trial court abused its discretion in dismissing this case, and we reverse and remand.

Attorney's Fees

The circuit court dismissed Buddy Lane and the Hootens because appellants presented no evidence establishing that Lane had destroyed appellants' trees and was continuing to trespass on their property. Appellants did not object to that dismissal and, at first, did not appeal it. Appellants, however, amended their notice of appeal to include Lane and the Hootens, but appellants did not brief this point. Consequently, we will not address whether the trial court committed error in dismissing Land and the Hootens based on appellants' property destruction and trespass claims.

Appellants' fourth argument, however, is that there is no statutory basis for the trial court's award of attorney's fees to Lane and the Hootens. Lane and the Hootens requested attorney's fees pursuant to Ark. Code Ann. § 16-22-309 (Repl. 1999), claiming the actions against them were "totally lacking a justiciable issue of law or fact." Section 16-22-309(a)(1) provides for an award of fees in any civil action in which there was a complete absence of a justiciable issue. We review whether there was a complete absence of a justiciable issue de novo, by reviewing the trial court's record. Ark. Code Ann. § 16-22-309(d) (Repl. 1999).

The record is clear that Lane was in possession of property owned by the Hootens, which property is adjacent to Taylor Loop Road. The trial court dismissed the case against the

City, in part, because appellants failed to join all of the parties owning property adjacent to Taylor Loop Road. We hold that the court erred in, on one hand finding that appellants were required to join all of the adjacent property owners while, on the other hand, finding that appellants' claim against the only adjacent property owner was lacking merit. Although the arguments made against the Hootens were weak, the Hootens were nonetheless indispensable parties whom appellants were required to join for a complete adjudication of the road issues. Consequently, the court erred in awarding attorney's fees to the Hootens.

A separate analysis applies to the fees awarded to Lane. Lane was not an indispensable party and appellants presented no evidence establishing the merit of their claims against him. Therefore, on remand, the trial court may reconsider the award of fees to Lane.

Remaining Issues

We cannot address appellants' remaining two points regarding whether the City can install utility lines under Taylor Loop Road and whether appellants are entitled to a decree defining the width of Taylor Loop Road because the trial court did not rule on these issues. Failure to obtain a ruling is a procedural bar to our consideration of an issue on appeal. *See Scamardo v. Jaggers*, 356 Ark. 236, 149 S.W.3d 311 (2004). These issues can be addressed on remand after joinder of all interested parties.

Reversed and remanded.

GLADWIN and MARSHALL, JJ., agree.

BOB COLE BAIL BONDS, INC. *v.* STATE of Arkansas

CA CR 06-1371 260 S.W.3d 754

Court of Appeals of Arkansas
Opinion delivered August 29, 2007

[Rehearing denied October 3, 2007.]

J. Marvin Honeycutt, for appellant.

Dustin McDaniel, Att'y Gen., by: *Karen Virgina Wallace*, Ass't Att'y Gen., for appellee.

SAM BIRD, Judge. Appellant Bob Cole Bail Bonds, Inc., appeals from an order of forfeiture of the Franklin County Circuit Court, concerning an appearance bond for Corey S. Turner. We affirm the circuit court's order.

On December 30, 2004, appellant filed a bail bond in the amount of $80,000 to secure the appearance of criminal defendant Corey S. Turner in the Circuit Court of Franklin County, Ozark District. On April 29, 2005, Turner entered a conditional plea to drug charges under Rule 24.3 of the Arkansas Rules of Criminal Procedure, reserving his right to appeal the order denying his motion to suppress. At the conditional-plea hearing, Turner's lawyer told the court that the bondsman had agreed to stay on Turner's bond. The court responded that, because an appeal bond is considered under law to be a separate bond, a new bond order probably needed to be entered. The court told Turner's counsel that it needed "something in writing from the bonding company to confirm that they intend to go forward on your bond." Defense counsel said it would "get that done." No new order or bond was ever entered.

Turner's conviction was affirmed by this court on February 22, 2006, and our mandate, issued on March 16, 2006, ordered Turner to surrender immediately to the Sheriff of Franklin County. When Turner did not surrender, a bench warrant for his arrest was issued on March 28, 2006. That same day, the prosecutor notified appellant that it had until July 7, 2006, to arrest and surrender Turner or to have a representative appear for a show-cause hearing. On June 9, 2006, appellant filed a motion to dismiss it from showing cause, alleging that the bond was for the Franklin County Circuit Court proceedings only, that it never agreed to remain as guarantor on the bond beyond the plea and sentencing, and that it was released from liability. After a hearing on August 1, 2006, the circuit court denied the motion to dismiss and entered an order of forfeiture on August 28, 2006. Appellant filed this appeal from that order.

Appellant argues that its obligation was terminated after Turner's plea and when the circuit court ordered that a new bond should be executed. Because appellant neither executed and filed a

new appeal bond nor indicated in writing to the court that it would remain on its original bond, appellant argues that it was released from liability when Turner entered his conditional plea. In support of its position, appellant cites the Arkansas Supreme Court decisions in *Liberty Bonding Co. v. State*, 270 Ark. 434, 604 S.W.2d 956 (1980), and *Zoller v. State*, 284 Ark. 118, 680 S.W.2d 87 (1984).

Pursuant to Rule 9.2 of the Arkansas Rules of Criminal Procedure, an "appearance bond . . . shall serve to guarantee all subsequent appearances of a defendant on the same charge or on other charges arising out of the same conduct before any court, including appearances relating to appeals and upon remand." Ark. R. Crim. P. 9.2(e). In *Liberty Bonding Co.* the defendant entered a plea of guilty and was sentenced but, pursuant to the plea agreement, was allowed to remain free on bond for three weeks before surrendering. The trial court stated that this could not be done if the bondsman did not agree, and the defense attorney said that the bondsman had agreed. *Liberty Bonding Co.*, 270 Ark. at 437-38, 604 S.W.2d at 956. When the defendant failed to surrender, the trial court entered an order of forfeiture on the bond. The supreme court reversed, holding that the trial court had no authority under Ark. R. Crim. P. 9.2(e) to continue the bond beyond the time defendant was sentenced without the consent of the bondsman. *Liberty Bonding Co.*, 270 Ark. at 440, 604 S.W.2d at 958. Appellant contends that, because it did not consent to be obligated after Turner entered his plea and was sentenced, *Liberty* dictates that its bond could not be forfeited.

We do not agree with appellant that *Liberty* supports its argument in this case. After stating that Rule 9.2(e) provides that an appearance bond shall guarantee all subsequent appearances of a defendant, including appearances relating to appeals, the supreme court specifically stated in *Liberty* that the possibility of appeal had no bearing on that case because there was no appeal from a guilty plea. *Id.* After defendant's guilty plea in *Liberty* there were no "subsequent appearances" for the bondsman to guarantee; the case was over. Conversely, in this case Turner's plea was specifically conditioned on his right to appeal the denial of his motion to suppress. Turner's case was not over when he entered a conditional plea. Rule 9.2(e) clearly provides that appellant's appearance bond guarantees "all subsequent appearances of a defendant . . . including appearances relating to appeals and upon remand." Ark. R. Crim. P. 9.2(e); *see also Miller v. State*, 262 Ark. 223, 555 S.W.2d

563 (1977) (holding that a bail bond will be construed as if Rule 9.2(e) had been written into the bond agreement).

In *Zoller* the supreme court had previously reversed and remanded an appeal on the trial court's denial of defendant's motion to withdraw his original plea of nolo contendere. On remand from the supreme court, defendant entered a plea of not guilty, and the trial court entered an order requiring a new appearance bond. On a petition for writ of certiorari, the supreme court held that the trial court erred in requiring defendant to post a new bond, stating that "the law is clear that an appearance bond once approved remains in effect through appeal, and this includes any appearances on remand." *Zoller*, 284 Ark. at 119, 680 S.W.2d at 88. The court noted, however, that while a new bond was not required and the trial court erred in so finding, "[t]his in no way implies that a new bond cannot be required or that a bond cannot be raised in an appropriate situation." It is this language that appellant relies upon from *Zoller*, arguing that the circuit court in this case did require a new bond and, therefore, that appellant was no longer obligated under the original appearance bond after the conditional-plea hearing.

The court in *Zoller* also stated that any statutes or rules that relate to a bail bond are implicitly read into the bail-bond contract. *Zoller*, 284 Ark. at 120, 680 S.W.2d at 89 (citing *Miller v. State*, 262 Ark. 223, 555 S.W.2d 563 (1977)). Further, the court also stated that, when a bail bondsman executes a bond, "he does so with knowledge of and pursuant to the statutes and rules regulating bail bonds." *Id.* While the trial court in this case stated at the conditional-plea hearing that it "need[ed] something in writing from the bonding company to confirm that they intend to go forward on your bond," the law required no such writing. Just as the trial court in *Zoller* erred in finding that a new bond was required upon remand, here the circuit court was in error when it stated that a written confirmation was necessary for the bond to continue. It was not. Under Arkansas law, appellant's appearance bond remained in effect through Turner's appeal. *See Zoller*, 284 Ark. at 119, 680 S.W.2d at 88, and Ark. R. Crim. P. 9.2(e).

For the foregoing reasons, we affirm the circuit court's order of forfeiture.

MARSHALL and HEFFLEY, JJ., agree.

Kathy D. STUART *v.* Loren STUART

CA 06-1331 260 S.W.3d 740

Court of Appeals of Arkansas
Opinion delivered August 29, 2007

Shackleford, Phillips, Wineland & Ratcliff, P.A., by: *Kennth P. Castleberry*, for appellant.

No response.

SAM BIRD, Judge. This is a one-brief appeal from an order of the Cleburne County Circuit Court modifying the parties' divorce decree. The modification required appellant Kathy Stuart to pay as child support fifteen percent of a settlement she will receive as part of a class-action lawsuit. Appellant raises two points for reversal. We affirm in part and reverse and remand in part.

Appellant and appellee Loren Stuart were divorced on March 3, 2003. The divorce decree incorporated a settlement agreement and provided that appellee would have custody of the parties' two minor children and that appellant, because of her health condition, would not be required to pay child support.[1]

On May 30, 2006, appellee filed a petition seeking to modify the decree to require appellant to pay child support. The petition alleged that appellant had started drawing Social Security benefits; that she had settled a medical-malpractice lawsuit in the summer of 2005 for $21,000; and that she would soon receive approximately $60,000 for settlement of a class-action suit involving one of her medications. The petition sought child support based on appellant's Social Security benefits, as well as fifteen percent of the settlement proceeds from the medical-malpractice and class-action lawsuits.

Appellant testified that she settled a medical-malpractice case, which was pending at the time of the divorce, receiving a net amount of $18,000 after payment of attorney's fees and reimbursements to Medicaid and Medicare. She also testified that she was currently receiving $528 per month from Social Security in SSI benefits and $95 per month in Social Security disability benefits. Appellant stated that her class-action lawsuit had been settled and that she would receive money as part of that settlement but that she did not know how much she would receive or when the settlement would be paid.

Appellee testified that he had received no financial help from appellant for the support of their minor child. He also stated that a letter from the attorneys handling the class-action suit indicated

[1] One of the children has since attained majority.

that the case had settled and appellant would receive either $60,000 or $100,000 as her share of the settlement proceeds. Appellee had no knowledge of how much of any settlement would be payable as attorney's fees or attributable to appellant's loss of income or earning capacity.

Appellant argued to the trial court that the funds to be received from the class-action settlement were not "income" because the supreme court's Administrative Order No. 10 defines income in accordance with federal tax law definitions and, under those definitions, compensation for a personal injury is not "income." She also argued that, because the class-action settlement funds had not been received, the trial court would be issuing an advisory opinion if the court found that appellee was entitled to child support based on those funds.

In its comments from the bench, the trial court found that Administrative Order No. 10's definition was broad enough to encompass appellant's class-action settlement. The court stated that it did not like the outcome but felt compelled to reach the result it did. The trial court entered an order on August 25, 2006, denying appellee's motion insofar as it sought fifteen percent of the 2005 settlement. The trial court fixed appellant's child-support obligation at $79.20 per month, based on appellant's Social Security benefits in the amount of $528 per month. Finally, the trial court ordered appellant to pay fifteen percent of sums received in her class-action settlement as child support, when the settlement is received. Appellant appeals only the decision ordering the payment of child support on proceeds to be received from settlement of her class-action claim.

Child-support cases are reviewed de novo on the record. *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, the appellate court will not reverse the trial judge absent an abuse of discretion. *Id.* It is the ultimate task of the trial judge to determine the expendable income of a child-support payor. *Id.*

Appellant first argues that the trial court erred in ordering the payment of child support from the proceeds of the class-action settlement because the issue was not ripe. The argument is that, because the settlement proceeds have not yet been received, because it is not known when the settlement proceeds will be received, and because the amount of the proceeds is not known, the court acted prematurely in setting support based on that settlement. We agree.

This case is controlled by the supreme court's decision in *Kelly v. Kelly*, 341 Ark. 596, 19 S.W.3d 1 (2000), where the court held that the trial court erred because it could not set a sum-certain dollar amount of support based on the father's bonus where the receipt of that bonus was uncertain and contingent upon the profitability of the business. Here, although it appears likely that appellant will receive some money in settlement of the class-action lawsuit, the amount of money she will receive as a result of the settlement, and when she will receive it, are unknown, and the trial court cannot set a sum-certain dollar amount of support until the amount is known and the settlement proceeds are actually received by appellant. Further, all or part of the settlement funds may not be received before the minor child attains majority, at which point appellant's obligation may terminate.[2] Therefore, we reverse the trial court's order setting child support based on the class-action settlement proceeds and remand for further proceedings consistent with this opinion.

Although we reverse on appellant's first point, we proceed to address her second point because it is likely to arise again on remand. In her second point, appellant asserts that the trial court erred in holding that the proceeds from her class-action settlement, when received, would constitute "income" for purposes of determining child support. Appellant relies on the definition of "income" found in *In re Guidelines for Child Support Enforcement*, 301 Ark. App'x 627, 784 S.W.2d 589 (1990), for her argument that, because personal-injury settlements are not "income" under the Internal Revenue Code, her class-action settlement for a personal injury should not be "income" for child-support purposes. The 1990 guidelines, as they relate to a payor's periodic income, "refer[ ] to the definition of income in the federal income tax laws." 301 Ark. at 630, 784 S.W.2d at 591.

We disagree with appellant's argument for two reasons. First, the supreme court has abandoned that definition and, in 1997, adopted a new, broader definition of "income" no longer tied to the federal tax code definition. *In re Administrative Order No. 10: Ark. Child Support Guidelines*, 329 Ark. App'x 668 (1997). The current definition of "income" is:

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[2] The minor child was sixteen at the time of trial.

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

In re: Administrative Order No. 10: Ark. Child Support Guidelines, 347 Ark. App'x 1064, 1067 (2002).[3] The definition of income is intentionally broad and designed to encompass the widest range of potential income sources for the support of minor children. *Montgomery v. Bolton*, 349 Ark. 460, 79 S.W.3d 354 (2002). Further, the types of income are not limited to only those listed in Section II of Administrative Order No. 10. *Id*; *see also Evans v. Tillery*, 361 Ark. 63, 204 S.W.3d 547 (2005) (holding that money judgments for malicious prosecution and assault were "income" for support purposes). Second, later cases interpreting the current definition have held that the definition of income for purposes of support may differ from income for tax purposes. *See Huey v. Huey*, 90 Ark. App. 98, 204 S.W.3d 92 (2005); *Delacey v. Delacey*, 85 Ark. App. 419, 155 S.W.3d 701 (2004); *Brown v. Brown*, 76 Ark. App. 494, 68 S.W.3d 316 (2002).

Here, the trial court used the correct definition of "income" when it determined that appellant's class-action settlement fell within the definition of "income" because it is a "payment" from "any source." Therefore, we cannot say that the trial court erred in finding that the class-action settlement proceeds, when paid, would constitute "income" for purposes of calculating child support.

Affirmed in part; reversed and remanded in part.

MARSHALL and HEFFLEY, JJ., agree.

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[3] We note that the supreme court recently issued a revised Administrative Order No. 10, effective May 3, 2007. The definition of "income" in the new order remains the same.

Roderick L. HICKMAN *v.* STATE of Arkansas

CA CR 06-841 260 S.W.3d 747

Court of Appeals of Arkansas
Opinion delivered August 29, 2007

John P. Mazzanti, III, for appellant.

Dustin McDaniel, Att'y Gen., by: *Nicana C. Sherman*, Ass't Att'y Gen., for appellee.

WENDELL L. GRIFFEN, Judge. Roderick L. Hickman appeals from his conviction for residential burglary. He raises three arguments for reversal: 1) the trial court erred in not issuing his requested jury instruction on disputed-accomplice liability regarding one of the State's witnesses; 2) the State failed to prove that he was an accomplice to burglary; 3) the trial court erred in denying his request for a continuance. Because we agree with appellant's first argument, we hold that the trial court erred in not issuing the disputed-accomplice liability instruction. Accordingly, we reverse appellant's conviction and remand for a new trial. Because we reverse and remand on that ground, we do not address appellant's continuance argument.

Appellant was charged as an accomplice to residential burglary in connection with the burglary of the home of Christine Haddad, in Dermott, Arkansas, on the Saturday following Thanksgiving in 2004. On December 1, 2004, Officer Glen Anderson met Icer Crouse, Haddad's grandson, to investigate a house burglary. Crouse had been staying at Haddad's home a few nights each week while Haddad recuperated from an illness at the home of her daughter (Crouse's mother).

Appellant concedes that the Haddad home was burglarized. The property taken from that home included a TV, keys, $200-300 cash, including coins, and a book of checks bearing Haddad's name. The Eudora Police Department subsequently faxed Anderson and informed him that one of the stolen checks had been cashed by Caleb Johnson. Johnson was subsequently arrested and gave police a statement explaining when the burglary occurred and who was involved. In his statement, he told police that it was appellant's idea to go into the Haddad house.

Appellant's grandmother, Ruby Douglas, lives next door to the Haddad residence. Their properties are separated by a waist-high fence. The testimony of various witnesses showed that on the day the burglary occurred, appellant was driving Douglas's silver or gray van and was accompanied by Johnson (appellant's cousin,

who had lived in Douglas's home on a prior occasion), James Earl Benton, and Corderia Black. When the van developed a flat, appellant drove into Dermott, arriving at Douglas's home. Douglas's son, Sammy, who was approximately ten years old at the time, was also at home.

Appellant and his companions asked Douglas to help them locate a tire. Before Douglas left her house to do so, she told appellant not to disturb other people in the neighborhood and not to go next door (to the Haddad home) because no one was home. Johnson accompanied Douglas at one point but returned to the home while she continued to look for a tire. After Johnson returned to the home, he went outside to smoke and when he did, he saw Benton pass a television over the fence to appellant, who put the television in the back of the van. Johnson then went back inside the Douglas home.

Johnson's testimony was corroborated by Sammy, who was eleven years old when he testified. He said that appellant was driving a van with a flat tire; that he saw Benton pass a TV over the fence to appellant, who put the TV into the van; and that appellant and his companions seemed to be in a hurry to leave.

When Douglas returned home later that afternoon (without a tire), she noticed that her van had been moved toward the back of the yard and that the tire was still flat. She said that appellant seemed anxious to leave. Appellant and his companions left approximately thirty minutes after she returned, still driving on a flat tire.

Johnson testified that before they arrived at Douglas's home, there was no money in the van but after they left, Benton had some coins. He also saw Haddad's checks and a television in the back of the van that was covered.

Lenora Robinson testified that appellant visited her home and asked if she wanted to purchase a television. When Robinson refused, appellant sold the TV to her neighbor, LaShona Williams. Williams testified that appellant said his grandmother was selling the TV, that he hooked up the TV, that she paid him for the TV, that appellant was driving his grandmother's van at the time, and that Johnson and Benton were with him.

At the close of the State's case, appellant moved for a directed verdict, arguing there was no proof that he acted as an accomplice to the burglary because there was no proof he aided or

assisted in entering the Haddad home for an unlawful purpose. The trial court denied the motion and the subsequent renewal of the same.

Appellant also proffered AMCI 403, concerning disputed-accomplice liability status, on the theory that Johnson was an accomplice in this case. The trial court refused to issue the instruction. The jury subsequently convicted appellant and he was sentenced to serve sixty months in the Arkansas Department of Correction.

I. Sufficiency of the Evidence

Although we reverse based on the trial court's failure to provide the disputed-liability accomplice instruction, we first address the sufficiency of the evidence supporting a conviction before considering other trial errors to preserve appellant's right to be free from double jeopardy. *See Grillot v. State*, 353 Ark. 294, 107 S.W.3d 136 (2003).

We treat a motion for a directed verdict as a challenge to the sufficiency of the evidence. *See Jordan v. State*, 356 Ark. 248, 147 S.W.3d 691 (2004). The test for determining the sufficiency of the evidence is whether the verdict is supported by substantial evidence, direct or circumstantial. *Id.* Evidence is substantial if it is of sufficient force and character to compel reasonable minds to reach a conclusion and pass beyond suspicion and conjecture. *Id.* On appeal, we view the evidence in the light most favorable to the State, considering only that evidence that supports the verdict. *Id.*

A person commits residential burglary if he or she enters or remains unlawfully in a residential occupiable structure of another person with the purpose of committing in the residential occupiable structure any offense punishable by imprisonment. Ark. Code Ann. § 5-39-201 (Repl. 2006). A criminal defendant is an accomplice of a defendant if he assists and actively participates in the crime. *See Cook v. State*, 350 Ark. 398, 86 S.W.3d 916 (2002). However, a defendant may also be liable as an accomplice where he renders the requisite aid or encouragement to the principal with regard to the offense at issue, irrespective of the fact that the defendant did not directly commit the offense. *Id.*

Moreover, when two persons assist one another in the commission of a crime, each is an accomplice and is criminally liable for the conduct of both. *Id.* A participant cannot disclaim

responsibility because he did not personally take part in every act that went to make up the crime as a whole. *Id.* Factors relevant in determining whether a person is an accomplice include the presence of the accused near the crime, the accused's opportunity to commit the crime, and association with a person involved in the crime in a manner suggestive of joint participation. *See Releford v. State*, 59 Ark. App. 136, 954 S.W.2d 295 (1997).

Appellant does not dispute the evidence that the burglary took place, or that he took the TV from Benton, hid it in the van, and sold it to Williams. Rather, he maintains that the evidence is insufficient to demonstrate that he entered or remained unlawfully on the Haddad premises, that he solicited, advised, encouraged or coerced another individual to commit the offense of burglary, or that he aided, agreed to aid, or attempted to aid in the planning or commission of the offense. As such, he argues that, at most, he is guilty of theft or theft by receiving, but not residential burglary.

We disagree. It is true that there is no direct evidence that appellant personally entered the home but the State was not required to prove that he did so. *See Passley v. State*, 323 Ark. 301, 915 S.W.2d 248 (1996); *Bradley v. State*, 8 Ark. App. 300, 651 S.W.2d 113 (1983). Substantial evidence supports the conclusion that committing the burglary was appellant's idea, that he assisted in removing one of the stolen items, even if he did not enter the Haddad residence, and that he transported and sold the stolen item. That is sufficient proof that he acted as an accomplice to the Haddad burglary. *See Bradley, supra* (affirming a burglary conviction where there was no evidence that the defendant entered the residence but there was evidence that he planned the burglary and sold the stolen goods). Accordingly, the trial court did not err in denying appellant's motion for a directed verdict.

II. Disputed-Accomplice Liability Instruction

Nonetheless, we reverse appellant's conviction and remand for a new trial because the trial court erred in refusing to issue the jury instruction regarding Johnson's disputed-accomplice liability status. Appellant proffered AMCI 403, which stated that if the jury found that Johnson was an accomplice, his testimony must be corroborated by other evidence tending to connect appellant with the commission of the offense. The parties argued at length

regarding whether Johnson was an accomplice. The trial court ultimately refused to issue the instruction, finding that Johnson was not an accomplice.[1]

It is clear that a defendant's mere presence at the scene or negative acquiescence and passive failure to disclose a crime are neither separately nor collectively sufficient to make him an accomplice. *See Hutcheson v. State*, 92 Ark. App. 307, 213 S.W.3d 25 (2005). Further, knowledge that a crime is being or is about to be committed usually cannot be said to establish accomplice liability; nor can the concealment of knowledge, or the mere failure to inform the officers of the law when one has learned of the commission of a crime. *Id.* In short, absent a legal duty, presence, acquiescence, silence, knowledge, or failure to inform an officer of the law is not sufficient to make one an accomplice. *Id.* Our law is well settled that a witness's status as an accomplice is a mixed question of law and fact, and that when the status of a witness presents issues of fact, the defense is entitled to have the question submitted to the jury. *See King v. State*, 323 Ark. 671, 916 S.W.2d 732 (1996).

Here, the instruction should have been given because there was evidence presented upon which the jury could have concluded that Johnson was an accomplice. Johnson did not merely acquiesce to the burglary or merely fail to inform the police of the offense. Rather, the evidence was sufficient to allow the jury to reasonably infer that Johnson knew when the burglary was taking place, knew where it was taking place, and knew who was involved. He accompanied appellant and Benton when they left the scene of the crime; he knew that the stolen TV, checks, and money were transported in appellant's van, in which he also rode; he accepted a stolen check from Benton, whom he had seen giving a stolen TV to appellant, and whom he had seen counting coins in the van that were not present prior to the burglary; he was present when the TV was sold to Williams; and he did not reveal the information to authorities until he was arrested for using the stolen check. These facts indicate Johnson's joint participation in the burglary; therefore, the trial court should have issued the disputed-accomplice liability instruction.

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[1] Johnson was charged with forgery of the check that he attempted to cash but was not charged with burglary.

Reversed and remanded for new trial.

PITTMAN, C.J., HART, ROBBINS, GLOVER, BAKER and MILLER, JJ., agree.

GLADWIN and BIRD, JJ., dissent.

SAM BIRD, Judge, dissenting. I disagree that the trial court erred in refusing to issue the disputed-accomplice instruction as it relates to Caleb Johnson. Under cases decided by our supreme court, I see no need to remand this case for new trial.

The term "accomplice" cannot be used in a loose or popular sense so as to embrace one who has guilty knowledge, or is morally delinquent, or who was even an admitted participant in a related, but distinct offense. *McGehee v. State*, 348 Ark. 395, 72 S.W.3d 867 (2002); *Hicks v. State*, 271 Ark. 132, 607 S.W.2d 388 (1980); *Burke v. State*, 242 Ark. 368, 413 S.W.2d 646 (1967). A person is an accomplice of another person in the commission of an offense if, with the purpose of promoting or facilitating the commission of an offense, the person solicits, advises, encourages, or coerces the other person to commit the offense; aids, agrees to aid, or attempts to aid the other person in planning or committing the offense; or, having a legal duty to prevent the commission of the offense, fails to make a proper effort to prevent the commission of the offense. Ark. Code Ann. § 5-2-403(a) (Repl. 2006).[1] A person cannot be convicted of a felony based upon the testimony of an accomplice unless that testimony is corroborated by other evidence tending to connect the defendant with the commission of the offense. Ark. Code Ann. § 16-89-111(e)(1)(A) (Repl. 2005).

In *King v. State*, 323 Ark. 671, 916 S.W.2d 732 (1996), a murder conviction was remanded for retrial because the jury was not given instruction on the disputed-accomplice status of State's witness Vernon Scott. The supreme court recited evidence that Scott knew of ill-will between the co-defendants and their victim, who had knowledge about another murder; that Scott was to be paid with rock cocaine, and indeed was so paid, in exchange for luring the victim to the co-defendants' reach; that within five minutes of luring and leaving the victim, Scott heard a flurry of

[1] In *Hutcheson v. State*, 92 Ark. App. 307, 213 S.W.3d 25 (2005), Hutcheson's silence, knowledge, concealment, and failure to inform law enforcement officers of sexual assaults against her child made Hutcheson an accomplice to the assaults because she had a legal duty to protect the child.

gunshots and had the immediate thought that "they done shot that boy"; and that Scott initially denied knowledge of the co-defendants' involvement in the crime.

In *Ford v. State*, 296 Ark. 8, 753 S.W.2d 258 (1988), Adam Ford and King McNichols were convicted of burglary and theft in connection with items taken from a liquor store. The supreme court reviewed the following evidence and held that the trial court did not err in refusing to instruct the jury on the accomplice status of Jo Ann Willis, Johnny Wyllis, and William Harvey:

> On the morning following the burglary, [Jo Ann Willis] awoke to find McNichols, appellant Ford and McNichols' nephew, together with liquor and cigarettes, in her house. She stated that she did not know where the liquor came from, that she thought it may have been stolen, but she did not know. In any event, she asked the three parties to help her put it in the car so that she could take it away from the house. Jo Ann drove the appellants McNichols and Ford, McNichols' nephew, Johnny Wyllis, and another party to a tavern, Fat Daddy's, where McNichols sold portions of the stolen liquor to the tavern owner, William Harvey. Jo Ann's testimony was corroborated to some extent by Johnny Wyllis.

296 Ark. at 13, 753 S.W.2d at 260; *see also Shrader v. State*, 13 Ark. App. 17, 25, 678 S.W.2d 777, 781 (1984) (stating that it would be proper to submit to the jury the question of whether the person who made the silencer for a gun, which he was told was to be used to kill the victim, was an accomplice).

In light of these cases, I believe that this court should overrule *Robinson v. State*, 11 Ark. App. 18, 665 S.W.2d 890 (1984), which is the sole decision discussed in Hickman's brief to support his position, and which the majority opinion does not even mention. In my view, the *Robinson* court wrongly accepted the appellant's argument that the trial court erred in refusing to instruct the jury so as to allow it to determine the status of four State's witnesses who had ridden with him to a lake: three of them fished while he was apparently stealing boat motors, and the fourth lay sick in the car while the theft was going on. There was various testimony that Robinson "toted" a motor to the car, put two motors in the back of the car, and stated that he planned to sell them in Pine Bluff. One witness stated that "they told [him] he shouldn't take the motors but he said he needed money," and that he asked them to go to Pine Bluff but "we said no, you know, we

didn't want to have nothing to do with it." 11 Ark. App. at 21, 665 S.W.3d at 891. I agree with the dissenting judge in *Robinson* that the evidence was insufficient to make the status of these witnesses a question for the jury to decide.

Here, Caleb Johnson was guilty of forgery in connection with using a check that Hickman stole from Haddad's house. Johnson was not charged with residential burglary. His testimony, corroborated by young Sammy, was that he watched Benton pass the television over the fence to Hickman; Johnson further testified that he "didn't want to be involved" and went back inside Ruby Douglas's home once he saw the television being loaded into the van. Johnson had no duty to report this crime to authorities. The evidence presented — that Johnson saw other persons pass the television over the fence and load it into the van, that he knew that the television and the checks were in the van, and that he was present when the television was sold — does not suggest any way in which he aided or abetted the crime of residential burglary.

Thus, there was nothing for the jury to decide about Johnson's status as an accomplice, and the circuit court did not err in refusing to give the jury AMCI 403. I would affirm Hickman's conviction.

GLADWIN, J., joins.

Dawn Michelle SINGLETON *v.* Michael Larue SINGLETON

CA 06-1070 260 S.W.3d 756

Court of Appeals of Arkansas
Opinion delivered August 29, 2007

James M. Pratt, Jr., for appellant.

Mary Thomason, for appellee.

WENDELL L. GRIFFEN, Judge. Appellant Dawn Singleton brings this appeal from an order of the Ouachita County Circuit Court contending that the trial court erred in not awarding her an unequal share of the parties' marital assets. We disagree, and we affirm.

Appellant and appellee Michael Singleton married in January 1990 and separated in 2005. Appellant filed her complaint for divorce and appellee filed a counterclaim for divorce. The parties had three minor children and agreed on the issues concerning custody, visitation, and support of the children. Appellant owned and operated her own hair salon, which, according to appellant, had lost money the last three years of the marriage. Appellee worked for a paper company and had a small retirement account.

The major issue at trial was the distribution of the marital assets because appellant was seeking an unequal division of the marital property in her favor. The testimony revealed the following facts. In October 2003, appellant received a settlement of a personal-injury claim in excess of $304,000. Appellee received a settlement of his derivative claim in the amount of $3100. The parties placed appellant's settlement funds into a joint bank account. Appellee also deposited his paycheck into the same account. By the time of trial, the parties had spent all of the settlement proceeds.

The parties purchased a home for $85,000 and made improvements valued at $30,000. The home was valued at $116,000 at the time of trial. The furniture and furnishings for the home were valued at $4000. The parties also purchased a $30,000 used Yukon Denali for appellant. The vehicle was worth $18,500 at the time of trial. Appellant twice borrowed against her vehicle to pay various bills. Appellee purchased a truck, valued at $14,000, and a ski boat and accessories. The boat was financed, and a balance of $4900 remained. Appellant opined that the boat was worth more than $6500. A travel camper was also purchased for $8500. Appellant testified that it was worth more than the $4500 value given by appellee.

Some of the settlement funds were placed in a joint account at a brokerage house. In March 2005, appellant withdrew the remaining balance of $53,000 from that account because she believed appellee was going to remove the money first. That money was spent purchasing a $14,500 vehicle for the parties' daughter; paying $2100 for insurance, subsequently repaid in part

by appellee; purchasing a new washing machine; purchasing a $3000 four-wheeler; a $2000 riding lawnmower; spending $3000 for a weekend getaway for appellant and her girlfriends; paying some medical bills; and simply giving some of the money to appellant's friends. Appellee did not seek to recover any of these funds.

On February 28, 2006, the trial court issued a letter opinion containing its findings relating to the disposition of the marital property. After stating that it had considered the factors contained in Ark. Code Ann. § 9-12-315 (Repl. 2002), the court awarded appellant her vehicle, the four-wheeler, and the furniture and appliances located in the marital residence, as well as the fixtures from her shop. Appellee was awarded his pick-up truck; the ski boat, motor, and trailer; the riding lawn mower; the travel trailer; and other items of personal property. Appellee's retirement account was divided equally between the parties. Appellant was responsible for certain debts, while appellee was responsible for the payment of the debt on the boat. The parties were to be equally responsible for payment of certain medical bills. Pursuant to appellant's alternative request, the court awarded appellant possession of the marital residence until the parties' youngest child turned eighteen or appellant remarried or cohabited with an adult male, at which time the home would be sold and the proceeds equally divided. The parties were to own the home as tenants in common. After entry of a decree memorializing these findings, this appeal followed.[1]

On appeal, divorce cases are reviewed de novo. *Skokos v. Skokos*, 344 Ark. 420, 40 S.W.3d 768 (2001). With respect to the division of property, we review the trial court's findings of fact and affirm them unless they are clearly erroneous, or against the preponderance of the evidence; the division of property itself is also reviewed, and the same standard applies. *Id.*

■ In her sole point on appeal, appellant argues that the trial court should have awarded her a greater share of the marital assets because all of those assets were purchased with funds from

[1] The decree was entered on May 25, 2006, and the notice of appeal was filed on June 26, 2006. The thirtieth day on which to file the notice of appeal fell on Saturday, June 24, 2006. Therefore, the time for filing the notice of appeal was extended to the following business day, Monday, June 26. Ark. R. App. P. – Civil 9; *Watanabe v. Webb*, 320 Ark. 375, 896 S.W.2d 597 (1995).

her injury settlement. Appellant lists the factors contained in section 9-12-315(a)(1)(A) and argues that they weigh in favor of an unequal division in her favor.[2] However, appellant offered no evidence, other than the parties' 2003 and 2004 tax returns and her own statement that she was "uninsurable," having any bearing on these factors. Nevertheless, the trial court indicated that it considered the proper factors. The application of these factors is a factual determination; therefore, this court will not reverse the division of marital property unless that division is clearly against the preponderance of the evidence. *See Russell v. Russell*, 275 Ark. 193, 628 S.W.2d 315 (1982). We will not substitute our judgment on appeal as to the exact interest each party should have but will only decide whether the order is clearly wrong. *Coombe v. Coombe*, 89 Ark. App. 114, 201 S.W.3d 15 (2005).

Appellant's argument focuses on the fact that the funds used to purchase the home, vehicles, and other property came from her personal-injury settlement. The trial court could have decided that, because the settlement money was deposited into joint accounts and was used to purchase, among other things, a house titled in both names, it lost its character as appellant's separate property. *See McKay v. McKay*, 340 Ark. 171, 8 S.W.3d 525 (2000); *Lofton v. Lofton*, 23 Ark. App. 203, 745 S.W.2d 635 (1988). Placing the funds from her settlement into *joint* accounts created a presumption that appellant intended to make a gift to appellee of one-half of the settlement proceeds. Appellant offered no testimony seeking to rebut this presumption, and it was her burden to do so. *See Davis v. Davis*, 79 Ark. App. 178, 84 S.W.3d 447 (2002). Moreover, one spouse's unequal contributions to marital property need not be recognized upon divorce. *McKay, supra.*

Finally, contrary to the dissent's assertion, equity does not compel an unequal division in appellant's favor where she commingled the settlement proceeds, where she voluntarily spent

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[2] These factors, although not exhaustive, include the length of the marriage; age, health and station in life of the parties; occupation of the parties; amount and sources of income; vocational skills; employability; estate, liabilities, and needs of each party and opportunity of each for further acquisition of capital assets and income; contribution of each party in acquisition, preservation, or appreciation of marital property, including services as a homemaker; and the federal income-tax consequences of the court's division of property.

a considerable amount of those proceeds on non-essential items with full knowledge that she was "uninsurable" and that there would be no more money with which to pay her future medical expenses, and with full knowledge that she had suffered losses in her business in each of the last three years prior to the divorce.[3]

We cannot say that the trial court was clearly wrong in its division of the parties' marital estate. Therefore, we affirm.

Affirmed.

PITTMAN, C.J., ROBBINS, GLOVER, and HEFFLEY, JJ., agree.

HART, J., dissents.

JOSEPHINE LINKER HART, Judge, dissenting. I am baffled by the majority's opinion in this case. In rejecting Ms. Singleton's argument, they assert that there is a paucity of evidence regarding the statutory factors that should guide us in making an unequal disposition of marital property. Specifically, they state that she "offered no evidence, other than the parties' 2003 and 2004 tax returns and her own statement that she was 'uninsurable,' " that had "any bearing on these factors." This is simply not true. Given this patently incorrect statement, I must conclude that my esteemed colleagues

[3] Our dissenting colleague professes to be "baffled" by our decision to affirm the trial court's decision. Nevertheless, the record and the controlling law are unmistakably clear. Appellant knowingly deposited her personal injury settlement into a marital bank account. She and appellee deducted funds from that account for numerous purchases. In affirming the trial court's rulings concerning the legal effect of appellant's decision and the subsequent transactions on the marital account, we, like the trial judge, are following settled Arkansas law that such voluntary commingling of separate funds into marital accounts creates a rebuttable presumption that appellant, as the owner of separate property, intended to make a gift of that property to the other marital partner. *See McKay, supra; Davis, supra.* We must affirm in the instant case because appellant failed to rebut this presumption.

As for our colleague's preferred disposition of the marital residence, we note that neither counsel for appellant nor our esteemed colleague has cited any authority for the contention that appellant is entitled to a life estate in the marital residence because her voluntary choices about spending the settlement proceeds have resulted in financial distress. Clearly, appellee is entitled to his share of the value of the marital residence now that the parties have divorced. The trial court correctly ruled that appellant is entitled to occupy the residence until the parties' children reach their majority. To grant appellant a life estate in the residence beyond that point would amount to an unauthorized and unwarranted seizure and transfer of appellee's legal interest in the property, and would give appellant relief that she did not request.

have misunderstood the nineteen-page abstract; otherwise they would not make such an obvious mistake of fact. The testimony of Ms. Singleton and her ex-husband, addressed *all* of the statutory factors enumerated in Arkansas Code Annotated section 9-12-315(a)(1)(A) (Repl. 2002), with the exception of whether there would be detrimental income-tax consequences of a particular property division. While I am mindful that we defer to the trial judge's "superior position to determine the credibility of witnesses and the weight to be given their testimony," *see, e.g.*, *Myrick v. Myrick*, 339 Ark. 1, 2 S.W.3d 60 (1999), this case does not hinge on Ms. Singleton's credibility. Indeed, there are virtually no disputed facts relating to the section 9-12-315(a)(1)(A) factors.

It is important to note, if only in dissent, that there is evidence that relates to each of the statutory factors. These are as follows:

■ The length of the marriage. The parties were married for sixteen years, long enough to be considered a marriage of substantial duration. Consequently, the likely standards of living of both parties post-divorce should be equalized if possible.

■ Age, health, and station in life of the parties. Ms. Singleton is still in her thirties, but she has had back surgery and has heart problems that were severe enough to result in her receiving a $300,000 settlement in her personal-injury case. Conversely, there is no evidence, save for Mr. Singleton's use of illegal drugs, to suggest that he has any impairments to his health.

■ Occupation of the parties. Ms. Singleton runs her own barber shop and has waited on tables and worked in a flower shop. With this experience, but for her health problems, she should be able to attain at least a minimal standard of living. However, Ms. Singleton's health issues overshadow this factor. By comparison, Mr. Singleton is an experienced supervisor, who has demonstrated the ability to earn several times what Ms. Singleton has been able to realize from her employment. His earning potential should continue to increase.

■ Amount and sources of income. As the majority notes, Mr. Singleton has demonstrated the ability to earn approximately $40,000 per year over the last three years, while Ms. Singleton's employment has resulted in a loss. As noted previously, the onset of her health problems does not suggest that her earning potential will increase.

Vocational skills. Ms. Singleton is a trained barber and Mr. Singleton an experienced supervisor. Even without Ms. Singleton's health problems, this factor should not weigh equally for the parties. I cannot ignore the fact that she did present unrebutted testimony that she doubted that she could work the kind of hours that would allow her to support herself, and Mr. Singleton did not really dispute this assessment.

Employability. Ms. Singleton has serious health problems that will certainly make her less attractive to future employers. Mr. Singleton, conversely, demonstrated the ability to secure new employment when his previous employer, International Paper, discontinued its operations.

Estate, liabilities, and needs of each party and opportunity of each for further acquisition of capital assets and income. Ms. Singleton has virtually no chance of securing another home. Her personal injury, while eventually debilitating, did give her a chance at securing the comfort of her own home. Mr. Singleton is entering his prime earning years, so presumably his opportunities to accrue more property should only be greater in the years to come.

Contribution of each party in acquisition, preservation, or appreciation of marital property, including services as a homemaker. Ms. Singleton, through her unfortunate experience with a diet drug and her consequent personal-injury settlement, was responsible for bringing to the marriage all of the significant marital assets. I believe it is proper to consider that the marital estate in its present form existed for only about one year of the sixteen-year marriage. Moreover, if Ms. Singleton had been more selfish, none of the proceeds of her personal-injury settlement would even have become marital property. Mr. Singleton, on the other hand, helped spend Ms. Singleton's personal-injury settlement by purchasing a thirty-two foot travel trailer, a ski boat, and a new truck, not to mention the use of illicit drugs. I certainly cannot imagine why anyone from the bench, bar, or street would have trouble weighing these factors. I do not understand why the majority chooses to ignore the obvious.

In addition to missing this evidence, the majority fails to grasp the essence of Ms. Singleton's argument. Instead they spend a full paragraph of their rather limited analysis speculating that the trial judge "could have decided that, because the settlement money was deposited into joint accounts and was used to purchase,

among other things, a house titled in both names, it lost its character as appellant's separate property." Ms. Singleton, however, does not make a tracing argument here. Again, it was undisputed that almost every single piece of significant marital property with the exception of a barbecue grill and a lawnmower, came from the proceeds of Ms. Singleton's personal-injury settlement. This undisputed fact directly corresponds to section 9-12-315(a)(1)(A) factors vii and viii, relating to the "opportunity of each for further acquisition of capital assets and income" and "contribution of each party in acquisition . . . of marital property," respectively. I would regard this failure on the part of the majority as a mixed mistake of law and fact, given their earlier erroneous statement that there was no evidence having a "bearing" on these factors.

I recognize that our review in traditional equity cases has become increasingly deferential; however, our review is still de novo. *Skokos v. Skokos*, 344 Ark. 420, 40 S.W.3d 768 (2001). As such, the appellate courts of this state are charged with determining where the equities lie. Applying the undisputed facts to the section 9-12-315(a)(1)(A) factors leads me to the inevitable conclusion that Ms. Singleton should have gotten a larger share of the marital property. I simply cannot subscribe to the majority's bald assertion that "equity does not compel an unequal division in appellant's favor where she commingled the settlement proceeds, where she voluntarily spent a considerable amount of those proceeds on non-essential items with full knowledge that she was 'uninsurable' and there would be no more money with which to pay her future medical expenses, and with full knowledge that she had suffered losses in her business in each of the last three years prior to the divorce." While it is true that Ms. Singleton purchased a four-wheeler for $3,500 and spent $3,000 on a vacation in Hot Springs, the balance of her expenditures, identified by her ex-husband as "non-essential items," included a $14,500 car for the parties' daughter, $2,100 for insurance, payment on medical bills and a new washing machine. With the exception of the washing machine, all of these purchases were undisputedly made while the parties were living together as husband and wife. I cannot understand why the majority would conclude that equity would not compel a more favorable distribution of the marital assets to Ms. Singleton where her ex-husband took from her personal-injury settlement a thirty-two-foot travel trailer; a pick-up truck; a *second* stainless steel barbecue grill; fishing equipment; and a ski boat, trailer and motor; particularly where there was unrebutted testi-

mony that the marriage broke down due in large part to appellee's use of illegal drugs. Today's majority opinion establishes what I have labeled the "doctrine of worthier toys," i.e., that a washing machine for a household that contains three teenagers is "nonessential" and, by implication, it is somehow "essential" for a single man to have a thirty-two-foot travel trailer and ski boat. By the majority's reckoning, equity has a new face.

Lastly, and most importantly, the biggest problem with the majority's opinion is that it is simply too myopic. Because this is an equity case, we are afforded significant latitude in how we dispose of a case on review. It is not the all-or-nothing situation that the majority seems to believe. On de novo review of a fully developed record in an equity case, where we can plainly see where the equities lie, we may enter the order that the trial judge should have entered. *See White v. White*, 50 Ark. App. 240, 905 S.W.2d 485 (1995). I submit that the trial judge was largely correct, opining that Ms. Singleton should remain in the home that was purchased with the proceeds of her personal-injury settlement. I disagree only with the length of time that she should be allowed to stay. While it is certainly in the best interest of the children to allow them to spend the rest of their minority in their new home, this decision ignores the fact that, given her health problems, in seven years Ms. Singleton will be less able to achieve even the modest standard of living she enjoyed in her sixteen-year marriage. I would therefore affirm this case as modified, leaving Ms. Singleton in possession of the house for the rest of her life, not merely until her duties as a mother and primary caretaker of the parties' minor children are considered at an end by this court.

Larry PROCK *v.* SOUTHERN FARM BUREAU CASUALTY INSURANCE CO.

CA 06-1391 260 S.W.3d 737

Court of Appeals of Arkansas
Opinion delivered August 29, 2007

Osborne & Baker, by: *Ken Osborne*, for appellant.

Laser Law Firm, by: *Alfred F. Angulo, Jr.* and *Brian A. Brown*, for appellee.

WENDELL L. GRIFFEN, Judge. On September 12, 2006, the Washington County Circuit Court granted Southern Farm Bureau Casualty Insurance Company's ("Farm Bureau") motion for summary judgment and denied Larry Prock's motion for summary judgment, based on a finding that there was no coverage afforded to Linda Dobbs for the claims made against her by Prock. Prock appeals, contending that the circuit court erroneously found that he was a member of Dobbs's family, thereby excluding him from coverage. We hold that Prock was a member of Dobbs's family under the terms of Farm Bureau's automobile liability insurance policy. Therefore, the circuit court properly granted summary judgment, and we affirm.

On June 10, 2005, Prock filed a complaint against Dobbs, alleging that he was a passenger in her automobile when she was involved in an accident on Highway 62 in Washington County. Prock was living with Dobbs on the day of the accident, and Prock is married to Dobbs's cousin. In other words, Prock is Dobbs's "cousin-in-law." On March 16, 2006, Farm Bureau, Dobbs's liability-insurance carrier, filed a complaint for declaratory judgment, alleging that it owed no coverage for Prock's claim against Dobbs and that it had no duty to defend claims and suits arising out of the accident. In its complaint, Farm Bureau relied on a provision in the policy that excluded from coverage "bodily injury sustained by you or any member of your family residing in your household" (emphasis in original omitted). Farm Bureau and Prock filed cross-motions for summary judgment.[1] The parties had a hearing on their motions on August 30, 2006. The circuit court, relying on *Smith v. Southern Farm Bureau Casualty Insurance Co.*, 353 Ark. 188, 114 S.W.3d 205 (2003), found that Prock was a family member residing in Dobbs's household and granted Farm Bureau's motion for summary judgment. This finding was incorporated into an order entered September 12, 2006, and Prock filed a timely notice of appeal.

Summary judgment should be granted only when there are clearly no genuine issues of material fact to be litigated and the moving party is entitled to judgment as a matter of law. *Riverdale Dev. Co. v. Ruffin Bldg. Sys. Inc.*, 356 Ark. 90, 146 S.W.3d 852 (2004). The burden of sustaining a motion for summary judgment is the responsibility of the moving party. *Pugh v. Griggs*, 327 Ark. 577, 940 S.W.2d 445 (1997). Normally, this court determines if summary judgment was appropriate based on whether the evidence presented by the moving party in support of its motion leaves a material fact unanswered, viewing the evidence in the light most favorable to the nonmoving party, and resolving all doubts and inferences against the moving party. *George v. Jefferson Hosp. Ass'n, Inc.*, 337 Ark. 206, 987 S.W.2d 710 (1999); *Adams v. Arthur*, 333 Ark. 53, 969 S.W.2d 598 (1998). However, when there is no dispute on the relevant facts, a court needs only to determine whether the moving party was entitled to judgment as

[1] Dobbs was also named as a separate defendant in Farm Bureau's complaint for declaratory judgment, and she participated in the proceedings below, including filing a motion for summary judgment. She is not participating in this appeal.

a matter of law. *Southern Farm Bureau Cas. Ins. Co. v. Craven*, 79 Ark. App. 423, 89 S.W.3d 369 (2002).

The sole issue here is whether a cousin-in-law can be considered a "family member" under the terms of Farm Bureau's liability coverage. If the answer is in the affirmative, then Farm Bureau owes no coverage for Prock's claim against Dobbs, and the circuit court properly granted Farm Bureau's motion for summary judgment. If a cousin-in-law is not considered a "family member" under the terms of the policy, then the circuit court erroneously granted Farm Bureau's motion for summary judgment.

The Arkansas Supreme Court addressed the issue of the definition of "family member" in *Smith, supra.* At issue was whether the appellant, then-girlfriend of the insured, was included in the phrase "any member of your family residing in your household." The supreme court began its analysis by noting familiar maxims in interpreting insurance policies in Arkansas:

> Ambiguous terms within an insurance policy should be construed against the insurer. However, we also held that "the terms of an insurance contract are not to be rewritten under the rule of strict construction against the company issuing it so as to bind the insurer to a risk which is plainly excluded and for which it was not paid." Insurance contracts are to be construed strictly against the insurer, but where language is unambiguous, and only one reasonable interpretation is possible, it is the duty of the courts to give effect to the plain wording of the policy. Our court of appeals has expanded on this language and stated that the "language of an insurance policy is to be construed in its plain, ordinary, and popular sense."
>
> . . . .
>
> We have established as a guideline of contract interpretation that the different clauses of a contract must be read together and that the contract should be construed so that all parts harmonize. Construction that neutralizes any provision of a contract should never be adopted if the contract can be construed to give effect to all provisions.

Smith, 353 Ark. at 192, 114 S.W.3d at 206-07 (citations omitted).

The supreme court then relied on a case from the Washington Court of Appeals, *Matthews v. Penn-America Ins. Co.*, 106 Wash. App. 745, 25 P.3d 451 (2001), and stated that one could not

construe the word "family" to mean anything other than a relationship by blood or by law, else the terms "family" and "household" would merge and render the word "family" in the phrase "you or any member of your family residing in your household" redundant and meaningless. *Smith*, 353 Ark. at 193, 114 S.W.3d at 207. The supreme court concluded by holding that the term "family" meant "kin, by blood, marriage, or adoption." *Id.* at 194, 114 S.W.3d at 208. As a result, it held that the appellant was not a family member of the insured and affirmed the circuit court's grant of summary judgment in favor of the insurance company.

Therefore, under Arkansas law, a family member for the purposes of an insurance policy is one's "kin, by blood, marriage, or adoption." In arguing that a cousin-in-law does not qualify as one's "family member," Prock argues that if this court were to expand the definition of "family member" to include a cousin-in-law, one might run into the problem of "the implausible definition of family relation into the biblical sense tracking back to Adam & Eve." He also argues that the common parlance associated with a relative connected by blood or marriage does not include a cousin-in-law and concludes that a jury should decide whether "family" includes a cousin-in-law. However, the supreme court has already declared the term "family member" to be an unambiguous term. Therefore, as a matter of law, no jury question is presented. It is up to the court, not the jury, to determine whether a cousin-in-law is a family member.[2]

Cases from other jurisdictions, many of which Farm Bureau cites, are helpful.[3] For example, a Missouri court held that a cousin was unambiguously a "member of the family of the insured." *State Farm Mut. Auto. Ins. Co. v. McBride*, 489 S.W.2d 229 (Mo. Ct. App. 1972). Other jurisdictions have held that in-laws are "relatives" under insurance policies. *See Vernatter v. Allstate Ins. Co.*, 362 F.2d 403 (4th Cir. 1966) (uncle-in-law); *Aji v. Allstate Ins. Co.*, 416 So. 2d 1225 (Fla. Dist. Ct. App. 1982) (brother-in-law); *Liprie v. Michigan Millers Mut. Ins. Co.*, 143 So. 2d 597 (La. Ct. App. 1962)

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[2] Prock also relies on the dissenting opinion in *Smith* to argue that the definition of family is a question of material fact that a jury should decide. However, it should go without saying that this court is bound by the majority opinion in *Smith*, not the dissenting opinion.

[3] For an interesting discussion, *see* David B. Harrison, Annotation, *Who Is "Resident" or "Member" of the Same "Household" or "Family" as Named Insured, Within Liability Insurance Provision Defining Additional Insureds*, 93 A.L.R.3d 420 (1979).

(daughter-in-law); *Great America Ins. Co. v. Curl*, 181 N.E.2d 916 (Ohio Ct. App. 1961) (mother-in-law). Stepchildren also have been considered "relatives." *See Sigel v. New Jersey Mfrs. Ins. Co.*, 328 N.J. Super. 293, 745 A.2d 602 (App. Div. 2000). *But see Ledford v. State Farm Mut. Auto. Ins. Co.*, 189 Ga. App. 866, 377 S.E.2d 693 (1989) (holding that the term "relative" does not extend to foster children); *State Farm Mut. Auto. Ins. Co. v. Byrne*, 156 Ill. App. 3d 1098, 510 N.E.2d 131 (1987) (insured's stepmother's brother not a relative); *Frost ex rel. Anderson v. Whitbeck*, 257 Wis. 2d 80, 654 N.W.2d 225 (2002) (third cousin not a relative).[4]

We hold that a "cousin-in-law" is a "family member" under the terms of Farm Bureau's insurance policy. While none of the aforementioned cases are directly on point, the closest cases are those involving in-laws, which have been considered "relatives" in other jurisdictions. Particularly persuasive is *Vernatter*, which held that an uncle-in-law was a member of the family. The child of an uncle-in-law would be a cousin-in-law; therefore, it follows that a cousin-in-law is also family.

Because a cousin-in-law is a family member, the circuit court properly granted summary judgment to Farm Bureau, as Prock and Dobbs are "family members." Accordingly, we affirm.

Affirmed.

GLADWIN and VAUGHT, JJ., agree.

[4] However, the Wisconsin court held that the term "relative" was ambiguous. This is contrary to Arkansas law as announced in *Smith*, which held that "family member" was unambiguous.

David BRISTOW and Cliff Ferren *v.*
Randy MOUROT

CA 06-1419 260 S.W.3d 733

Court of Appeals of Arkansas
Opinion delivered August 29, 2007

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Dover Dixon Horne, PLLC, by: *Thomas S. Stone* and *Nona M. Robinson*, for appellants.

Friday, Eldredge & Clark, LLP, by: *Kevin A. Crass* and *Jamie Huffman Jones*, for appellee Randall Mourot.

DAVID M. GLOVER, Judge. The trial court, sitting as fact-finder, ruled that appellee Randy Mourot did not violate the Arkansas Securities Act and therefore owed no damages to appellants. We affirm.[1]

In 1997, Mourot decided to sell his company, Mail Contractors of America. He asked several members of his management team, including appellants, to assist him with presentations for prospective buyers. In return, he promised them a "transaction bonus" equivalent to a year's salary when the company sold.

After several presentations were made, Mourot decided to sell to Code, Hennessey, & Simmons, a Chicago company. He told his managers that Code Hennessey wanted to maintain continuity of management and that key management personnel would have the opportunity to invest in the company. In early 1998, representatives from Code Hennessey came to Arkansas to discuss the investment opportunity. Attendees, including appellants, were informed that they could invest in a holding company, Contract Mail Holding, Inc. (CMH) and that they could obtain personal loans from CMH. Code Hennessey representatives answered questions about the investment and, although Mourot attended the meeting, he did not say much, according to appellant Ferren.

After the meeting, Mourot wrote a memo to his managers and addressed them as "Potential Equity Investors." The memo stated that he had asked attorney Paul Bishop, who was representing him in the sale of the company, to review the investment and loan documents on the managers' behalf, although the managers were free to have their personal attorneys review the documents. The memo also addressed a tax question and a loan question regarding the managers' investments; answered two questions about the managers' transaction bonuses; and stated the following:

> I need to know your plans for investing by the end of this week or sooner if you can. I need to know:
>
> — Dollar amount of investment
>
> — Loan Amount (max of 50% of investment amount)

[1] This case was previously dismissed for lack of an appealable order. *Bristow v. Mourot*, CA06-153 (Oct. 4, 2006) (not designated for publication). Appellants have now obtained a final order, giving us jurisdiction to address the merits.

— Actual name investment to be held in (for example mine: Randall G. Mourot)

— Whether to withhold 401(k) percentage from transaction bonus or not

— Amount to be withheld for Federal and State taxes

Appellants provided this information to Mourot, who said he passed it along to Bishop.

After the memo was written, appellants and other members of the management team met with attorney Bishop. There is no indication that Mourot was present at this meeting. Bishop informed the managers of the minimum terms they could expect to receive for their investments, and he promised to try to negotiate better terms from Code Hennessey. As a result of those negotiations, appellant Bristow agreed to invest $75,000 in CMH, and appellant Ferren agreed to invest $40,000. They planned to use their transaction bonuses from Mourot to pay for most if not all of their investments. However, because they would not obtain those bonuses until the sale closed, Mourot agreed to provide them with short-term loans. Therefore, appellants made their investment checks out to Mourot, who purchased the CMH stock for them.

After the sale closed on March 20, 1998, appellants were employed by CMH and apparently made additional investments in the company. However, they were fired in 2000. When they inquired about the return of their investments, CMH sent a check for $18,567.29 to Bristow and $955 to Ferren, despite the fact that Bristow had invested $123,756 and Ferren $93,643.24. As a result, appellants sued CMH for violating the Arkansas Securities Act.[2] They also sued Mourot, claiming that he acted as CMH's agent in selling the investments. CMH consented to judgment in the above amounts, but the case against Mourot went to trial. The sole issue was whether he was liable under the Arkansas Securities Act as an agent who materially aided in the sale of the investments. The circuit judge, after hearing testimony and receiving trial briefs, entered judgment in favor of Mourot. Appellants now appeal from that ruling.

Our standard of review is well established. In an appeal from a bench trial, we do not reverse unless the trial court's finding is clearly erroneous. *First Nat'l Bank v. Garner*, 86 Ark. App. 213, 167

[2] Other causes of action were pled but dismissed.

S.W.3d 664 (2004). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed. *Id.*

Generally, with exceptions not applicable here, an agent who materially aids in the sale of a security is jointly and severally liable with, and to the same extent as, the seller. Ark. Code Ann. § 23-42-106(c) (Repl. 2000). An "agent," for our purposes, is any individual who represents a securities issuer in effecting or attempting to effect the sale of securities. Ark. Code Ann. § 23-42-102(1)(A) (Supp. 2005).[3] The question of whether a representative materially aids in the sale of a security is one of fact, the resolution of which depends, to some extent, on inferences drawn from the testimony. *See Hogg v. Jerry*, 299 Ark. 283, 773 S.W.2d 84 (1989).

Appellants contend that several aspects of Mourot's behavior constitute "overwhelming evidence" that he acted as an agent for CMH and materially aided in the sale of CMH securities. Some of the activities that they attribute to Mourot include: 1) aiding in arranging a meeting of potential investors and selecting potential investors; 2) answering questions about the investments and asking potential investors to inform him about their decision to invest; 3) providing the potential investors with an attorney; 4) facilitating the investments by use of the transaction bonus; 5) having a strong incentive to facilitate the investments in order to close his sale of the company.

Under the facts of this case, we are not left with a definite and firm conviction that the trial court erred. While Mourot undisputedly passed along information to appellants and answered questions about their investments, he denied that he was acting on behalf of CMH, and he testified that his actions were taken because appellants and the other investors were his friends and employees. Further, while Mourot informed his managers that they would have the opportunity to invest in CMH and that Code Hennessey was "coming down" for the investment meeting, there is no proof that Mourot actively participated in the meeting. *See Titan Oil & Gas Co. v. Shipley*, 257 Ark. 278, 517 S.W.2d 210 (1974) (affirming the trial court's finding that a person who provided an investor with a prospectus and attended an investors'

[3] We have cited to the most recent versions of these statutes, but they are the same in all relevant respects as they were in 1997-98 when the sales in this case were taking place.

meeting but did not participate was not liable as an agent for the issuer). Likewise, Mourot's answering questions about the investments, gathering information, and offering the services of his attorney can be attributed, as he testified, to his close business and personal relationship with his managers rather than an agency relationship with CMH. Moreover, there is no direct evidence that Code Hennessey or CMH had asked Mourot to act on their behalf or that Mourot received any direct compensation from CMH for acquiring or encouraging the investors.[4] In fact, Mourot testified that he and his managers were friends and "a close-knit group" and that he was engaged in "contentious negotiations" with CMH up to the time of closing, lending credence to the idea that he was not acting on CMH's behalf.

As for appellants' claim that Mourot "chose" the investors, the evidence is in conflict on that point. The investors' booklet stated that CMH would offer securities to members of senior management "selected by Randall Mourot . . . and [Code Hennessey]." However, Mourot said his task was merely to identify his managers to Code Hennessey. Conflicts in testimony are to be resolved by the trier of fact. *McNamara v. Bohn*, 69 Ark. App. 337, 13 S.W.3d 185 (2000).

Finally, even though Mourot facilitated appellants' investment by use of the transaction bonuses, it is undisputed that he did not earmark the transaction bonuses for use as an investment in CMH. The bonuses were promised before Code Hennessey was selected as a buyer, and Mourot testified that the bonuses could be used as the recipient wished. Later, when the investors decided to use their bonuses to invest in CMH, a timing problem arose because they would not receive their bonus until the sale closed. There was evidence that Mourot and attorney Bishop came up with the idea to make a short-term "handshake" loan to the investors to allow them to make their investments. As before, it could reasonably be inferred that Mourot was acting in his own interest and in the interest of his managers but not necessarily as a representative of CMH.

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[4] This distinguishes the present case from *Segal v. Goodman*, 115 N.M. 349, 851 P.2d 471 (1993), and *Boland v. Hammond*, 144 Ohio App. 3d 89, 759 N.E.2d 789 (2001), cited by appellants.

Appellants rely on *Quick v. Woody*, 295 Ark. 168, 747 S.W.2d 108 (1988), and *Hogg v. Jerry*, *supra*, for their claim that Mourot was an agent of CMH. In *Quick*, Gary Quick began offering securities for sale. His mother, Hazel Quick, participated in a promotional meeting by making comments about what to expect from the investment, and she asked potential investors at the meeting to let her and Gary know of others that might be interested. Hazel also made a similar comment while handing out a business card with her name on it. Further, Hazel encouraged another person to invest and provided her with a prospectus containing the statement "remit to Hazel Quick." Hazel accepted a check from another investor and indicated to him that she was handling Gary's interests in Arkansas. The trial court found that Hazel was an agent who materially aided in the sale of securities and, on appeal, our supreme court affirmed, ruling that the trial court's finding was not clearly erroneous.

In *Hogg*, the trial court ruled that Nolan Haines was an agent who materially aided in a securities sale. The supreme court affirmed, stating that Haines "admitted" in his deposition that he materially aided in the sale and that he "helped to get" one investor. There was also evidence that Haines provided the investor with a prospectus and promoted the investor's participation in the venture.

The outcomes in *Quick* and *Hogg* do not require reversal here. First of all, in those cases, our supreme court affirmed the trial courts' findings. The supreme court did not state that, as a matter of law, the activities in those cases amounted to materially aiding in the sale of securities but held that the trial court's ruling, based on those activities, could not be said to be clearly erroneous. Moreover, we do not believe that Mourot's conduct in this case rose to the level of overt promotion engaged in by Hazel Quick and Nolan Haines. Unlike the defendants in those cases, Mourot's actions could be viewed as an attempt to help his employees and investors rather than "representing" CMH.

For these reasons, we affirm the trial court's ruling.

Affirmed.

ROBBINS and BAKER, JJ., agree.

Matthew STURDIVANT *v.* ARKANSAS DEPARTMENT of HEALTH & HUMAN SERVICES

CA 07-38 260 S.W.3d 763

Court of Appeals of Arkansas
Opinion delivered August 29, 2007

Morgan Law Firm, by: *M. Edward Morgan*, for appellant.

Gray Allen Turner, Dep't of Human Servs., Office of Chief Counsel, for appellee.

LARRY D. VAUGHT, Judge. After Matthew Sturdivant had sexual contact with a minor, his name was placed on the Child Maltreatment Central Registry. The placement decision was upheld after being reviewed by an administrative law judge and again on appeal to the Van Buren County Circuit Court. Sturdivant now appeals to us. He claims that the trial court erroneously failed to consider an affirmative defense and refused to apply the doctrine of collateral estoppel. We find no error and affirm the judgment of the circuit court.

The facts of this case are undisputed. On July 7, 2004, a complaint of sexual contact between Sturdivant and his minor girlfriend, A.H., was received by the Department of Health and Human Services. Sturdivant, who was nineteen at the time of the incident, admitted to having sexual intercourse with A.H., who was thirteen years and eight months old. Based on Sturdivant's admission, investigators from DHHS's Crimes Against Children Division determined the complaint to be "true," and Sturdivant's name was placed on the Child Maltreatment Central Registry. Subsequently, Sturdivant was also charged with two counts of statutory rape. Sturdivant filed an administrative appeal with DHHS, arguing that his name should be removed from the registry; however, his administrative appeal hearing was stayed pending the outcome of the criminal proceeding.

The criminal charges were tried before a jury on February 15, 2005. At trial, Sturdivant presented an affirmative defense arguing that he reasonably believed A.H. to be older than the critical age of fourteen. *See* Ark. Code Ann. § 5-14-102(c)(1)

(Repl. 2005).[1] The jury returned a verdict finding Sturdivant "not guilty" of rape based on his affirmative defense.

Following trial, on May 12, 2005, the administrative appeal regarding Sturdivant's placement on the registry was heard. The ALJ determined that Sturdivant's name "shall remain" on the registry because the affirmative defense raised by appellant was not applicable to the Child Maltreatment Act. The ALJ further concluded that Sturdivant's actions satisfied the elements of sexual abuse and ordered that his name remain on the registry. Sturdivant appealed the ALJ's decision to circuit court. After considering Sturdivant's affirmative defense and estoppel arguments, the circuit court ordered that his name remain on the registry. It is from this decision that Sturdivant appeals.

Our review of administrative agency decisions is limited in scope. *Ark. Dep't of Human Servs. v. Bixler*, 364 Ark. 292, 210 S.W.3d 135 (2005). The standard of review to be used by both circuit and appellate courts is whether there is substantial evidence to support the agency's finding. *Id.*, 210 S.W.3d 135. Thus, the review by an appellate court is directed not to the decision of the circuit court but rather to the decision of the administrative agency. *Id.*, 210 S.W.3d 135. The challenging party has the burden of proving an absence of substantial evidence and must demonstrate that the proof before the administrative agency was so nearly undisputed that fair-minded persons could not have reached its conclusion. *Id.*, 210 S.W.3d 135. The question is not whether the evidence would have supported a contrary finding, but rather whether it supports the finding that was made. *Id.*, 210 S.W.3d 135. Because administrative agencies are better equipped than courts, by specialization, experience, and more flexible procedures, to determine and analyze underlying legal issues affecting their agencies, a court may not substitute its judgment and discretion for that of the administrative agency. *Id.*, 210 S.W.3d 135.

For his first point on appeal, Sturdivant argues that he was wrongly denied the benefit of his affirmative defense in his administrative hearing. On August 12, 2005, Act 1705 went into effect, which amended the Child Maltreatment Code to allow the

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[1] This statute provides that "[w]hen the criminality of conduct depends on a child's being below the age of fourteen (14) years and the actor is under the age of twenty (20) years, it is an affirmative defense that the actor reasonably believed the child to be of the critical age or above." Ark. Code Ann. § 5-14-102(c)(1).

application of affirmative defenses to maltreatment proceedings.[2] But Sturdivant's case was decided on May 23, 2005, less than a month before the amendment went into effect (and the sexual contact occurred more than a year before the act went into effect). In accordance with the canons of statutory interpretation, unless a statute expressly states otherwise, it is presumed that the legislature intends for it to apply prospectively or on the date of its enactment. *Dickenson v. Fletcher*, 361 Ark. 244, 206 S.W.3d 229 (2005). However, our supreme court has determined that procedural and remedial legislation is appropriately applied retroactively because these changes do not disturb vested rights or create new obligations. *Id.*, 206 S.W.3d 229.

Based on this exception to the general rule, Sturdivant argues that because Act 1705 is both procedural and remedial legislation it should be applied retroactively. We disagree. Strict statutory construction is waived only if a statute provides new or more appropriate remedies to enforce existing rights or obligations. *Id.*, 206 S.W.3d 229. The right to raise offenses or affirmative defenses in maltreatment proceedings did not exist prior to the enactment of Act 1705 — the statute created a *new* right. Therefore, the circuit court correctly refused to apply Act 1705 retroactively to Sturdivant's administrative proceeding and correctly denied him the benefit of his affirmative defense.

Further, even if Sturdivant were allowed the benefit of the affirmative defense he successfully offered in his criminal proceeding, substantial evidence remains to support a finding that his name should remain on the registry. Indeed, the registry applies to persons who have sexually maltreated children under sixteen years of age. At his criminal trial, Sturdivant merely proved that he reasonably believed A.H. to be at least fourteen years old. Thus, the possibility was left open that he knew she was fourteen or fifteen at the time of sexual contact.

Lastly, Sturdivant argues that because he was acquitted of rape in his criminal proceeding, DHHS was collaterally estopped from listing his name on the registry. However, the

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[2] Act 1705, which was codified at Ark. Code Ann. § 12-12-512 (2)(A)(1)(ii)(b) (Repl. 2005), reads: For any act or omission of maltreatment [that] would be a criminal offense or an act of delinquency, any offense or affirmative defense that would be applicable to the criminal offense or delinquent act is also cognizable in a maltreatment proceeding.

doctrine of collateral estoppel only bars the re-litigation of issues that have already been decided. *Ark. Dep't of Human Servs. v. Dearman*, 40 Ark. App. 63, 842 S.W.2d 449 (1992). The issue in Sturdivant's criminal trial was whether he committed statutory rape. In his administrative hearing, the issue was whether he sexually abused a minor. As discussed previously, these offenses have different age thresholds. Additionally, the burden of proof in a criminal proceeding is beyond a reasonable doubt, whereas the burden of proof in an administrative proceeding is preponderance of the evidence. As such, Sturdivant's success in his criminal proceeding has no bearing on the administrative determination, and the circuit court correctly refused to apply the doctrine of collateral estoppel.

Affirmed.

GLADWIN and GRIFFEN, JJ., agree.

Tommy L. GULLAHORN *v.* Gail A. GULLAHORN

CA 06-1258 260 S.W.3d 744

Court of Appeals of Arkansas
Opinion delivered August 29, 2007

Stuart Vess, for appellant.

Mitchell, Blackstock, Barnes, Wagoner, Ivers and Sneddon, PLLC, by: *Greg Alagood*, for appellee.

KAREN R. BAKER, Judge. Appellant challenges the trial court's modification of visitation asserting that the trial court erred in failing to transfer jurisdiction to the State of Texas where he and the minor child had resided since 2002. Although appellant challenged the Arkansas court's jurisdiction under the Uniform Child Custody & Jurisdiction Enforcement Act (UCCJEA) and requested a transfer to the courts of Texas, the trial court denied the request under the premise that it was compelled to retain jurisdiction as long as either party continued to live in the State of Arkansas. The trial court was wrong as a matter of law that it was required to retain jurisdiction based solely upon one parent's continued residence in the state. Applying this mistaken premise, the court erred when it failed to exercise its discretion to determine whether it should exercise, or decline to exercise, jurisdiction.

Appellant and appellee were divorced in Pulaski County in 1999 and have one child. At the time of the divorce, appellee was granted custody. Thereafter, the parties agreed that appellant would have full custody, and he and the child moved to Texas where he and the child have lived since 2002. In 2006, appellee filed for change of custody, but then withdrew her request and instead asked for an increase in visitation. After denying appellant's jurisdictional challenge, the trial court entered an order modifying visitation.

Our standard of review in this case is de novo, although we will not reverse a finding of fact by the circuit court unless it is clearly erroneous. *See Arkansas Dep't of Human Servs. v. Cox*, 349

Ark. 205, 82 S.W.3d 806 (2002). The UCCJEA is the exclusive method for determining the proper state for jurisdictional purposes in child-custody proceedings that involve other jurisdictions. *See Greenhough v. Goforth*, 354 Ark. 502, 126 S.W.3d 345 (2003). One of the purposes behind the UCCJEA is to avoid relitigation of child-custody determinations in other states. *See Arkansas Dep't of Human Servs. v. Cox, supra.* The specific section of the UCCJEA at issue in the instant case provides in pertinent part:

> (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:
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> (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; or
>
> (2) a court of this state or a court of another state determines that the child, the child's parents, and any person acting as a parent do not presently reside in this state.

Ark. Code Ann. § 9-19-202(a) (Repl. 2002).

In the instant case, the divorce decree indicates that the Arkansas trial court entered the parties' initial divorce decree and award of custody. Thus, the Arkansas court had exclusive, continuing jurisdiction over the child-custody determination until the court made either of the two determinations set forth in § 9-19-202(a). *See West v. West*, 364 Ark. 73, 216 S.W.3d 557 (2005). In that context, the trial court had jurisdiction to make findings regarding the residency of the parties and whether substantial evidence regarding the best interest of the child was no longer available in this state. The allegations before the trial court indicates that factual determinations affecting the propriety of the Arkansas court's continued jurisdiction should be made. Paragraph 4 of the ex parte motion for temporary change of custody identified the residence of the father and son as McKinney, Texas. The emergency nature of the petition involved the child's psychological condition. The petition identified medical evidence available in Arkansas through the Dennis Development Center, UAMS, in Little Rock, Arkansas, in the form of an opinion based upon an

evaluation performed by a key witness in Texas. The response to the motion identified evaluations of the child conducted in Texas, and other witnesses regarding the child's behavior.

In its order retaining jurisdiction filed February 13, 2006, the trial court noted that it has continuing jurisdiction over the matter unless and until it was determined that there is a more appropriate forum on the basis of Arkansas being an inconvenient forum or otherwise. However, from the bench, the trial judge expressed his belief that he would be reversed if he transferred the case to Texas because the law of this state required him to retain jurisdiction as long as one parent to the divorce action and to the original custody order remains in this state. The trial court's statement of the law is incorrect. The trial court has discretion to exercise, or decline to exercise, jurisdiction and the erroneous failure of a trial court to exercise its discretion is reversible error. *Acklin v. State*, 270 Ark. 879, 606 S.W.2d 594 (1980); *Gould & Co. v. Tatum*, 21 Ark. 329 (1860). The failure to exercise its discretion resulted in no findings regarding the extent or significance of the connections with the state.

Accordingly, we reverse and remand the matter for the trial court to properly exercise its discretion in a manner not inconsistent with this opinion.

GLADWIN, BIRD, MARSHALL and MILLER, JJ., agree.

VAUGHT, J., dissents.

LARRY D. VAUGHT, Judge, dissenting. I would affirm the decision of the trial court to maintain jurisdiction of this child-custody case in Arkansas, and therefore, I dissent. The facts and applicable standard of review are set out in the majority opinion. On this issue of jurisdiction, the trial court's order of February 13, 2006, states in paragraph four that "it has continuing jurisdiction over this matter unless and until it were determined that there is a more appropriate forum on the basis of Arkansas being an inconvenient forum or otherwise." The only other holding by the court on this issue is an oral pronouncement that it did not have authority to transfer the case to another state as long as at least one parent resided in Arkansas, unless both parties agreed to the transfer. This statement is held to be an error of law by the majority, and the basis for reversal.

The applicable section of the UCCJEA is Arkansas Code Annotated section § 9-19-202, which provides, in part:

> (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; or
>
> (2) a court of this state or a court of another state determines that the child, the child's parents, and any person acting as a parent do not presently reside in this state.

The trial court ruled that under the UCCJEA it had continuing jurisdiction of the case, so long as at least one of the parents lived in Arkansas, and that it had no authority to transfer the case. While there is no further analysis by the court in the record, it appears that it was relying on subsection (a)(2) of the above statute in making the ruling. I believe the wording of that subsection supports the trial court's conclusion. The wording of subsection (a)(2) uses the conjunction "and," indicating that in order to lose its exclusive, continuing jurisdiction the trial court must determine that the child, the child's parents, *and* any person acting as a parent do not reside in the state. Because it was established that the mother resided in Arkansas, the court correctly held that Arkansas had continuing jurisdiction.

The majority relies on subsection (a)(1), holding that there are no findings to support a conclusion that there are significant connections with this state. However, even if this subsection does apply, I believe that the record in this case supports the existence of significant connections, and we may affirm under our de novo review by concluding that a preponderance of the evidence supports the conclusion. *See Hamilton v. Barrett*, 337 Ark. 460, 989 S.W.2d 520 (1999).

This case is very similar to *West v. West*, 364 Ark. 73, 216 S.W.3d 557 (2005), where our supreme court held that Arkansas retained jurisdiction even though the mother and her children had lived in Oregon the last few years. The court held that the children

had significant connections with Arkansas because the father still lived in Arkansas, and the children spent 20-25% of their time with him in Arkansas.

I would affirm under either subsection (a)(1) or (a)(2) of Arkansas Code Annotated section 9-19-202.

Glee Alan BURT & Elizabeth Burt *v.*
ARKANSAS DEPARTMENT OF HEALTH
& HUMAN SERVICES

CA 06-1088 261 S.W.3d 468

Court of Appeals of Arkansas
Opinion delivered September 5, 2007

Larry J. Steele, for appellants.

Gray Allen Turner, Dep't of Human Servs., Office of Chief Counsel, for appellee.

Kendall A.J. Sample, attorney ad litem.

SAM BIRD, Judge. Elizabeth and Glee Alan Burt appeal the Pulaski County Circuit Court's denial of their motion to intervene in adoption proceedings of their grandchildren, the natural-born children of their daughter, Jennifer Burt. Because Jennifer Burt's parental rights were terminated on February 27, 2002, and upheld on appeal by mandate of this court on May 21, 2003, we affirm the circuit court's denial of appellants' motion to intervene.

The children who are the subject of appellants' motion to intervene are J.B., born on March 16, 1992; M.B., born on February 19, 1993; and G.B., born on March 18, 1994. J.B. and M.B. are presently in the custody of the Arkansas Department of Health and Human Services (DHHS), and G.B. has already been adopted. This case began when the children were placed in foster care by DHHS in August 2000. The record reflects that, before they were placed in foster care, they periodically lived in the home of appellants. We note, however, that the record contains no evidence that appellants had ever been granted court-ordered custody, guardianship, or visitation rights.

At a permanency-planning-and-review hearing held on August 23, 2001, the circuit court changed the goal of the case from reunification with Jennifer Burt, the children's mother, to adoption. Subsequently, on November 2, 2001, appellants filed their first motion to intervene to obtain custody of the children. The circuit court denied the motion on November 20, 2001, finding that permissive intervention pursuant to Ark. R. Civ. P. 24 was not applicable because there were other avenues open to appellants to address their request. The circuit court mentioned that one

avenue was to request DHHS to perform a home study for possible placement of the children in their home, which the court noted had already been ordered at a hearing on June 14, 2001.

The home study, which was performed on September 28, 2001, indicated that appellants' two-bedroom, one-bath home was very small and inadequate to accommodate all of Jennifer Burt's children.[1] The preparer of the home study also opined that, in order for appellants' home to be considered, the home would need to be child-proofed, appellants' work schedules would need to be changed to allow for supervision of the children, and appellants would need parenting classes. At some point before the circuit court terminated Ms. Burt's parental rights, the court determined that it was contrary to the best interest of the children to be placed in appellants' custody, concluding that the children had suffered neglect, inadequate supervision, and inadequate parenting when they lived with appellants.[2] On February 27, 2002, the circuit court terminated Jennifer Burt's parental rights to J.B., M.B., and G.B.

Four years later, on February 14, 2006, appellants filed a second motion to intervene, claiming that they "desire[d] to have the minor children reside in their home permanently" and alleging that they had been denied the right to a hearing on this issue. The circuit court denied appellants' motion, stating that the parental rights of the mother had been terminated, that the court had already determined that it was contrary to the best interest of the children to be placed with appellants, and that the court had issued two no-contact orders, which remained in full force and effect, restraining appellants from having contact with the children. Appellants filed this appeal.

There are two means by which a non-party may intervene in a lawsuit: as a matter of right and by permission. The former cannot be denied, but the latter is discretionary, the denial of which will be reversed only if that discretion is abused. *Schacht v.*

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[1] The home study stated that appellants' home was being considered for placement of seven of Jennifer Burt's children. The record on appeal does not indicate the disposition of the case for the four children who are not the subject of this appeal.

[2] We note that appellants did not provide sufficient parts of the record to enable us to review the order or transcript making this determination, but the circuit court stated in its denial of appellants' second motion to intervene, the subject of this appeal, that this determination was made.

Garner, 281 Ark. 45, 46, 661 S.W.2d 361, 362 (1983). Rule 24(c) sets forth the method for requesting intervention and requires the party seeking intervention to serve a motion stating the grounds therefor accompanied by a pleading setting forth the claim or defense for which intervention is being sought. Ark. R. Civ. P. 24(c).

Appellants did not indicate in either of their motions to intervene whether they were asserting intervention as a matter of right or by permission. Nor did they accompany their motions with a pleading suggesting that they were seeking intervention as a matter of right. We will not make their case for them. Therefore, we will treat the motion as one for intervention by permission and will reverse the circuit court's denial of their motion only if the court abused its discretion. *See Ballard v. Garrett*, 349 Ark. 371, 78 S.W.3d 73 (2002); *Schacht*, 281 Ark. at 46, 661 S.W.2d at 362. We note, however, that our disposition of this case would remain the same were we to treat their motion as requesting intervention as a matter of right.[3]

On appeal, appellants cite several statutes and cases to support their position that their motion for intervention should have been granted. All of these statutes and cases concern the rights of grandparents of children whose parents' rights have *not been terminated*. *See, e.g.*, Ark. Code Ann. § 9-28-503 (Repl. 2002) (requiring DHHS to attempt to place a child with a relative when placing the child in foster care); Ark. Code Ann. § 9-13-101 (Supp. 2005) (authorizing intervention by a grandparent in a custody proceeding of an action for divorce under certain defined circumstances); *Freeman v. Rushton*, 360 Ark. 445, 202 S.W.3d 485 (2005) (affirming circuit court's award of guardianship to maternal grandmother over biological father who had never been married to mother after death of mother where child had always lived with mother in home of maternal grandmother); *Hunt v. Perry*, 357 Ark. 224, 162 S.W.3d 891 (2004) (upholding maternal grandparent's right to visitation after her daughter's death in spite of father's attempt to terminate the visitation); *Crosser v. Henson*, 357 Ark. 635, 187 S.W.3d 848 (2004) (holding natural-parent preference was not absolute in modification-of-custody case where grandpar-

[3] *See Suster v. Ark. Dep't of Human Servs.*, 314 Ark. 92, 858 S.W.2d 122 (1993) (holding that grandparent whose child's parental rights were terminated had no recognized interest in adoption of grandchildren to warrant intervention as a matter of right).

ent had custody for previous five years by virtue of court-ordered guardianship before father filed petition for custody and termination of guardianship).

None of these statutes or cases is applicable to this case. Each presupposes that the grandparents are still grandparents. In other words, in each of these cases and statutes the parents' rights have not been terminated. Under Arkansas law, grandparents' rights, to the extent they have rights, are derivative of their son's or daughter's parental rights. *Suster v. Ark. Dep't of Human Servs.*, 314 Ark. 92, 93, 858 S.W.2d 122, 123 (1993). In *Vice v. Andrews*, 328 Ark. 573, 945 S.W.2d 914 (1997), an adopted child's paternal grandmother sought visitation rights after her son had already consented to the child's adoption by another person. The court in *Vice* held that, where a natural parent consents to the adoption of his or her child by another person, the consenting parent's relatives lose their legal right to visitation because such rights are derivative of the consenting parent's rights and likewise are terminated when the parent's rights are ended. *Id*; *see also Henry v. Buchanan*, 364 Ark. 485, 489-90, 221 S.W.3d 346, 349 (2006).

To the extent that appellants had any rights to custody of, or visitation with, these children, they lost them in 2002 when their daughter's parental rights were terminated. There is no evidence in the record that appellants have ever attempted to adopt these children. Finally, we note that the circuit court determined before it terminated Jennifer Burt's parental rights that it was contrary to the best interest of the children to be placed with appellants. In light of these facts and Arkansas law, we hold that the circuit court did not abuse its discretion in denying appellant's motion to intervene.

Affirmed.

MARSHALL and HEFFLEY, JJ., agree.

Phillip LINN *v.* Brenda Linn MILLER

CA 06-1479 261 S.W.3d 471

Court of Appeals of Arkansas
Opinion delivered September 5, 2007

James L. Bargar, for appellant.

Kent Tester, for appellee.

WENDELL L. GRIFFEN, Judge. Phillip Linn appeals from an order modifying a divorce decree. He argues that the trial court lacked jurisdiction to make the modifications. We agree and reverse and remand.

Factual and Procedural History

Phillip Linn and Brenda Linn Miller were divorced in 2004 after more than thirty years of marriage. Their property-settlement agreement divided, among other things, a 192-acre tract of land, with Phillip to receive 112 acres and Brenda to receive 80 acres. Other than these proportions, no particular manner of division was specified.

Later, a survey separated the tract into 80- and 112-acre parcels. Brenda's parcel was a reverse-L-shaped tract along the eastern side of the acreage. Phillip received the remainder of the land.[1] The manner in which the boundaries were drawn gave Phillip a strip of land across the top of Brenda's northern section. This prevented Brenda from accessing a public road just north of her parcel. However, Brenda did not discover this situation when viewing the survey. She therefore voiced no objection when a divorce decree was entered stating that the 192 acres "shall be" surveyed and divided into 80- and 112-acre parcels. (The trial court apparently was not aware that a survey had already taken place.)

The decree also provided that an $18,000 mortgage balance on the 192 acres would be prorated between the parties based on the amount of acreage each held. Thus, Brenda was responsible for 41.7% (80/192) of the mortgage payments and Phillip for 58.3% (112/192). Each party was to "assume all obligations pertaining to the real property in their name including any indebtedness . . . and . . . indemnify and hold the other harmless from same."

Thereafter, Brenda and Phillip disagreed over the enforcement of the decree, and the trial judge ordered them to mediation. This produced a Memorandum of Understanding that dealt, in part, with the 192 acres but did not change the division of the land or the parties' pro rata obligations on the mortgage. The parties did agree that each would be responsible for his or her own attorney fees and costs. The Memorandum was adopted in an amended divorce decree dated April 21, 2005. The decree stated that the court retained jurisdiction for "such further Orders as may from time to time be necessary for the enforcement of this Amended Decree of Divorce."

In late 2005, Brenda decided to sell ten acres of her eighty-acre tract. However, she was unable to do so because she could not obtain a partial release of the mortgage for the ten acres alone. To accomplish the sale, she paid off the entire mortgage balance on the 192 acres. Around this same time, she also discovered that the northern part of her property did not extend all the way to the public road. As a result, she filed a motion on November 17, 2005, asking the court to "clarify" the April 21, 2005 decree. She sought

[1] As surveyed, the tract was actually closer to 198 acres, which resulted in Brenda receiving 81.91 acres and Phillip receiving 115.86 acres.

ownership of or an easement in the northern part of the property to allow ingress and egress to the public road and asked the court to require Phillip to reimburse her $8124.04 for his share of the mortgage payoff. Phillip asserted that the trial court lacked jurisdiction to modify the decree and, in any case, that no modifications were necessary.

At the hearing on Brenda's motion, she testified that the mortgage on the 192 acres had a maturity date of 2021 and that during the marriage, she and Phillip made mortgage payments of $274 per month. However, in order to close her sale of the ten acres in 2005, she paid the entire $16,969.65 balance on the mortgage. She stated that, after receiving some money from Phillip, he owed her $8124.04 for his portion of the payoff. Brenda also testified that she saw the survey of the 192 acres around the time the original divorce decree was entered, but she did not "understand that kind of thing" and believed her property went all the way to the public road. She said that she learned she was "landlocked" when another survey was taken in 2005 in connection with her sale of the ten acres. On cross-examination, she testified that during the period that the court approved the property-settlement agreement and during the time that she and Phillip were in mediation, the question of what would happen if one of them sold his or her portion of the property "never came up" and "really wasn't an issue at the time."

Surveyor Jeffrey West testified that when he conducted the survey, Phillip instructed him to divide the property in such a way as to give him a 58.5-foot strip running across the northern boundary of the property. West offered no testimony that Phillip's request was nefarious or motivated by improper motives; rather, he said, Phillip told him that the particular strip of land had some historical significance to Phillip's family. West also noted that Brenda's son, Darren Linn, was present during the survey. West acknowledged that Brenda's property line stopped before it got to the public road on the north and that .9 acres of Phillip's property separated her from the road.

Phillip testified that he did not intend to "spite" Brenda by asking the surveyor to give him the strip of land across her northern boundary. He said that the property once belonged to his grandfather. He admitted in his testimony that he owed Brenda $8124.04 on the mortgage and that nothing would prevent him from taking out a mortgage on his acreage to pay her off. However, he said that he did not think it was fair that he be

required to pay Brenda the entire amount in one lump sum because, at the time Brenda paid the loan off, it was fifteen years from maturity. He said he would have no problem making an annual payment or monthly payments to Brenda.

Following the hearing, the court entered a final order dated August 25, 2006, requiring Phillip to pay Brenda $8124.04 within sixty days; declaring that the division of the 192 acres in the divorce decree was in error and that, due to an "error in the survey," Phillip should deed Brenda .9 acres "running across the top" of her property; and awarding Brenda $4023.78 in fees and costs. Phillip filed a timely notice of appeal.

Jurisdiction to Modify the 2005 Decree

Phillip contends that neither Ark. R. Civ. P. 60 nor the trial court's reservation of jurisdiction in the April 2005 decree empowered the court to modify the decree in its August 2006 order. We agree for the following reasons.

Ark. R. Civ. P. 60

Arkansas Rule of Civil Procedure 60 governs the circumstances in which a trial court may grant relief from a decree already entered. Rule 60(a) allows a trial court to modify or vacate a judgment for certain stated purposes within ninety days of its having been entered. Clearly, that subsection does not apply here as the August 2006 order was entered more than ninety days after the April 2005 decree. Rule 60(c) allows a court to vacate or modify a decree after the expiration of ninety days for one of several enumerated reasons, such as newly-discovered evidence, fraud, or misprisions of the clerk. *See New Holland Credit Co. v. Hill*, 362 Ark. 329, 208 S.W.3d 191 (2005). That subsection is also inapplicable. The trial judge did not rely upon it, and it has not been argued that any of the enumerated reasons are material to this case.

The only possible basis for the trial court's jurisdiction under Rule 60 is contained in subsection (b), which permits a trial court, at any time, to "correct clerical mistakes in judgments, decrees, orders, or other parts of the record and errors therein arising from oversight or omission." The trial court seemed to rely on this subsection, based on its reference in the amended order to "errors" in the divorce decree and the survey.

However, the amended order did not correct any "errors" of the type contemplated by Rule 60(b). The 2005 decree con-

tained no clerical mistake, such as an inaccurate mathematical calculation or misidentification of a party by the court. *See Holt Bonding Co. v. State*, 353 Ark. 136, 114 S.W.3d 179 (2003); *Lord v. Mazzanti*, 339 Ark. 25, 2 S.W.3d 76 (1999); *Luckes v. Luckes*, 262 Ark. 770, 561 S.W.2d 300 (1978). Nor was there an oversight or omission in the 2005 decree, in the sense that the trial court inadvertently failed to set out a matter it originally intended to include. *See Ford v. Ford*, 30 Ark. App. 147, 783 S.W.2d 879 (1990).

Further, the amended order did not merely clarify or interpret the 2005 decree. *See Abbott v. Abbott*, 79 Ark. App. 413, 90 S.W.3d 10 (2002); *Ford, supra* (recognizing that a trial court retains the power to clarify or interpret a prior decree for more than ninety days in order to more accurately reflect the court's original intention). Rather, the court went beyond these parameters and supplemented the prior decree by deciding issues that were not previously before it, and which the parties had never agreed upon: the consequences of one party selling a portion of his or her land; the acceleration of Phillip's mortgage payment; and the particular manner of dividing the 192 acres. Essentially, the court tried to reform or rewrite the parties' independent property-settlement and mediation agreements, which were incorporated in the prior decree, to include these new features. However, no grounds for reformation, such as fraud or mutual mistake, were asserted here, and there is no evidence that any existed. *See Wyatt v. Ark. Game & Fish Comm'n*, 360 Ark. 507, 202 S.W.2d 513 (2005) (holding that an instrument cannot be reformed in the absence of a mutual mistake or a mistake on one side accompanied by fraud and inequitable conduct on the other).

■ We have stated on several occasions that Rule 60(b) should be used only to make the record speak the truth, not to make it speak what it did not speak but ought to have spoken. *See Taylor v. Zanone Props.*, 342 Ark. 465, 30 S.W.3d 74 (2000); *Shipp v. Shipp*, 94 Ark. App. 351, 230 S.W.3d 305 (2006); *see also generally First Nat'l Bank of Lewisville v. Mayberry*, 368 Ark. 243, 244 S.W.3d 676 (2006). Rule 60 should not be used to make additions to a decree involving matters that were not addressed in the original order. *See generally Holt v. Holt*, 70 Ark. App. 43, 14 S.W.3d 887 (2000); *Harrison v. Bradford*, 9 Ark. App. 156, 655 S.W.2d 466 (1983). That is what occurred here. We therefore conclude that the trial court abused its discretion in exercising jurisdiction pursuant to Rule 60. *See New Holland Credit Co., supra* (applying

abuse-of-discretion standard when reviewing a trial court's grant of relief under Rule 60).

Reservation of Jurisdiction

Nor did the trial court's reservation of jurisdiction in the 2005 decree clothe it with the power to enter the amended order. We have held that a general reservation of jurisdiction may permit modification of a decree after ninety days. *Jones v. Jones*, 26 Ark. App. 1, 759 S.W.2d 42 (1988). However, this precept cannot and should not be used to evade the jurisdictional mandates of Rule 60. Thus, even where jurisdiction has been reserved, there can be no modification of a decree more than ninety days after its entry with respect to issues that were not before the trial court in the original action. *See id.* As we previously observed in this opinion, the possibility that Phillip's mortgage payments could be accelerated or that one party might wish to sell a portion of his or her land was not addressed by the court or the parties earlier in the case. Further, the parties never agreed upon nor, it appears, ever discussed, the details of dividing the 192 acres. These matters, then, were not issues to be revisited under a reservation of jurisdiction. Instead, they were matters that the trial court visited for the first time more than ninety days after entry of the prior decree. *See Tyer v. Tyer*, 56 Ark. App. 1, 937 S.W.2d 667 (1997).

In addressing this point, we feel compelled to distinguish our recent holding in *Carver v. Carver*, 93 Ark. App. 129, 217 S.W.3d 185 (2005). There, we held that the trial court's general reservation of jurisdiction in a divorce decree permitted it to enter an amended order more than ninety days later in which the court divided a retirement account that it had neglected to divide in the original decree. Our ruling was based, in part, on the notion that the trial court had jurisdiction to divide the account because the general issue of property division was before the court in the original action. However, this aspect of *Carver* should not be read too broadly. Two factors figured into our decision in *Carver* that are not present here. First, it was undisputed in *Carver* that the parties had agreed upon the division of the retirement account, even though the account was not addressed in the decree. By contrast, there is no evidence here that Phillip and Brenda agreed on any matters regarding acceleration of the mortgage debt or the details of dividing the 192 acres. Additionally, the trial judge in *Carver* entered a subsequent order less than ninety days after the

original decree was filed in which he expressly retained jurisdiction over the issue of dividing the retirement account. No such order was entered here.

Based on the foregoing analysis, we hold that the trial court was without jurisdiction to enter the 2006 amended decree. We therefore reverse and remand with directions to reinstate the April 2005 decree. As a practical matter, we point out that reinstatement of that decree does not leave Brenda without recourse. She may recover from Phillip for her payment of the mortgage debt as envisioned in the parties' agreements, albeit not in an accelerated fashion that those agreements do not contemplate. And, if she remains without access to a public road, she may, as Phillip's adjoining landowner, seek an easement over his land in a more appropriate forum.[2]

Award of Attorney Fees

Because we reverse and remand to allow reinstatement of the 2005 decree, we also reverse the court's award of costs and fees to Brenda. We note that the parties' Memorandum of Understanding, entered after mediation and incorporated in the 2005 decree, provided that each party would bear his or her own attorney's fees and related costs.

Reversed and remanded.

GLADWIN and VAUGHT, JJ., agree.

[2] Brenda also argues that the involvement of mediation justified the court's continuing exercise of jurisdiction. However, we do not believe that she has developed this point sufficiently to convince this court. We see nothing in the mediation statute, Ark. Code Ann. § 16-7-202 (Supp. 2003) to suggest that it gives a court continuing jurisdiction over all potential aspects of a case more than ninety days after entry of a final decree.

Leona M. MIZE *v.* RESOURCE POWER, INC.
& Liberty Mutual Insurance Corporation

CA 06-1270 261 S.W.3d 477

Court of Appeals of Arkansas
Opinion delivered September 5, 2007

C. Michael White, for appellant.

Friday, Eldredge & Clark, LLP, by: *Guy Alton Wade*, for appellee.

DAVID M. GLOVER, Judge. In this workers' compensation case, the administrative law judge determined that the left knee injury claimed by appellant, Leona Mize, was not a compensable injury because Mize sustained the injury while engaged in horseplay, not while performing employment services. The Commission affirmed and adopted this opinion as its own. Mize now appeals, arguing that the Commission's finding that she failed to prove that she was performing employment services at the time of her injury is not supported by substantial evidence, and that she was not engaged in horseplay at the time of her injury that would preclude a finding that she sustained a compensable injury. We affirm.

In *Stutzman v. Baxter Healthcare Corp.*, 99 Ark. App. 19, 23-24, 256 S.W.3d 524, 527 (2007) (citations omitted), this court set forth the well-settled standard of review for workers' compensation cases:

> When reviewing a decision of the Arkansas Workers' Compensation Commission, the appellate court views the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings and affirms that decision if it is supported by substantial evidence. Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. The issue is not whether this court might have reached a different result from the Commission; the Commission's decision will not be reversed unless it is clear that fair-minded persons could not have reached the same conclusions if presented with the same facts. When a claim is denied because a claimant failed to show entitlement to compensation by a preponderance of

> the evidence, the substantial-evidence standard of review requires that we affirm if the Commission's opinion displays a substantial basis for the denial.

Here, appellant was working through Resource Power, Inc., on a production line at Bosch Skil inserting motor brushes into the motor of saws. At the hearing, Mize testified that in the early morning hours of May 14, 2005, near the end of her shift, she was standing at her workstation, which she described as a "cubbyhole" about two feet by two feet. She said that Wesley Greenhaw was on her left, and Brenda Edmonds was on her right, and that they were working "elbow to elbow." Mize explained that she was required to keep her work area clean, and that when she had free time, she was to pick up her area if she could do so without getting behind. She said that workers were provided air hoses and brooms and dustpans for cleanup, and that they were not allowed to leave the work area without permission, even if they were caught up.

Mize testified that on the night of her injury, she had a free moment and was going to clean her work area. She said that a broom was leaning on the table directly behind her, and when she turned to her right to grab it, she felt a "popping" in her knee and she fell to the floor. She stated that no one noticed that she had fallen, and she had to hit Greenhaw's leg and grab his ankle to get his attention. Someone notified the group leader, who took Mize to the first-aid room in a wheelchair after she said that she could not get up. Mize was treated at the hospital emergency room in Heber Springs, where she was given crutches. She returned to light-duty work through June 2005, but she still had trouble with pain, instability, and swelling.

Mize eventually was seen by Dr. Robert Cowherd, a family physician, who ordered an MRI, which indicated a complete ACL tear. Mize was then referred to Dr. Dennis Luter, an orthopedic surgeon, who recommended physical therapy and ACL replacement surgery. The surgery was not performed when recommended because Mize did not have insurance, but she eventually underwent the surgery in November 2005. When Mize informed Resource Power that she was restricted to sit-down, light-duty work, she was told that she could not return to work. Mize said that she had not worked anywhere since leaving Resource Power and that she had not attempted to find work because she did not feel able to work.

Mize testified that she had done Tae Bo, an aerobic kick-boxing, in the past, but she denied doing Tae Bo on the night of her injury. She said there was not enough space to do a kickboxing demonstration at her work station even if she had wanted to, because she could not kick her leg completely out, which would have required, in her estimation, about five feet. Mize testified that she never danced while she was working on the line, and that at the time of her injury, she was not doing any type of dance step or kick. She reiterated that there was not enough room to do any type of kick or dance step.

On cross-examination, Mize said that she did not slip and fall; that the floor was not slick; that her shoe did not lose traction; and that there was nothing unusual about her work station that night. She said that she was not taking any medication for her knee and that she was not wearing a knee brace. She stated that at the time she fell, she was turning to get a broom that she needed to perform her employment duties. Mize said that she talked to Brenda Edmonds about Tae Bo and was going to loan Edmonds her video tapes. She stated that she was not paid to do aerobics, dancing, or Tae Bo. Although she denied that she was dancing or doing Tae Bo, she asserted that even if she had been doing one of those, she was still entitled to benefits because she was performing an employment duty.

Wesley Greenhaw, who appeared at the hearing pursuant to a subpoena and no longer worked at Bosch Skil, testified for appellees that he was employed by Resource Power and assigned to Bosh Skil at the time of Mize's accident. He said that he worked beside Mize, but he described the work area as a "big space" or a "hallway" between Mize and himself that was more than eight feet, and he said that the space was big enough for someone to step back from the line. Greenhaw stated that there was not a broom behind Mize at the time of her injury, that the brooms were kept in a hallway away from the line. Greenhaw testified that prior to the date of the injury, he had noticed Mize wearing a knee brace, and that she told him that she was wearing it because her knee was hurting. He said that Mize also told him that she was taking some type of medication, and when she pulled her knee brace down, that her knee was black and blue.

Greenhaw testified that near the end of shift on May 14, Mize started dancing and throwing her leg up in the air, and that she fell the last time she threw her right leg up. Greenhaw said that Mize was trying to kick her leg as high as she could, and that she

was kicking toward him when she fell. Greenhaw testified that Mize was not working on the line when she fell, that she had backed away; he said that he thought she just kicked too high and lost her balance. Greenhaw stated that sometimes the employees would "sing and carry on" and that they would dance on the line.

On rebuttal, Mize stated that she had no idea why Greenhaw testified as he did, but that on the night of her injury, he had made some comments about her rear end and was laughing about her and her body. Again, she denied that she was doing kicks that night; that there was no room for her to do kicks; and that if she had kicked, she would have kicked Greenhaw. She repeated that brooms were kept in various locations on the line.

In denying Mize's claim, the Administrative Law Judge specifically found Greenhaw's version of the events more believable, or more credible, than the version of events related by Mize. The ALJ further found that Mize was not forthcoming about the condition of her left knee, noting that Greenhaw testified that she had made previous complaints about that knee, was taking medication in relation to the knee, and was wearing a brace on that knee. The ALJ further found that Mize was actively engaged in horseplay at the time her injury occurred.

The ALJ also addressed Mize's alternative contention that even if she was performing some type of dance step or kick, she was still performing employment services under the approach set forth in *Ringier Am. v. Combs*, 41 Ark. App. 47, 849 S.W.2d 1 (1993), which treats an injury resulting from horseplay as a "course of employment" rather than an "arising out of employment" problem. Mize argued that minor acts of horseplay did not automatically constitute a departure from employment but rather may be found to be insubstantial. Appellees argued that *Ringier* has no precedential value because the Arkansas Legislature rewrote the workers' compensation law after that case was decided and added a specific prohibition that injuries caused by horseplay shall not be considered compensable.

The ALJ, citing *Ringier*, stated:

> Whether initiation of horseplay is a deviation from one's course of employment depends on: (1) the extent and seriousness of the deviation; (2) the completeness of the deviation, *i.e.*, whether it was co-mingled with the performance of duty or involved in abandonment of duty; (3) the extent to which the practice of

> horseplay had been an accepted part of the employment; and (4) the extent to which the nature of the employment may be expected to include some such horseplay.

Using these standards, the ALJ found that there was a complete deviation from the job Mize was contracted to perform when she chose to demonstrate an aerobic exercise for a co-worker. The ALJ further found that Mize admitted that she had stopped working on the assembly line at the time the alleged injury occurred, and that performance of an aerobic exercise was not part of Mize's job duties. The ALJ found that at the time of her alleged injury, Mize "was involved in nothing required by her employer and was doing nothing to carry out the employer's purpose."

On appeal, Mize first argues that she presented credible evidence as to how her injury occurred, and that her description is consistent with the history found in her medical reports. She argues that Greenhaw's description of the events surrounding the injury is totally implausible and should be disregarded by the Commission and this court. Mize also argues that Greenhaw's statements about her having previous knee problems should be ignored because there was no other evidence in the record that indicated that she had ever experienced any problems with her left knee prior to May 14, 2006.

The short answer to this argument is that it is the Commission's province to determine witness credibility and the weight to be given to each witness's testimony. *Johnson v. Riceland Foods*, 47 Ark. App. 71, 884 S.W.2d 626 (1994). In this case, the ALJ, and the Commission by affirming and adopting the ALJ's opinion, found that Greenhaw's version of the events was more credible than Mize's version. This argument presents no basis for reversal.

Mize next argues that she was performing employment services at the time of her injury because she was cleaning her work area and because she remained in her work area. However, as explained above, the Commission did not believe Mize's testimony that she was reaching for a broom when she fell; rather, it believed she was performing an aerobic exercise, which was not related in any way to her job duties. Simply because a person is physically present in an assigned work area when the injury occurs does not mean that the person is performing employment services. In this case, although Mize was present in her work area at the time

of her injury, the Commission found that she was engaged in horseplay at the time of her injury and was not performing employment services.

Mize's last argument is that she was not engaged in horseplay at the time of her injury that would preclude a finding that she sustained a compensable injury. In support of her argument, Mize cites *Morales v. Martinez*, 88 Ark. App. 274, 198 S.W.3d 134 (2004), and *Ringier, supra*. She cites *Morales* for the proposition that "horseplay" has not been defined by statute or case law, except to note that its meaning is synonymous with "skylarking" or "rough or boisterous play." She cites *Ringier* for the aspects considered in determining whether horseplay is a deviation from one's course of employment, as set forth above.

We do not find *Ringier* to be controlling because it dealt with a 1991 workers' compensation injury, which was prior to the revision of the workers' compensation laws in 1993. Arkansas Code Annotated section 11-9-102(4)(B)(i) (Repl. 2002) provides that "compensable injury" does not include injuries caused by horseplay, except for innocent victims. This statutory provision was enacted after the *Ringier* case was decided and is controlling in the present case.

In this case, as in *Morales*, it was Mize's burden of proof to show that she was not engaged in horseplay at the time of her injury. Given the evidence, and the fact that the Commission determined that Greenhaw's testimony was more credible than that of Mize, we hold that there was substantial evidence to support the Commission's determination that Mize was engaged in horseplay at the time of her injury, when she demonstrated some type of kicks or aerobic exercise, which was not performance of employment services.

Affirmed.

ROBBINS and BAKER, JJ., agree.

Robert Earl THOMPSON *v.* STATE of Arkansas

CA CR 06-1014 262 S.W.3d 193

Court of Appeals of Arkansas
Opinion delivered September 12, 2007

Sandra C. Bradshaw, for appellant.

Dustin McDaniel, Att'y Gen., by: *Nicana C. Sherman*, Ass't Att'y Gen., for appellee.

JOSEPHINE LINKER HART, Judge. A jury found appellant, Robert Earl Thompson, guilty of rape, two counts of second-degree sexual assault, and one count of sexual indecency with a child. On appeal, he only challenges the sufficiency of the evidence to support the rape conviction. Specifically, he argues that the State failed to prove that he was the victim's guardian, which was an element of the charge. We affirm, concluding that substantial evidence supported appellant's conviction.

In reviewing a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the State, considering only the evidence that supports the verdict, and we will affirm a conviction if substantial evidence exists to support it. *Cummings v. State*, 353 Ark. 618, 110 S.W.3d 272 (2003). Appellant's rape conviction required proof that he engaged in sexual

intercourse or deviate sexual activity with another person who was less than eighteen years of age and that he was the victim's guardian. Ark. Code Ann. § 5-14-103(4)(a)(A)(i) (Supp. 2007). Our criminal statutes define "guardian" as "a parent, stepparent, legal guardian, legal custodian, foster parent, or any person who by virtue of a living arrangement is placed in an apparent position of power or authority over a minor." Ark. Code Ann. § 5-14-101(3) (Repl. 2006).

The criminal information charged appellant with committing a rape in July 2005. At trial, Henrietta Nelson testified that she had lived with appellant for approximately fifteen years and that they had four children together. Also living with them were two other children, including her daughter, the victim C.P., born January 21, 1989, who was not appellant's daughter. Nelson testified that appellant played the "[f]ather role" in the household in that he was the breadwinner. His name was on their residential lease with hers, and he kept numerous items at the residence, including a truck and a car, and they had purchased their last car together. She stated that both she and appellant paid the bills, such as clothing and Christmas presents for the children. She also stated that appellant would take the children for a ride in the country or go fishing. She further observed that if there was a medical emergency and she was unavailable, appellant would be the one to take the children to the hospital. She noted that on one occasion, C.P. had pain with her sickle-cell anemia and that appellant took C.P. to the hospital. She further testified, however, that appellant and C.P. did not communicate and had no relationship.

C.P. testified that she had always lived with her mother and that appellant had lived with her mother for about fifteen or sixteen years. She testified that she and appellant did not have much of a relationship and that they would not talk, though appellant would come into her room. She said that he would come in her room and "try to bribe me with money or whatever" so that "he can get onto me or he touching me on my breasts and in my clothes," and that she "really couldn't do nothing." She also said that appellant would have sexual intercourse with her and that it happened more than once, including in her room and her mother's room. She testified that appellant said to her that if she ever told "somebody about this situation, he'll kill me." She further testified that she told him that she "was going to tell somebody," and he replied that if she "was going to tell somebody, he was going to kill

me." Though she testified that he told her this after everything had already happened, she further testified that he had told her this before he did anything.

We conclude that there was substantial evidence that appellant was C.P.'s guardian who, by virtue of their living arrangement, was placed in an apparent position of power or authority over C.P. This was established by evidence that appellant lived in the same household as C.P. for most of her life and resided with her mother and C.P.'s half-siblings who were fathered by appellant, that he played the "father role" and paid bills and leased the residence in which they lived, and that he took C.P. to the hospital and would take the children on outings. Furthermore, appellant exhibited his power and authority over C.P. by his threats to kill her if she told. *See Cummings*, 363 Ark. at 639 n.5, 110 S.W.3d at 285 n.5 (finding as evidence of control the stepfather's directions to the minor on a sexually explicit videotape). Accordingly, we affirm appellant's conviction.

Affirmed.

PITTMAN, C.J., and MILLER, J., agree.

RICHARD HARP HOMES, INC. *v.* Jim VAN WYK and Marla Van Wyk

CA 06-1446 262 S.W.3d 189

Court of Appeals of Arkansas
Opinion delivered September 12, 2007

Niswanger Law Firm, PLC, by: *Stephen Niswanger*, for appellant.

Albert Janney Thomas, III, for appellee.

KAREN R. BAKER, Judge. This is an appeal from an order denying a motion by appellant Richard Harp Homes, Inc. (Harp), seeking to compel arbitration of a cross-claim filed against it by appellees Marla and Jim Van Wyk. The circuit court found that the arbitration provision was supported by mutuality of obligation but that the obligations were rendered illusory when the contract was considered as a whole. We affirm.

In April 2004, Harp agreed to construct a home for the Van Wyks in a subdivision covered by a "Bill of Assurance" containing a provision regulating setback lines between adjacent lots. The agreement contained the following provisions:

> 10. DISPUTES OR CLAIMS:
>
> A. It is mutually agreed that all disputes and controversies between the parties arising out of or in connection with this Contract as to the existence, construction, validity, interpretation or meaning, performances, nonperformance, enforcement, operation, breach, continuance, or termination thereof or any claim, whatsoever, including, without limitation, alleged misrepresentation, unjust enrichment, fraud, negligence and violations of the Arkansas Deceptive Trade Practices Act (Ark. Code Ann. § 4-88-101, *et seq.*), Arkansas Unfair Practices Act (Ark. Code Ann. § 4-75-201, *et seq.*) or any other consumer protection statute shall be submitted to non-binding mediation in accordance with the rules and procedures of the American Arbitration Association and by using the following procedure. Any warranty claims shall first be submitted to any dispute resolution procedure as set forth in the warranty program called for herein. Thereafter, either party may demand mediation by setting forth such claims in such detail as shall give the other party notice and by submitting the claim to mediation in accordance with the rules and procedures of the American Arbitration Association; provided, the parties may mutually agree at the time of a dispute to use a mediation service other than the American Arbitration Association.

1. Within thirty (30) days after the demand, the other party shall prepare a response to the allegations set forth in the Statement setting forth such other matters the other party considers pertinent.

2. Each party shall bear her or his or its own mediation costs and expenses and shall equally bear the cost of the mediation.

B. If the parties are unable to settle or resolve the dispute or controversy by mediation, the claim shall be submitted to binding arbitration before one (1) arbiter in accordance with the rules and procedures of the American Arbitration Association in which event the decision of the arbitrator shall be final and binding upon both Parties and may be entered in any Court having jurisdiction; provided, the parties may mutually agree at the time of a dispute to use an arbitration service other than the American Arbitration Association. Demand for arbitration shall be made in writing with the other party to the claim and with the arbitrator. A demand for arbitration shall be made within a reasonable time after the claim, dispute or other matter in question has arisen, but in no event later than the date for the institution of legal proceedings based upon the law of the state where the property is located. The cost of the arbitrator shall be paid by the non-prevailing party or as determined by the arbitrator. The parties acknowledge and agree that the subject matter of this Contract and the undertakings of the parties are matters involving interstate commerce, and as such this arbitration clause is governed by and enforceable pursuant to the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.*

C. The parties stipulate that the provisions of this Contract shall be a complete defense to any suit, action, or proceeding instituted in any federal, state, or local court or before any administrative tribunal with respect to any controversy or dispute arising during the period of this Contract. The mediation and arbitration provisions shall, with respect to the controversy or dispute, survive the termination or expiration of this Contract.

D. Said Warranty provides for final and binding arbitration regarding any controversy, claim or complaint arising under said Warranty, which is not resolved by mutual agreement between PURCHASER and BUILDER. PURCHASER'S sole rem-

edy for any such unresolved Warranty matter is the final and binding arbitration stated herein, the right to sue the BUILDER in court being expressly waived.

. . . .

31. BREACH BY PURCHASER:

If this Contract is breached by PURCHASER or if the PURCHASER fails for any reason to complete his purchase of Property in accordance with the terms and conditions set forth herein, BUILDER shall have the following non-exclusive remedies: BUILDER shall be excused from further performance and may sell the property to a third party without in any way limiting BUILDER'S remedies set forth below; or BUILDER may declare this Contract terminated and Earnest Money plus non-refundable funds shall be forfeited and in addition five thousand dollars ($5,000) shall be paid by PURCHASER to BUILDER as liquidated damages. Earnest Money, non-refundable funds or other damages paid to BUILDER, shall not in any way prejudice the rights of BUILDER or Broker in any action for damages or specific performance, or both. PURCHASER shall be obligated to pay all costs or losses which BUILDER may sustain, including lost profit, court costs and expenses of litigation, including attorneys' fees. PURCHASER shall also be obligated to pay any sales commissions that are due.

32. BREACH BY BUILDER:

If this Contract is breached by BUILDER or if BUILDER fails for any reason to complete the sale, PURCHASER may terminate this Contract by written notice to BUILDER and receive a refund of the Earnest Money as PURCHASER'S sole remedy. PURCHASER hereby waives the right to damages or specific performance, or both from BUILDER. PURCHASER hereby waives the defense of non-mutuality of remedies.

During construction, Harp discovered that one corner of the structure may have been in violation of the setback provision of the bill of assurances. Harp asserts that, when it brought the matter to the attention of the Van Wyks, it was instructed to complete the

residence. In April 2005, Harp submitted a proposal to ensure that the residence would comply with the bill of assurances. After the proposal was approved by the Van Wyks and the architectural committee, the Van Wyks refused to allow the modifications to be made. John Crow and his wife, Lee Ann McMillan-Crow, live next door to the Van Wyks on the side where the Van Wyk home allegedly encroaches on the setback line. On March 16, 2006, the Crows filed suit against Harp and the Van Wyks seeking to enforce the setback requirements of the bill of assurances. Harp answered, stating that "the Van Wyks' structure appears to sit within the setback area" but otherwise denying the material allegations of the complaint. The Van Wyks denied the material allegations of the complaint. They subsequently amended their answer to assert a cross-claim against Harp.

The cross-claim stated causes of action for failure to return a security deposit for rental property, breach of contract, breach of implied warranty, negligence, fraud, slander, and deceptive trade practices[1]. The cross-claim also sought punitive damages. Harp responded by filing a motion to compel arbitration.[2] The Van Wyks opposed the motion, asserting that the arbitration provision lacked mutuality and that some of their claims were not subject to arbitration.

At the hearing on the motion, Harp argued that the agreement required arbitration of all claims between the parties. The Van Wyks admitted that they amended their complaint to eliminate the claims that would be subject to arbitration, i.e., the breach-of-contract and deceptive-trade-practices claims. They also asserted that the remaining tort and fraud claims had no connection with the agreement containing the arbitration provision.

The trial court ruled from the bench and found that, although the arbitration clause contained mutuality of obligation, that mutuality was rendered illusory when the contract was read as a whole, considering the remedies provided each party in paragraphs 31 and 32. A written order was entered on August 17, 2006.

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[1] The cross-claim was later amended to omit the causes of action for breach of implied warranty and violation of the Deceptive Trade Practices Act.

[2] Harp also answered the cross-claim, denying the material allegations. Harp asserted that the Van Wyks were the first party to breach the agreement.

Harp filed its notice of appeal on September 18, 2006.[3] The Crows subsequently dismissed Harp from the original suit.

An order denying a motion to compel arbitration is an immediately appealable order. Ark. R. App. P.–Civ. 2(a)(12); *IGF Ins. Co. v. Hat Creek P'ship*, 349 Ark. 133, 76 S.W.3d 859 (2002). We review a circuit court's order denying a motion to compel arbitration de novo on the record. *IGF Ins.*, *supra.*

Harp argues that the mutuality of the arbitration provision is not rendered illusory because it has not reserved the right to pursue its remedies through any means other than arbitration.

We find this case to be controlled by the supreme court's decision in *Tyson Foods, Inc. v. Archer*, 356 Ark. 136, 157 S.W.3d 681 (2004), because the agreement in the present case, when read as a whole, does not clearly and specifically limit Harp to its remedies in arbitration. In *Tyson Foods*, the court held that an arbitration agreement lacked the necessary mutuality of obligation where swine producers were limited to pursuing any grievance in an arbitration forum while the owner of the swine (Tyson) retained the sole right to pursue legal or equitable remedies. *Tyson*, 356 Ark. at 146, 147 S.W.3d at 687. The court also noted that there is no mutuality of obligation where one party uses an arbitration agreement to shield itself from litigation, while at the same time reserving its own ability to pursue relief through the court system. *Id.*

The same rules of construction and interpretation apply to arbitration agreements as apply to agreements generally, thus we will seek to give effect to the intent of the parties as evidenced by the arbitration agreement itself. *Id.* In the present case, paragraph 10 purports to require that both parties submit "all disputes" to mediation and arbitration. Paragraphs 31 and 32 then specify the remedies available to each party in the case of a breach. Included in paragraph 31, entitled "Breach by Purchaser," is the following language: "[Van Wyk] shall be obligated to pay all costs or losses which [Harp] may sustain, *including* lost profit, *court costs and expenses of litigation*, including attorneys' fees." (Emphasis added.)

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[3] The order was entered on August 17, 2006, and the notice of appeal was filed on September 18, 2006. The thirtieth day on which to file the notice of appeal fell on Saturday, September 16, 2006. Therefore, the time for filing the notice of appeal was extended to the following business day, Monday, September 18. Ark. R. App. P.–Civil 9; *Watanabe v. Webb*, 320 Ark. 375, 896 S.W.2d 597 (1995).

While this language does not specifically reserve Harp's right to litigate any or all disputes, it does render the agreement ambiguous so that the trial court can construe the agreement. The ambiguity arises because the italicized section could be seen as merely illustrative of the types of costs or losses for which the Van Wyks would be responsible. On the other hand, the language could indicate an intent that Harp retained the right to bring suit in court for a breach.[4]

In *Tyson Foods*, the supreme court declined to read into the contract qualifying language that would have made it clear that Tyson's remedies were limited to the confines of arbitration. *Tyson*, 356 Ark. at 143, 147 S.W.3d at 685. In the present case, it would be necessary to change the wording of paragraph 31 in order for the court to find an unambiguous mutuality of obligation. However, that would be contrary to the rules of construction that require that effect be given to all provisions of the agreement. *Id.* at 143-44, 147 S.W.3d at 685. Therefore, the circuit court correctly declined to compel the parties to submit to arbitration, and we affirm.

Affirmed.

ROBBINS and GLOVER, JJ., agree.

[4] *Cf. Hamilton v. Ford Motor Credit, Inc.*, 99 Ark. App. 124, 257 S.W.3d 566 (2007) (finding the arbitration agreement to be unambiguous where it allowed both parties to demand arbitration while, at the same time, allowing both parties to maintain certain rights, such as the right of Ford Motor Credit to protect its security interest in the vehicle).

McALMONT SUBURBAN SEWER IMPROVEMENT DIST. NO. 242 *v.* McCAIN-HWY. 161, LLC

CA 06-1445 262 S.W.3d 185

Court of Appeals of Arkansas
Opinion delivered September 12, 2007

Terrence Cain; *Ivory Law Firm*, by: *George S. Ivory, Jr.*, for appellant.

Stuart W. Hankins and *A. Vaughan Hankins*, for appellee.

D.P. MARSHALL JR., Judge. This appeal arises out of an agreement about sewer services between the Sewer Committee of the City of North Little Rock, Arkansas, and the McAlmont Sewer Improvement District No. 242 of Pulaski County, Arkansas. We must answer questions about standing and the meaning of that agreement.

I.

In 1984, the Committee and the District made a thirty-year contract about sewer services. The parties agreed that the District would connect its sewer lines to a conveniently located treatment plant owned by the Committee. The Committee, in turn, would charge District residents a fee for sewer services, the same fee it would charge residents of North Little Rock. The parties also agreed to these terms about services to non-residents of the District:

> The District shall have the right to make charges for connections to the District's trunk sewer lines by residents living outside the boundaries of the District, provided that such residents and the Committee have entered into an agreement with regard to services to be rendered to such residents by the Committee or the Committee has otherwise approved such charges.

McCain-Hwy. 161, LLC owns property outside the District. When it began developing that property, it tied into the District's sewer lines. But McCain and the District could not agree on a connection fee. The Committee eventually decided on a $45,000.00 fee for the landowners' entire tract, which is approximately thirty-eight acres. McCain was willing to pay that amount, but the District refused to accept it. The District contended that

McCain owed a $77,000.00 fee for tying in the development on approximately one-third of this property or a $113,000.00 fee for the entire tract.

McCain then filed this action. It sought a declaratory judgment that the Committee had the final say about the connection fee under the District/Committee agreement. The circuit court rejected the District's initial contention that McCain had no standing to sue under the District/Committee agreement. The court then entered summary judgment for McCain, holding that the agreement unambiguously gave the Committee the ultimate right to decide the connection fee for non-residents. The court ordered the District to accept the Committee-approved amount ($45,000.00) from McCain. The District has appealed.

II.

For reversal, the District first renews its no-standing argument. We review this issue of law de novo. *Farm Bureau Ins. Co. of Arkansas, Inc. v. Running M Farms, Inc.*, 366 Ark. 480, 485, 237 S.W.3d 32, 36 (2006). The circuit court concluded that McCain-Hwy. 161, LLC was a third-party beneficiary of the District/Committee agreement, and that ruling was right.

Our law presumes that parties contract only for themselves. *Elsner v. Farmers Ins. Group, Inc.*, 364 Ark. 393, 395, 220 S.W.3d 633, 635 (2005). The District and the Committee made their agreement about sewer services approximately fifteen years before McCain was even formed. And the District/Committee agreement does not name McCain or say that it was intended to benefit non-parties. The agreement, however, sufficiently described a class of which McCain is a member — non-residents of the District whom the District and the Committee were willing to serve. *Ibid.*; *Perry v. Baptist Health*; 358 Ark. 238, 245-48, 189 S.W.3d 54, 58-60 (2004). The opportunity for sewer service arises out of this agreement and benefits that class of non-residents. This benefit is more than incidental; sewer services are an essential of modern urban life. The District was willing to serve McCain, and indeed has done so on an interim basis before and during this litigation. McCain sought no damages. It sought only an injunction requiring the District to accept the connection fee set by the Committee. Considering all these circumstances, we hold that McCain was a beneficiary of the non-resident provision of the

District/Committee agreement and thus had standing to litigate which entity had the power to set the connection fee under that agreement.

McCain had standing for another reason. It sought a declaratory judgment. The governing statute contains a broad standing provision: "[a]ny person interested under a . . . written contract . . . or whose rights, status, or other legal relations are affected by a . . . contract . . . may have determined any question of construction or validity arising under the . . . contract . . . and obtain a declaration of rights, status, or other legal relations thereunder." Ark. Code Ann. § 16-111-104 (Repl. 2006). We liberally construe our Declaratory Judgment Act. Ark. Code Ann. § 16-111-102(c) (Repl. 2006); *Hardy v. United Services Auto. Ass'n*, 95 Ark. App. 48, 50, 233 S.W.3d 165, 167 (2006).

McCain's legal relations with the District were affected by the District/Committee agreement. The Committee and the District were able and willing to serve all the development on this tract of land. But how much McCain must pay to tie into the District's sewer lines depends on who has the last word about that fee under the agreement. Construing the Act liberally, we hold that McCain had standing to have the circuit court declare what this agreement means for non-District residents even if McCain was not a third-party beneficiary. *Cf.*, *Stilley v. James*, 345 Ark. 362, 372-73, 48 S.W.3d 521, 528 (2001) (judgment creditors had standing under the Act to determine their rights under an indemnity agreement to which they were not parties, but which was created solely to benefit them).

III.

The District argues second that, as a suburban improvement district, it must charge a fee for using its sewer system. *See generally* Ark. Code Ann. §§ 14-92-205 to 14-92-235 (Repl. 1998 & Supp. 2005). The District also notes that it has executed a bond and pledged collected fees — such as the disputed fee here — for repayment. All these points are correct, but provide no basis for reversing the judgment. The District will collect a fee from McCain for tying into the sewer line. The fighting issue is who gets to decide the amount of that fee. Neither the statute nor the District's bond obligations resolve that issue.

IV.

Third, and on the merits, the District challenges the circuit court's construction of the District/Committee agreement as unreasonable. Arguing that it never intended to give the Committee a veto over connection fees for non-residents, the District says that genuine issues of material fact exist about what fee is reasonable. It points to the District assessor's determination that $77,000.00 was a fair and reasonable fee for giving the developed part of the tract access to the sewer system.

The District's arguments, however, run into the clear words of its agreement with the Committee. That agreement is not ambiguous, and the District does not argue that it is. The meaning of an unambiguous contract is a question of law for the circuit court. *Kremer v. Blissard Management & Realty, Inc.*, 289 Ark. 419, 421, 711 S.W.2d 813, 815 (1986). Thus we must glean the District's intentions from the District/Committee agreement alone. After our de novo review, we agree with the circuit court's reading of the parties' plain words. The District maintained the right to "make charges" for non-residents' connections to the District's trunk sewer lines, "provided that" the Committee and the non-residents had agreed about the Committee's services or "the Committee has otherwise approved [the District's] charges."

The agreement authorizes the District to charge a connection fee to non-residents subject to the Committee's approval of that fee. This is indeed a veto of sorts, as the Committee contends. But in construing this provision about tie-in fees for non-District residents we must consider the parties' whole agreement. *Floyd v. Otter Creek Homeowners Ass'n*, 23 Ark. App. 31, 35-36, 742 S.W.2d 120, 123 (1988). Their agreement reveals that the price the District paid for benefitting from the Committee's treatment plant was to give the Committee substantial control of the whole sewer system. The Committee services and maintains all the lines, approves all connections, and collects fees from District residents and non-residents for using the system. It is not unreasonable for the Committee to also have the last word about the connection fee for a non-District resident, such as McCain, who wants access to the District's lines, and through them, to the Committee's treatment plant. The parties agreed that the District gets the tie-in fee; but they also agreed that the Committee gets to make the ultimate decision about the amount of that fee.

We agree with the circuit court's remarks at the end of the summary judgment hearing. The agreement "just seems so clear." And the District must press any disagreement it has about the amount of a connection fee for any non-resident with the Committee, recognizing that the parties' agreement gives the Committee the final word.

Affirmed.

BIRD and HEFFLEY, JJ., agree.

Shahid OMAR *v.* STATE of Arkansas

CA CR 06-1321 262 S.W.3d 195

Court of Appeals of Arkansas
Opinion delivered September 12, 2007

Ron Fields, for appellant.

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

SAM BIRD, Judge. Shahid Iman Omar was convicted in a jury trial of possession of drug paraphernalia and possession of cocaine with intent to deliver. He was sentenced on the respective convictions to concurrent sentences of forty and sixty years' imprisonment. Raising two points on appeal, he challenges the trial court's denial of his motion to suppress the cocaine and packaging found in the rental car that he was driving on October 1, 2005. First, he contends that the thirty-seven-minute traffic stop, ending with a dog sniff, exceeded the scope and duration permitted by state and federal law, regardless of whether reasonable suspicion justified an investigation of something other than his traffic violation for speeding. Second, he contends that the drug dog's entry into the car through an open window "rendered any alert suspect to establish probable cause" and that the entry itself constituted a search without probable cause. We disagree with his arguments, and we affirm.

Omar asserts that his detention was improper under state and federal case law, as well as Rule 3.1 of the Arkansas Rules of Criminal Procedure. In reviewing a circuit court's denial of a motion to suppress evidence, the appellate court conducts a de novo review based on the totality of the circumstances, reviewing findings of historical facts for clear error and determining whether those facts give rise to reasonable suspicion or probable cause, giving due weight to inferences drawn by the trial court. *Sims v. State*, 356 Ark. 507, 157 S.W.3d 530 (2004). The circuit court's

ruling is reversed only if it is clearly against the preponderance of the evidence. *Yarbrough v. State*, 370 Ark. 31, 257 S.W.3d 50 (2007).

Arkansas Rule of Criminal Procedure 3.1 provides:

> A law enforcement officer lawfully present in any place may, in the performance of his duties, stop and detain any person who he reasonably suspects is committing, has committed, or is about to commit (1) a felony, or (2) a misdemeanor involving danger of forcible injury to persons or of appropriation of or damage to property, if such action is reasonably necessary either to obtain or verify the identification of the person or to determine the lawfulness of his conduct. An officer acting under this rule may require the person to remain in or near such place in the officer's presence for a period of not more than fifteen (15) minutes or for such time as is reasonable under the circumstances. . . .

As part of a valid traffic stop, a police officer may detain the motorist while the officer completes routine tasks related to the traffic violation, such as making computerized checks of the vehicle's registration and the driver's license and criminal history, and the writing of a citation or warning. *Laime v. State*, 347 Ark. 142, 60 S.W.3d 464 (2001). The officer may ask routine questions such as the party's destination, the purpose of the trip, and whether the officer may search the vehicle; the officer then may act on whatever information is volunteered. *Id.*

Rule 3.1's alternative time period of "such time as is reasonable under the circumstances" is not restricted to a specific number of minutes. *Yarbrough v. State, supra.* After the routine tasks are completed, continued detention of the driver can become unreasonable unless the officer has a reasonably articulable suspicion for believing that criminal activity is afoot. *Sims v. State*, 356 Ark. 507, 157 S.W.3d 530 (2004). Only what the officer knew at the time of the detention enters the analysis of whether the officer had reasonable suspicion to conduct investigative detention; after-acquired knowledge is irrelevant. *Laime, supra.*

After the legitimate purpose for an initial traffic stop has ended, the officer may conduct a canine sniff of the motorist's vehicle if the officer possesses reasonable suspicion that a person is committing, has committed, or is about to commit a felony or a misdemeanor involving danger to persons or property. *Malone v.*

State, 364 Ark. 256, 217 S.W.3d 810 (2005) (citing Ark. R. Crim. P. 3.1); *see also Illinois v. Caballes*, 543 U.S. 405, 407 (2005) (stating that a seizure justified solely by an interest in issuing the driver a warning ticket can become unlawful if prolonged beyond the time reasonably required to complete that mission).

The Thirty-Seven-Minute Detention

Omar contends that, regardless of whether reasonable suspicion justified an investigation of something other than the traffic violation, the thirty-seven-minute traffic stop exceeded the scope and duration permitted by state and federal law. This detention began at 6:52 p.m. when Officer Jason Aaron of the Arkansas State Police stopped Omar for speeding. It ended at 7:29 p.m. when Sgt. Kyle Drown walked his dog around the car, leading to the discovery of cocaine in a door panel.

Omar challenges the trial court's findings that, within a few moments of the stop, Officer Aaron developed a reasonable suspicion that a felony was being committed; that the delay beyond fifteen minutes "was caused by the only canine sniffing dog [being] miles away"; and that the delay was reasonable under the circumstances. He argues that no reasonable suspicion existed to justify the expanded investigation and the continued detention to conduct the canine sniff. Alternatively, he argues that, even if reasonable suspicion existed, the means by which the investigation was conducted were unreasonable in scope and duration.

Officer Aaron testified that in 2005 he was assigned highway patrol duties in Crawford County, where he "worked Interstate 40 and 540 for interstate transportation of drugs." On the evening of October 1, 2005, he turned on his blue lights after clocking a Crown Victoria at seventy-nine miles an hour in a seventy-mile-an-hour zone on I-40 near Alma. A DVD recording of the stop was made.

Officer Aaron approached the passenger side of the car when it pulled over, and he smelled a strong odor of air freshener coming from within the vehicle. He observed that Omar was the car's sole occupant; there were fast-food wrappers scattered in the front passenger seat, a new cell phone on the center armrest, a small black bag in the left rear seat, and clothes hanging up in the car. Aaron told Omar that the car had been going seventy-nine and asked to see a driver's license, insurance, and registration.

Omar's hands were trembling and fumbling through his paperwork. A rental contract showed that the car had been rented

at 1:09 p.m. the previous day at Los Angeles International Airport and was to be turned in two days afterward at Baltimore, Maryland. Aaron asked Omar where he had been, and Omar answered that he had come from Los Angeles after flying there to attend a cousin's Saturday wedding. When Aaron pointed out that "today is Saturday," Omar said instead that the wedding was Friday, he flew out Friday for the evening wedding, and he rented the car for the return trip because his flight had been rough.

After running driver's license and criminal checks, Aaron asked Omar if he had ever been arrested; Omar stated that a gun charge was the only thing he had. Five to ten minutes into the traffic stop, Aaron asked several times for permission to search the car and asked if Omar was transporting anything illegal. At 7:00 Omar refused permission to search. Aaron, telling Omar that a drug dog was being requested, telephoned the request to dispatch. At 7:04 Aaron informed Omar that a canine was in route. Aaron asked Omar the specifics about an arrest for murder, and Omar apparently responded that the murder conviction had been overturned. The criminal check had revealed previous charges of attempted murder, accessory to murder, armed robbery, and handgun violation.

Aaron asked further questions about the wedding, but Omar was not able to give specifics such as when or where it took place. He also said that it had been Friday morning and he had not attended the reception, then he said that he went to the first of the reception but left because of his hurry to get home, and he mentioned that he was a working man on a car lot who drove for a living. Aaron asked for the cousin's phone number to verify the truth about the wedding, but Omar was unable to recall the number and asked to get his phone out of the car. At 7:09 Aaron informed Omar that he was being issued a citation for speeding and would be free to go if the dog did not alert. They waited for the only canine available at the time. Around 7:15 Omar signed for the citation; the dog arrived about twenty-five minutes after Omar had been told that he would be free to go absent an alert.

Aaron testified that, because of the conflicting information of criminal history, he believed that Omar was trying to deceive him. Aaron was becoming suspicious four minutes into the stop, as the stop went on his suspicions of criminal activity rose, and by 7:04 he had a belief of criminal activity, albeit unspecified. He referred in his testimony to Omar's continued nervousness and evasive answers, his itinerary of flying to Los Angeles (described by

Aaron as "a source city") and driving the rental car the long distance to Maryland, and Omar's changing stories about the wedding's day and time. Aaron said that Omar's renting a car did not make sense to him with the hurry to get home by Monday, the costs of car rental around $400 and $3-a-gallon gas, and a return by air being much cheaper and quicker. Another basis for Aaron's suspicion was the presence of the cell phone along with the air freshener: drug offenders had told him that new cell phones are given to individuals to help track cross-country shipments of narcotics and weapons.

Sergeant Kyle Drown was in Sebastian County at Fort Chaffee when he received Aaron's request for a canine, but his dog was at Drown's apartment in Van Buren. In order to speed things up, he had his wife bring the dog to the interstate site. The two cars arrived at the same time. Drown took the dog straight to Omar's car to begin the sniff, which quickly resulted in the discovery of the cocaine.

The genesis for Rule 3.1 is the holding of *Terry v. Ohio*, 392 U.S. 1 (1968), that a police officer can detain a person without violating the Fourth Amendment if the officer has a reasonable suspicion that "criminal activity may be afoot." *Laime v. State*, 347 Ark. 142, 60 S.W.3d 464 (2001). In assessing whether a detention is too long in duration to be justified as an investigative stop, it is appropriate to examine whether police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant. *United States v. Sharpe*, 470 U.S. 675, 686 (1985). The question is not simply whether some other alternative was available, but whether the police acted unreasonably in failing to recognize or to pursue it. *Id.* at 687. Courts must "consider the law enforcement purposes to be served by the stop as well as the time reasonably needed to effectuate those purposes." *United States v. Bloomfield*, 40 F.3d 910, 917 (8th Cir. 1994) (quoting *Sharpe*, 470 U.S. at 685). "When police need the assistance of a drug dog in roadside *Terry* stops, it will in general take time to obtain one; local government police forces and the state highway patrol cannot be expected to have drug dogs immediately available to all officers in the field at all times." *Id.*

■ Here, our totality-of-the-circumstances review includes the following: (1) Omar's itinerary of flying to Los Angeles from Baltimore but returning by rental car, despite his desire to hurry home; (2) his changing stories about the time and location of

the wedding; (3) his admission to only one previous criminal charge, while the criminal check revealed three others; (4) the cell phone and air freshener in his rental car; (5) a small black bag but no wedding clothes visible on the back seat; and (6) his evasive answers and continued nervousness. We conclude from these factors that Officer Aaron had specific, particular, and articulable reasons to extend the detention beyond the initial traffic stop, giving him reasonable suspicion of criminal activity to detain Omar further for a canine sniff of the car.

Aaron's suspicions began in the first four minutes of stopping Omar, and they steadily grew. The officer acted diligently to verify his suspicions as quickly as possible. He radioed for the drug dog only about twelve minutes into the stop, but the only available dog was in Van Buren and his handler was at Fort Chaffee. The handler drove from Fort Chaffee and arranged for his wife to bring the dog to him on the interstate near Alma, where Aaron had stopped Omar and was awaiting their arrival. Under the facts of this case, the canine arrived without undue delay and the thirty-seven-minute detention was not unreasonable. *Cf. Bloomfield* (finding that a one-hour period was not unreasonable to wait for a drug dog).

Illegal Search

As his second point on appeal, Omar contends that the drug dog's entry into the car through an open window constituted an improper search without probable cause and was not an alert establishing probable cause to search. The argument he presents was preserved for our review through arguments and rulings that followed the circuit court's denial of his pretrial motion to suppress.

On the morning of trial, and before jury selection, Omar orally moved to amend his motion to suppress as follows:

> Part of the video depicted the drug dog going around Mr. Omar's car, jumping through the window. The handler said that he alerted — a strong alert. . . . [W]e'd like to amend our motion to suppress to the extent that we hadn't already made this argument and argue that it was not an alert when he [came] through the passenger window. It was a dog out of control, who just jumped through; and, therefore, they were inside the car without probable cause. It wasn't just a walk-around search. Like I said, the dog either jumped in, or he was directed to jump in, and they were searching the interior of the car without probable cause.

The State said that it had no objection to this additional ground. The court ruled, "[T]his is an aggressive alert dog, and that's probably the strongest alert I've ever seen. Your amendment is allowed. It is rejected as far as it goes to your motion to suppress. . . . Typically, it's just a dog raising its paw." The court subsequently denied Omar's motion to suppress after jury selection and, again, just before the cocaine and packing that Omar sought to suppress were introduced at trial.

We agree with the State's contention that the circuit court did not clearly err in ruling that the canine alerted before it entered the vehicle, thus establishing probable cause for the entry of the vehicle. Evidence introduced at the suppression hearing revealed that at 7:29 p.m. the dog, Rudy, arrived with his handler, Sgt. Drown. On their first walk-around of the car, Rudy jumped in through the window of the right, front passenger window. Within a minute, Drown opened a back door and pulled the dog out. Drown and Officer Aaron began searching the car and its trunk.

Drown testified that he had been Rudy's handler since 1999, that they were re-certified as a team each year, and that Rudy was trained to detect heroin, marijuana, cocaine, and methamphetamine. Drown, who normally handled calls in Sebastian County rather than Crawford County, received Officer Aaron's request at 7:03 and drove through traffic out of Fort Chaffee while evacuees from Hurricane Katrina were there. Rudy had not been trained as regularly as in the past because Drown had been moved into a supervisor's position at Fort Chaffee and did not have him on a full-time basis, but there had been no break in certification and Rudy was still in service when Drown testified.

Regarding the initial walk-around of Omar's vehicle, Drown stated:

> [W]hen we got to the right, front passenger door, the dog did a head turn, indicating that the odor of narcotics was present. He then gave an abnormal response by jumping through the window of the vehicle. He then went to the back seat, down to the area, where the seat and the door meet and indicated by scratching to the odor of narcotics being present.

Drown said that Rudy did not normally jump through windows, but Drown had no doubt that Rudy "alerted on the vehicle" when he turned his head, jumped through the window, and scratched inside

the car. Drown said that Rudy was trying to go to the source of the odor by making his way to the back seat, where the seat and door came together.

Drown testified that he again walked Rudy to the front of the vehicle, they went around the driver's side, and Rudy "indicated" on the left rear window by standing and scratching. Drown said that Rudy would not jump through the window or up on the vehicle if the odor of narcotics had not been present. He said that he had no reason to doubt Rudy's efficiency or proficiency, despite the lack of recent work.

Drown said that Rudy was an aggressive alert dog, which shows an alert by scratching and biting. Drown also testified that, upon reaching the passenger window, "the canine did a head turn, which is an alert, that he's alerting to the odor of narcotics being present in the vehicle. At that point, he did, what I call, an abnormal response." He said that Rudy's head turn at the door is called an alert, or a change in behavior; that jumping through the window was an abnormal response; but that Rudy was not trained to avoid jumping into a vehicle and was trying to go to the source of the odor. Drown had no doubt that Rudy alerted.

Drown searched the inside of the vehicle and he observed tool marks on screw heads of the back passenger door. He pulled the door panel off and observed two wrapped bundles, which were the subject of Omar's motion to suppress.

A dog's "instinctive" entry into a car does not constitute police misconduct requiring suppression of the evidence. *United States v. Stone*, 866 F.2d 359 (10th Cir. 1989). In the absence of evidence that police asked a defendant to open the hatchback to enable the dog to jump in and of the handler's encouraging the dog to jump in, the dog's instinctive actions did not violate the Fourth Amendment on the dog's first entry into the car. *United States v. McKoy*, 06-032, slip op. at 1 (D.D.C. Apr. 19, 2007) (citing *Stone*).[1]

[redacted] We reject Omar's argument that the drug dog's entry into the car through an open window constituted an improper search without probable cause and was not an alert establishing probable cause to search. The circuit court's finding that Rudy was an aggressive alert dog and that the jump through the window was

[1] *Stone*, however, did not relieve the police of their responsibility to restrain the leashed dog during a second scan.

"probably the strongest alert" the court had ever seen was well supported by the canine handler's testimony. There was no clear error in the trial court's finding.

Affirmed.

MARSHALL and HEFFLEY, JJ., agree.

Jon G. MORSE *v.* Teri Morse CHAPMAN

CA 06-1238 262 S.W.3d 178

Court of Appeals of Arkansas
Opinion delivered September 12, 2007

James R. Filyaw, for appellant.

Gant & Barlow, LLP, by: *Paul D. Gant*, for appellee.

SAM BIRD, Judge. This appeal arises out of an order of the Crawford County Circuit Court holding appellant Jon Morse in contempt for failure to pay past-due alimony and modifying the award of future alimony. Appellant has appealed the trial court's order, arguing that the trial court erred in refusing to abate the alimony payable under the original decree of divorce by appellant to appellee Teri Morse Chapman. We reverse and remand.

The parties were married in Arkansas on October 26, 1984. At that time, appellant worked at the Joint Readiness Training Center (JRTC) at Fort Chaffee in Fort Smith. Sometime after the marriage the JRTC was transferred to Louisiana, and the parties moved so that appellant could continue working for the Army.

On September 25, 2002, the parties were divorced by entry of a consent judgment of the district court of Vernon Parish, Louisiana. There were no children born of the marriage. At the time of the divorce, appellee was working at Lowe's and appellant was still working for the Army. Appellant agreed to pay $600 per month in alimony to appellee, which provision was included in the judgment of divorce.

In June 2005, appellee moved back to Arkansas and continued her work as a pricing coordinator for Lowe's. Sometime in 2005, appellant lost his job and also moved back to Arkansas. On April 13, 2006, appellee filed a petition for contempt in the Crawford County Circuit Court indicating that the Louisiana consent judgment had been transferred to the Crawford County Circuit Court; that the Louisiana court had entered an order on June 25, 2003, holding appellant liable for past-due alimony; and that appellant was in arrears on alimony payments. Appellee asked the court to find appellant in contempt, order him to pay the past-due alimony, and enter judgment for all accrued arrearages. Appellant filed a response to the petition admitting the arrearages, asking for credit for payments made since entry of the Louisiana judgment, and requesting the court to modify the original decree regarding alimony because there had been a substantial change in circumstances.

At a hearing on the matter, appellant testified that at the time of the divorce he was earning $18.00 per hour working as an electronics technician for the United States Government. On cross

examination, he admitted that he had lost his driver's license for failure to have insurance. He testified that he was terminated because the loss of his driver's license caused problems with his work. After he lost his job in 2005, he moved to Arkansas and got a job as a security guard with Securta's Security Company at the Tyson chicken plant in Van Buren earning $7.35 per hour. He said that he could not go back into the electronics business because his job with the Army was to help soldiers get ready for the Iraqi theater with equipment called "miles gear," and that his knowledge and skill were not transferable into another electronics field because there is no "miles gear" anywhere else. He added that there were no similarities between what he did in the Army and electronics factory work. He also testified that he had completed the twelfth grade, was forty-five years old, and had some medical problems with bone spurs, torn rotator cuffs, and torn tendons in his shoulder. He said that he felt that the fact that appellee now earned more than he did constituted a change of circumstances such that the court should end his alimony obligation.

Appellee testified that she worked at Lowe's as a pricing coordinator making $10.47 per hour and that she had been with Lowe's for twelve years. She said that she had one year of college, was forty-eight years old, and had no dependents.

The trial court found appellant in contempt, sentencing him to ninety days in jail, suspended if he made a monthly payment of $100 until the amount in arrears was paid. The trial court also found a change of circumstances and reduced the alimony from $600 to $500 per month. It based the alimony award on its finding that the change of circumstances was within appellant's control, that he was capable of making more, and that the reason he was not making more money was because of something he did to himself and not something someone else did. The trial judge stated that he thought that "the case law is clear that if there's a finding that he's capable of making more, then I can impute what he might be able to make and come up with a determination on that. And that's where I am." The trial judge also indicated that its award of alimony was based on the fact that appellant initially agreed to pay $600 per month. Appellant filed this appeal from the judgment of modification only. He does not appeal from the judgment ordering him to pay past-due alimony.

The purpose of alimony is to rectify economic imbalance in the earning power and the standard of living of the parties to a divorce in light of the particular facts of each case. *Harvey v. Harvey*,

295 Ark. 102, 747 S.W.2d 89 (1988). Modification of an award of alimony must be based on a change of circumstances of the parties. *Herman v. Herman*, 335 Ark. 36, 977 S.W.2d 209 (1998). The burden of showing such a change in circumstances is on the party seeking the change in the amount of alimony. *Id.* A trial judge's decision whether to award alimony is a matter that lies within his or her sound discretion and will not be reversed on appeal absent an abuse of that discretion. *Davis v. Davis*, 79 Ark. App. 178, 84 S.W.3d 447 (2002).

On appeal, appellant argues that the trial court abused its discretion in failing to terminate his payment of alimony to appellee because appellee now earns more than he does and because appellee has no need of alimony. Appellant also argues that the trial court's finding that appellant was responsible for his inability to make more money is not supported by the evidence. Alternatively, he claims that, even if his job loss was his fault, appellee has no need of alimony. He argues that the court's award operates as a punitive measure by forcing him to pay almost two-thirds of his take-home pay to appellee, who has no need of it.

Imputed Income

To determine whether the trial court abused its discretion in failing to terminate appellant's obligation to pay alimony in this case, we turn to the primary factors that a court should consider in determining whether to award alimony: the financial need of one spouse and the other spouse's ability to pay. *Herman*, 335 Ark. 36, 977 S.W.2d 209 (1998). In making his finding regarding appellant's ability to pay, the trial judge stated that he thought that "the case law is clear that if there's a finding that he's capable of making more, then I can impute what he might be able to make and come up with a determination on that." While the trial court did not indicate upon what case it was relying, the seminal case on this issue — and the only case cited by appellee in support of the circuit court's decision to impute income to appellant — is *Grady v. Grady*, 295 Ark. 94, 747 S.W.2d 77 (1988).

In *Grady*, Mr. Grady, a staff attorney for the Department of Correction for twelve years, making approximately $1900 a month, resigned from his position after he separated from his wife and began a solo law practice where his estimated net income was $81 a week. The parties had six children, four of whom were living at home at the time of the divorce hearing. Mrs. Grady was forty-five years old at the time of the divorce, had an eighth-grade

education, had no special training, and spent most of the twenty-two year marriage as a housewife caring for the children. The circuit court awarded custody to Mrs. Grady and ordered Mr. Grady to pay $600 a month in child support and $10 a year in alimony. On appeal, Mr. Grady argued that the court could not base a child-support award on his earning capacity when in fact his earnings were considerably less at the time of the divorce. The supreme court disagreed. The supreme court stated that there are circumstances under which it is appropriate to order child support based on a party's earning *capacity* rather than on actual earnings. The court determined that "[a] supporting spouse does not have total discretion in making decisions which affect the welfare of the family, if the minor children have to suffer at the expense of those decisions." *Id.* at 98, 747 S.W.2d at 79. Noting that a determination of the proper circumstances under which to impute income is often difficult, the court stated:

> On the one hand, the courts must not unduly interfere with the personal lives and career choices of individuals merely because they have been involved in a divorce. On the other hand, because there has been a divorce, the courts are thrust into the middle of the parties' personal lives in order to protect the interests of the minor children who are also unwilling participants in the divorce.

Id. (quoting *Rohloff v. Rohloff*, 411 N.W.2d 484 (Mich. Ct. App. 1987)).

We hold that the circuit court's finding imputing income to appellant in this case was an abuse of discretion. The holding in *Grady* authorizing a circuit court to impute income concerned child support. The supreme court did not apply this reasoning to the award of alimony in that case, nor has it applied the rule in *Grady* to a case in which child support was not awarded. While we do not decide today that income may never be imputed to support an award of alimony, we hold that it was not appropriate in this case.[1] In this case, where appellant's income had decreased by more than 50% since his initial agreement to pay alimony,

[1] The dissent states that we contend that "our supreme court allows imputed income for alimony purposes only where child support was also awarded." This is a mischaracterization. We merely note that income was imputed in *Grady* with regard to child support only and that the supreme court has not extended the reasoning in *Grady* regarding imputed income to a case involving alimony only. We decline to do so here.

where appellee made more than appellant and had no dependents, and where the circuit court's award of alimony required appellant to pay over one-half of his take-home pay to appellee, we hold that the trial court abused its discretion in imputing income to appellant and finding that appellant had the ability to pay.

Issue of Need

Turning to the other factor — the financial need of one spouse — we find no evidence of need to support an award of alimony. The initial award of alimony was based upon appellant's agreement to pay. There is no evidence in the record to suggest that appellee needed alimony then or that she needs alimony now. The trial court stated that, in addition to its finding imputing income to appellant, "the other thing is I took into consideration that this was a consent judgment that he entered into, a consent order to pay $600." This is simply not sufficient to support a finding of need where a party seeking a change in the amount of alimony has shown a change in circumstances.

Accordingly, because we find no evidence in the record to support a finding that appellant had the ability to pay alimony or that appellee had a financial need of alimony, we hold that the circuit court's decision not to terminate alimony in this case was an abuse of discretion. We reverse and remand for entry of an order consistent with this opinion.

Reversed and remanded.

MARSHALL, VAUGHT, and MILLER, JJ., agree.

GLADWIN and BAKER, JJ., dissent.

KAREN R. BAKER, Judge, dissenting. The majority's opinion is flawed in three distinct respects. First, it misstates the holding in the seminal case upon which it bases its decision. Second, it ignores critical testimony relied upon by the trial court in reaching its decision. Third, the disregard of this testimony leads to the improper shifting of the burden of proof.

First, the majority misstates the holding in *Grady v. Grady*, 295 Ark. 94, 747 S.W.2d 77 (1988). The majority acknowledges that *Grady* is "the seminal case on this issue." "This issue" is whether the trial court erred in imputing income to appellant when considering whether to modify the court's previous award of

alimony. Despite the majority's recognition that *Grady* controls, it contends that the imputation of income in *Grady* was limited to the child-support obligation in the case, and that our supreme court allows imputed income for alimony purposes only where child support was also awarded. The majority completely ignores our supreme court's specific proclamation in *Grady* that imputation of income is permitted in spousal support cases:

> We have not dealt with this issue directly, but elsewhere it has been held that the court may consider the fact that a supporting spouse voluntarily changes employment so as to lessen earning capacity and, in turn, the ability to pay *alimony and child support. Camp v. Camp,* 269 S.C. 173, 236 S.E.2d 814 (1977). A court may in proper circumstances *impute an income to a spouse* according to what could be earned by the use of his or her best efforts to gain employment suitable to his or her capabilities. *Klinge v. Klinge,* 554 S.W.2d 474 (Mo. 1977).

Grady, 295 Ark. at 97, 747 S.W.2d at 78-79 (emphasis added); *see also Christianson v. Christianson*, 671 N.W.2d 801, 806 (N.D. 2003) (recognizing that other states have permitted imputing income in spousal support cases, citing *Grady*, but holding that imputation not appropriate on facts of the case); *Moore v. Moore*, 242 Mich. App. 652, 619 N.W.2d 723 (2000); *In re Marriage of Carrick,* 560 N.W.2d 407 (Minn. Ct. App. 1997).

Our supreme court in *Grady* held that a trial court may impute income for alimony and child support purposes. This premise is clear and easily interpreted. What is unclear is how the majority embraces our supreme court's explanation in *Harvey v. Harvey*, 295 Ark. 102, 747 S.W.2d 89 (1988), decided the same day as *Grady*, that the purpose of alimony is to rectify economic imbalance that includes the earning power of the parties, while completely eviscerating that purpose by holding that our supreme court allows imputation of income to rectify economic imbalance only when a child support order is also entered. I cannot imagine our supreme court adopting the limitation set out by the majority; however, had the supreme court intended to allow imputation of income for spousal support only when a child support order is entered, they certainly could have used this limiting language. This court is without power to modify and limit the supreme court's specific statement allowing imputation of income in alimony cases found in *Grady*. The majority implicitly acknowledges that it cannot overrule our supreme court when it inserts, almost as an

afterthought: "While we do not decide today that income may never be imputed to support an award of alimony, we hold that it was not appropriate in this case."

Apparently the majority finds that it is not appropriate in this case because no child-support order was entered. The majority holds that the trial court abused its discretion in imputing income to appellant, and finding that appellant had the ability to pay the reduced alimony award, by focusing on the decrease in appellant's wages and emphasizing that appellee "had no dependents," i.e., a child. Not once in discussing imputation of income does the majority address the fact that appellant's wages were reduced when he lost his former job because he lost his driver's license. In appellant's testimony, he explained that he lost his driver's license because he did not have insurance. The majority ignores the fact that appellant's reduction in income was related to his refusing to purchase, or not being able to obtain, insurance. Nothing in the majority's opinion explains how this fact was an improper consideration in the trial court's decision that, although alimony should be reduced, it should not be eliminated. Certainly the majority does not explain how the trial court abused its discretion in finding that appellant had the ability to pay the reduced alimony award. The ability to pay is not limited to a supporting spouse's current wages, as the majority indicates, but includes what could be earned by the use of his or her best efforts to gain employment suitable to his or her capabilities. *Grady*, *supra*.

The decision to grant alimony lies within the sound discretion of the circuit court and will not be reversed on appeal, absent an abuse of discretion. *Taylor v. Taylor*, 369 Ark. 31, 250 S.W.3d 232 (2007). An abuse of discretion means discretion improvidently exercised, i.e., exercised thoughtlessly and without due consideration. *Southwestern Bell Yellow Pages, Inc. v. Pipkin Enterprises, Inc.*, 359 Ark. 402, 198 S.W.3d 115 (2004) (citing *Arnold v. Camden News Publ'g Co.*, 353 Ark. 522, 110 S.W.3d 268 (2003)). Our supreme court and this court have emphasized in the past that the circuit court is in the best position to view the needs of the parties in connection with an alimony award. *See Taylor*, *supra*.

Despite this standard of review, the majority reaches its conclusion that the trial court abused its discretion by ignoring evidence that the trial court specifically considered in reaching its decision. This is the second distinct flaw in the majority's reasoning. Based on appellant's testimony explaining the loss of his driver's license and job, the trial court found as follows:

> Mr. Morse, part of these circumstances are well within your control and I am basing this on the fact that what caused you not to be able to make the amount of money that you were making seems to me to be under your control and not someone else's. You got terminated for reasons that were partially or totally within your control.
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> . . . .
>
> . . . he's capable of making more and the reason he isn't making more is something he did. The case law is clear that if there's a finding that he's capable of making more, then I can impute what he might be able to make and come up with a determination on that. He said that he lost his $18.00 an hour job because of things he did, not because they just terminated him or the job ended. I think that's the difference here. I think there's other jobs he could have done. He lost a good job because of his own doing and that's my reasoning.

The trial judge correctly stated the law and relied upon it to impute income. *See Hurley v. Hurley*, 255 Ark. 68, 498 S.W.2d 887 (1973) (holding that changes that are the result of decisions made by the obligor cannot be urged as a change in circumstances to justify reduction of alimony); *see also Taylor v. Taylor*, 8 Ark. App. 6, 648 S.W.2d 505 (1983).

The majority ignores the evidence. Then it ignores our standard of review. The majority fails to explain how the trial judge acted thoughtlessly or without due consideration when he specifically stated that the reason appellant was terminated from his job was because he lost his license which was within appellant's control. The trial court specifically found appellant's fault was not an excuse for failing to meet his court-ordered obligations. Appellant was found in contempt and ordered to pay arrearages. Although the trial court reduced future support obligations, it refused to terminate the support altogether, specifically finding that, "he is capable of making more." The trial court's decision clearly was not exercised thoughtlessly and without due consideration. The majority also fails to explain how this court is in a better position than the circuit court to determine the need of one party and the ability to pay of the other in connection with the award of alimony, even though precedent clearly requires deference to the circuit court because that court is in the best position to view the needs of the parties in connection with an alimony award. *See Taylor, supra.*

The majority can reach its conclusion only by assuming that it, rather than the trial court, is in the "best position" to view the financial need of one spouse and the other spouse's ability to pay. In so doing, the majority impermissibly shifted the burden in this case from appellant to the appellee. It has long been held that a modification of an award of alimony must be based on a change of circumstances of the parties, *Herman v. Herman*, 335 Ark. 36, 977 S.W.2d 209 (1998), and the burden of showing a change in circumstances is always upon *the party seeking the change in the amount of alimony*. (Emphasis added.) *Weeks v. Wilson*, 95 Ark. App. 88, 234 S.W.3d 333 (2006) (citing *Hass v. Hass*, 80 Ark. App. 408, 97 S.W.3d 424 (2003)). The majority opinion specifically states that, "There is no evidence in the record to suggest that appellee needed alimony *then* or that she needs alimony *now*." (Emphasis added.) Apparently, the majority is attempting to go behind the order to determine whether or not the trial court erred in its first award of alimony. There is no authority for that proposition, and the premise is untenable. *See Taylor, supra* (citing *Lively v. Lively*, 222 Ark. 501, 261 S.W.2d 409 (1953) (holding that the liberality of the original allowance cannot afford grounds for modification)). This last distinct flaw, the shifting of the burden to appellee, demonstrates the majority's disregard of appellate precedent and deference to the trial court.

It is clearly appellant's burden to prove a change in circumstances existed, as he is the one seeking a modification of alimony in this case. It was appellant's burden to prove that appellee no longer needed alimony. He presented nothing to demonstrate need or a lack of need to the trial court. To the extent that the majority's reasoning relies upon that lack of evidence, they should remember that appellee did not have to prove anything, as it was not her burden. The majority's reasoning is structurally unsound. It misstates the holding in the seminal case upon which it bases its decision; it ignores critical testimony relied upon by the trial court in reaching its decision; and, it improperly shifts the burden of proof to appellee.

Accordingly, I dissent.

Stephanie COKER *v.* DIRECTOR, DEPARTMENT of WORKFORCE SERVICES, and James Law Firm

E 07-50 262 S.W.3d 175

Court of Appeals of Arkansas
Opinion delivered September 12, 2007

Appeal from the Arkansas Board of Review; affirmed.

Appellant, pro se.

Phyllis Edwards, for appellee Dep't of Workforce Services.

DAVID M. GLOVER, Judge. In this unbriefed unemployment case, appellant, Stephanie Coker, was initially denied unemployment benefits at the department level, but the Appeal Tribunal reversed that decision and awarded her benefits. Coker's employer, the James Law Firm, then appealed the appeal-tribunal decision to the Board of Review, which reversed the Appeal Tribunal and denied her application for unemployment benefits on the basis that she was discharged from her last work for misconduct in connection with the work. Coker now appeals to this court, arguing that there was not substantial evidence to support the Board of Review's finding. We affirm the Board of Review's denial of benefits.

A person will be disqualified for unemployment benefits if it is found that she was discharged from her employment on the basis of misconduct in connection with the work. Ark. Code Ann. § 11-10-514(a)(1) (Repl. 2002). In *Johnson v. Director*, 84 Ark. App.

349, 351-52, 141 S.W.3d 1, 2-3 (2004), this court set forth both the definition of "misconduct" as well as the well-settled standard of review in unemployment cases:

> "Misconduct," for purposes of unemployment compensation, involves: (1) disregard of the employer's interest; (2) violation of the employer's rules; (3) disregard of the standards of behavior which the employer has a right to expect; and (4) disregard of the employee's duties and obligations to his employer. *Rossini v. Director*, 81 Ark. App. 286, 101 S.W.3d 266 (2003). To constitute misconduct, however, the definitions require more than mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies, ordinary negligence in isolated instances, or good-faith errors in judgment or discretion. *Id.* Instead, there is an element of intent associated with a determination of misconduct. *Blackford v. Director*, 55 Ark. App. 418, 935 S.W.2d 311 (1996). There must be an intentional and deliberate violation, a willful and wanton disregard, or carelessness or negligence of such a degree or recurrence as to manifest wrongful intent or evil design. *Rossini v. Director, supra.* Misconduct contemplates a willful or wanton disregard of an employer's interest as is manifested in the deliberate violation or disregard of those standards of behavior which the employer has a right to expect from its employees. *Blackford v. Director, supra.*
>
> Whether an employee's actions constitute misconduct in connection with the work sufficient to deny unemployment benefits is a question of fact for the Board. *Thomas v. Director*, 55 Ark. App. 101, 931 S.W.2d 146 (1996). Our standard of review of the Board's findings of fact is well settled:
>
>> We do not conduct a *de novo* review in appeals from the Board of Review. In appeals of unemployment compensation cases we instead review the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Board of Review's findings. The findings of fact made by the Board of Review are conclusive if supported by substantial evidence; even when there is evidence upon which the Board might have reached a different decision, the scope of judicial review is limited to a determination of whether the Board could have reasonably reached its decision based on the evidence before it. Substantial evidence is such evidence as a reasonable mind might accept as adequate to support a conclusion.

> *Snyder v. Director*, 81 Ark. App. 262, 263, 101 S.W.3d 270, 271 (2003). Additionally, the credibility of witnesses and the weight to be accorded their testimony are matters to be resolved by the Board of Review. *Williams v. Director*, 79 Ark. App. 407, 88 S.W.2d 427 (2002).

Here, Coker was employed at the James Law Firm as a receptionist/secretary for approximately two weeks before being fired. At the hearing, Toni Coleman, a paralegal at the law firm, testified that on the morning in question, the firm was busy and there were numerous motions that needed to be filed at the courthouse. Coleman said that Coker had told her on several prior occasions that she needed to go to Office Depot, and that Coker had told her again that morning, to which Coleman had responded that Coker did not have time for Office Depot that day. Coleman testified that she later learned that Coker procured the office credit card from another firm employee, went to the courthouse, went to Office Depot, picked up her lunch, and arrived back at the office three hours later.

Coker testified that she was a receptionist/secretary for the law firm from October 2 until October 12, 2006, when she was fired by Bill James, an owner of the firm. Coker explained that she got the company credit card from Joe Barraza, another paralegal at the firm, and that he told her to go to Office Depot because she had to return a keyboard and purchase some office supplies. She explained that she was gone for three or four hours because she had to take motions to the courthouse and because Barraza sent her on other errands, including Office Depot. Coker stated that she told Barraza that Coleman did not want her to go to Office Depot that day, but that Barraza told her to go ahead and to go then because James was out of the office and it was better to go at that time. Coker said that she purchased the office supplies on her list, including the cheapest calendar she could find so that she could keep track of when to send out letters to clients regarding their court dates.

When questioned by the hearing officer about whether she went back to Coleman and told her that Barraza had told her to go to Office Depot after Coleman had told Coker not to go, Coker said that she did not let Coleman know. However, Coker said that she asked Barraza to let Coleman know that he had told Coker to go to Office Depot if Coleman asked where she was and that Barraza said that he would take care of it. Coker testified that she did not check with Coleman to see if Barraza had spoken with her

and that she just assumed that he had "covered it." Coker also said that she used her debit card to pay for an office key to be made for her because Barraza told her that James wanted her to have a key.

Under questioning by James, Coker said that Coleman had told her not to go to Office Depot on the day she was dismissed, but that Barraza had told her to go because James was out of the office. James asked Coker if she would agree that she got an office key made without authorization, and Coker told him that she did not have authorization from him, but that Barraza had told her that James wanted a key made for her. Coker admitted that she was gone for four hours that day, but she said that she went to the courthouse, to city hall, to the sheriff's office, back to the office and to Office Depot, and then she took her one-hour lunch.

Joe Barraza testified that Coker was terminated for taking too long running errands and for unauthorized credit-card purchases. Barraza said that Coker asked him if she could go to Office Depot and that he told her "yes." However, he stated that Coker did not tell him that Coleman had told her earlier not to go to Office Depot when he gave her permission to go. Barraza said that he told Coker to buy a calendar and that he gave her an office key. Barraza said that he did not recall that there was a deadline for returning the keyboard to Office Depot. He also denied that Coker told him that Coleman did not want her to go to Office Depot and that he said to go anyway.

In denying Coker's claim on the basis of misconduct connected with the work, the Board of Review found that Coker "had been directed by one supervisor not to go to Office Depot but circumvented that supervisor's authority by seeking permission from a second supervisor without informing him what the first supervisor had directed." We hold that there is substantial evidence to support the Board of Review's decision. Although Coker testified that she told Barraza that Coleman had told her not to go to Office Depot but Barraza told her to go anyway, Barraza flatly denied that Coker had told him that Coleman did not want her to go. The Board of Review believed Barraza's version, which it was entitled to do, and his testimony constitutes substantial evidence that Coker did not tell him that Coleman had already told her not to go to Office Depot before Coker came to him and received permission to go. Viewing the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Board of Review's findings, we hold that Coker's actions constituted

misconduct in connection with the work. We therefore affirm the denial of unemployment benefits.

Affirmed.

PITTMAN, C.J., HART, ROBBINS, and HEFFLEY, JJ., agree.

GRIFFEN, J., dissents.

WENDELL L. GRIFFEN, Judge, dissenting. I would reverse and hold that the Board's decision on misconduct is not supported by substantial evidence. The claimant failed to get clarification concerning the conflicting instructions she was given. However, her actions were in no way detrimental to the employer's interest. Although Coleman and Barraza gave the claimant conflicting instructions, the claimant's purchases with the firm credit card were authorized by Barraza, and the claimant filed the pleadings that Coleman directed her to file.

I do not see how the claimant's conduct involved disregard of her employment duties and obligations, disregard of the standards of behavior for her workplace, violation of the employer's rules, or disregard for the employer's interest so as to constitute misconduct as that term is defined by *Grigsby v. Everett*, 8 Ark. App. 188, 649 S.W.2d 404 (1983). Instead, the evidence in this case does not demonstrate the intent required for misconduct. In that sense, this case warrants reversal even more than was true in *Greenberg v. Director*, 53 Ark. App. 295, 922 S.W.2d 5 (1996), where we reversed the Board of Review for denying benefits to a legal secretary who was rather inept.

Here, the claimant received conflicting instructions, and appears to have been fired for trying to accomplish the tasks she was assigned by Coleman and Barraza. She might have exercised better judgment, but I do not see how she intentionally acted contrary to the law firm's interests. Consequently, I vote to reverse and remand for benefits.

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[redacted]