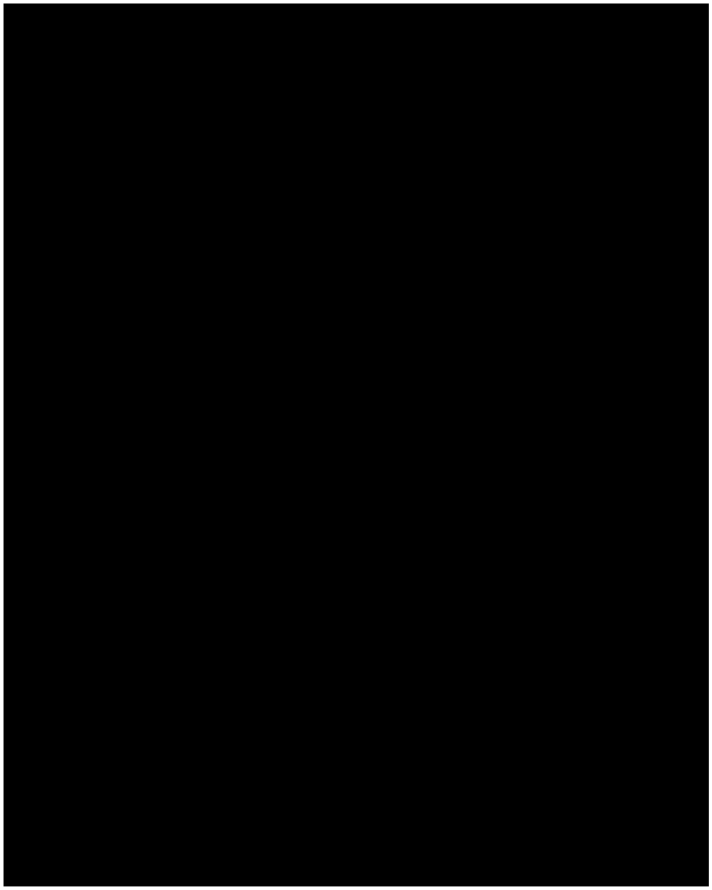

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ARK.

Donale Peter NAHLEN *v.* STATE of Arkansas

CR 97-422 953 S.W.2d 877

Supreme Court of Arkansas
Opinion delivered October 2, 1997

William C. McArthur, for appellant.

Winston Bryant, Att'y Gen., by: *Gil Dudley*, Asst. Att'y Gen., for appellee.

DAVID NEWBERN, Justice. Donale Peter Nahlen was convicted of two counts each of kidnapping and aggravated robbery. Pursuant to the so-called "three strikes and you're out" sentencing statute, Ark. Code Ann. § 5-4-501(d) (Supp. 1995), Mr. Nahlen was sentenced to life in prison without parole. Mr. Nahlen main-

tains that § 5-4-501(d) is "unconstitutionally vague, ambiguous, and unclear" and that his conviction therefore should be reversed. Mr. Nahlen also argues that his conviction should be reversed, and the case remanded, because the Trial Court prevented him from introducing, during the trial's penalty phase, video-taped statements made by some of his friends and acquaintances about their opinions of, and their experiences with, Mr. Nahlen. The statute is not vague, but it is ambiguous. The Trial Court, however, chose to apply the more liberal alternative interpretation. Even though the statute was interpreted in a way favorable to Mr. Nahlen, it required imposition of a sentence of life without parole. The Trial Court's refusal to admit the video tape in the sentencing phase thus becomes irrelevant. We affirm the conviction and sentence.

Mr. Nahlen and a female friend entered a pharmacy and robbed the pharmacist and his employee of drugs and cash at gunpoint. The victims were made to lie on the floor while they were bound with duct tape. They managed to free themselves before the culprits left the store. The pharmacist and Mr. Nahlen exchanged gunfire as a result of which Mr. Nahlen and an innocent customer-bystander were injured. Mr. Nahlen and his companion were held until the police arrived.

1. The "three strikes" statute

Aggravated robbery and kidnapping are both Class Y felonies. Under Ark. Code Ann. § 5-4-401(a)(1) (Repl. 1993), a defendant convicted of a Class Y felony may receive a sentence of not less than ten years and not more than forty years, or life. By its terms, § 5-4-401(a)(1) does not foreclose the possibility of parole. Mr. Nahlen, however, was sentenced to life without parole because, pursuant to Ark. Code Ann. § 5-4-501(d) (Repl. 1995), his aggravated robbery and kidnapping convictions qualified as felonies "involving violence" and because he had two or more prior convictions for violent felonies on his record. In other words, as this was Mr. Nahlen's "third strike," he received a harsher sentence under § 5-4-501(d) than he would have otherwise received under § 5-4-401(a)(1). The provisions of § 5-4-501(d) relevant to this case are:

> (1) A defendant who is convicted of a felony involving violence enumerated in subdivision (d)(2) of this section and who has previously been convicted on two (2) or more *separate and distinct* prior occasions of one (1) or more of the felonies involving violence enumerated in subdivision (d)(2) of this section shall be sentenced to an extended term of imprisonment, without eligibility for parole or community punishment transfer, as follows:
>
> (A) For a conviction of a Class Y felony, a term of not less than life in prison; . . .
>
> (2) For the purposes of this subsection, a felony involving violence shall mean:
>
> (A) Any of the following felonies enumerated as follows: . . .
>
> (iii) Kidnapping, § 5-11-102;
>
> (iv) Aggravated robbery, § 5-12-103; . . .
>
> (3)(A) After reaching the verdict of guilty on a felony involving violence, the same jury or the same judge sitting without a jury shall sit again in order to hear additional evidence determined pursuant to the procedures outlined in § 5-4-502, and if it is then determined beyond a reasonable doubt that in fact the defendant has previously pleaded guilty or nolo contendere to, or been found guilty of, two (2) or more prior felonies involving violence, then the defendant shall be sentenced in accordance with the provisions of subdivision (d)(1) of this section. [Emphasis supplied.]

The problem is that § 5-4-501(d)(1) contains the words "separate and distinct prior occasions" but §5-4-501(3)(A) does not, and each of those subsections purports to provide when the three-strikes enhancement applies.

The State proffered three Arkansas judgments, as well as one from Montana, reflecting Mr. Nahlen's convictions for aggravated robbery, a "violent offense" within the meaning of the three-strikes law. Each conviction resulted from Mr. Nahlen's plea of guilty. The Arkansas convictions arose from incidents occurring on three different dates in three different counties. Mr. Nahlen was represented by a different lawyer in each of the three separate proceedings. In response to a request from Montana authorities,

each of the Arkansas sentences was altered to provide that it would be served in Montana concurrently with the Montana forty-year sentence. Apparently Mr. Nahlen had agreed to plead guilty to the Montana charge if the Arkansas sentences could be served concurrently with his Montana sentence.

Mr. Nahlen requested that the Arkansas convictions be "treated as one instead of three" in light of his assessment that the three priors "all coincide and relate one to the other." In light of the provision for application of the "three strikes" statute only when a defendant has been "convicted on two (2) or more *separate and distinct prior occasions* of one (1) or more of the felonies involving violence," § 5-4-501(d)(1) (emphasis added), defense counsel conceded that the three aggravated robberies were all "different actions" but insisted that "the *punishment* for them was just one occasion and one sentencing and it was just run concurrent, one with the other." (Emphasis added). Mr. Nahlen's counsel maintained that the convictions "were all in one period of time" and "should be joined for purposes of this habitual statute."

After the jury had returned its verdict of guilty on the four offenses charged, the Trial Court provided the jury with two additional verdict forms. One read as follows:

> We, the Jury, find beyond a reasonable doubt that the Defendant has previously pled guilty or been found guilty on separate and distinct prior occasions of two or more prior felonies involving violence.

The other form contained the statement in the negative, *i.e.*, ". . .we do not find. . . ." The jury returned the positive form.

Although we make no determination whether it was proper for the Trial Court to submit the issue to the jury, as that is not an issue in this appeal, we conclude Mr. Nahlen has no basis for urging his ambiguity argument in view of the fact that, as the result of the verdict forms and instruction submitted to the jury, he received the benefit of the more liberal of the two possible interpretations.

We agree with the State's position that Mr. Nahlen was eligible for an enhanced sentence under the statute whether the

language in § 5-4-501(d)(1), or the language in § 5-4-501(d)(3)(A), controlled. Thus, Mr. Nahlen lacks standing to complain because he "clearly falls within the conduct proscribed by the statute." *Vickers v. State,* 313 Ark. 64, 69, 852 S.W.2d 787, 790 (1993).

We do not ignore the part of Mr. Nahlen's argument in which he refers to the statute at issue as "vague." We reject that characterization in favor of the Trial Court's and our conclusion that each alternative presented by the statute is clear but that each is inconsistent with the other. Thus, the statute containing both is ambiguous. Even if the statute were properly said to be vague, however, Mr. Nahlen could not prevail.

> It is an accepted principle that when challenging the constitutionality of a statute on the ground of vagueness, the individual challenging the statute must be one of the "entrapped innocent," who has not received fair warning. If, by his action, that individual *clearly* falls within the conduct proscribed by the statute he cannot be heard to complain.

Burrow v. State, 282 Ark. 479, 481, 669 S.W.2d 441, 443 (1984). Mr. Nahlen had clear warning from the statute that, at a minimum, he was facing a sentence of life in prison without parole if he were found to have committed qualifying offenses on separate and distinct occasions.

[redacted] "In order to challenge the constitutionality of a statute, a person must demonstrate that the challenged statute had a prejudicial impact on him. *Montgomery v. State*, 277 Ark. 95, 640 S.W.2d 108 (1982)." *Greer v. State*, 310 Ark. 522, 523, 837 S.W.2d 884, 885 (1992). Any ambiguity in the statute could not have affected Mr. Nahlen because he was eligible for the enhanced sentence under either of the inconsistent subsections.

2. *Videotaped character evidence*

In both the guilt-innocence phase and the sentencing phase of the trial Mr. Nahlen asked to be allowed to present a video-tape recording of character testimony by acquaintances from Montana. The State responded that it would wish to cross-examine any such

witness. The request to allow the jury to view the videotape was denied in each instance as it was inadmissible hearsay.

Mr. Nahlen now argues that testimony as to a person's character, based upon reputation, is not hearsay. Although not specifically made, the reference is apparently to Ark. R. Evid. 803(21) which excepts from inadmissible hearsay "Reputation as to character. Reputation of a person's character among his associates or in the community." We note that the rule does not provide that such evidence may be presented by other than a witness subject to cross-examination, and Mr. Nahlen supplies us with no authority on the point. The Trial Court ruled, correctly, that the tape-recorded statements, not subject to cross-examination in any form, would be hearsay.

The Trial Court also mentioned, again correctly, that if it were suggested to the jury that it could do other than that mandated by the three-strikes statute, it would amount to a nullification of the law. We agree. Mr. Nahlen was not prejudiced by the refusal to admit the tape into evidence because it could have had no effect on his sentence.

3. Rule 4-3(h)

The record of trial has been examined for errors prejudicial to Mr. Nahlen to which objection was made at the trial. None has been found.

Affirmed.

Stephanie Kay WOFFORD *v.* STATE of Arkansas

CR 97-38 952 S.W.2d 646

Supreme Court of Arkansas
Opinion delivered October 2, 1997

[redacted]

Walker, Shock & Harp, PLLC, by: *J. Randolph Shock*, for appellant.

Winston Bryant, Att'y Gen., by: *Vada Berger*, Asst. Att'y Gen., for appellee.

DAVID NEWBERN, Justice. Stephanie Kay Wofford pleaded *nolo contendere* to first-degree murder in connection with the death

of her five-year-old son Mark. She was convicted pursuant to her plea and sentenced to life imprisonment. In accordance with Ark. R. Crim. P. 24.3(b), Ms. Wofford's plea was conditional; thus she reserved the right to appeal from the Trial Court's denial of her motion to suppress evidence. The evidence in question included statements that were either given while she was not in custody or were preceded by an adequate *Miranda* warning. We hold there was no requirement that the statements be suppressed.

Also in question, however, are items of evidence seized by police officers who entered Ms. Wofford's home without a warrant sometime after other officers had entered without a warrant but pursuant to circumstances the Trial Court deemed exigent. The question to be answered is whether the officers entering later could properly seize items that could have been seized by the first entering officers because they were inadvertently seen by them in "plain view" while they were there for emergency purposes. As there was no testimony on the point at the suppression hearing, we cannot determine whether the items seized were in plain view of the officers who first entered. We, therefore, must remand the case for the limited purpose of determining the answer to that question. If it is properly determined by the Trial Court that the items seized were seen in plain view by the officers who initially entered Ms. Wofford's home, the conviction will be affirmed.

Before considering Ms. Wofford's suppression arguments, we note that she has raised two points of appeal not permitted by Rule 24.3(b) and the conditional plea arrangement. Those arguments concern the Trial Court's upward departure from the sentencing guideline contained in Ark. Code Ann. §§ 16-90-803 and 16-90-804 (Supp. 1995) and an alleged violation of Ark. Sup. Ct. Admin. Order #6 having to do with cameras in the courtroom. As a general rule, one is not allowed to appeal from a conviction resulting from a plea of guilty or *nolo contendere.* Ark. R. App. P.—Crim. 1(a). *See Payne v. State,* 327 Ark. 25, 937 S.W.2d 160 (1997). Rule 24.3(b) presents an exception to the rule but only for the purpose of determining on appeal whether an appellant should be allowed to withdraw her plea if it is concluded that evidence should have been, but was not, suppressed.

We, therefore, decline to consider the two points that do not concern suppression of evidence.

1. The search

From the home where she and her son lived, Ms. Wofford telephoned her parents' home, which was apparently nearby in Ft. Smith. Ms. Wofford's sister, Amanda Hutchins, learned of the call and believed "something was wrong." Ms. Hutchins went to Ms. Wofford's home where she found Ms. Wofford sitting on a couch with blood on her wrists and clothing. Ms. Wofford's father and brother, along with family friend Henry McMurtery, then arrived. Ms. Hutchins called 911 and reported that Ms. Wofford had tried to kill herself, that there was blood "all over," and that Ms. Wofford had said her son would not wake up.

Ft. Smith police officers William Ohm and David C. Boyd, Jr., were on patrol on Ms. Wofford's block. They heard a dispatch and arrived at Ms. Wofford's house almost immediately. They understood that a child was "down and bleeding," and they thought it might have been as the result of a traffic accident. Ms. Wofford's father, sister, and brother were in the yard along with Mr. McMurtery who waived to the police officers to follow him into the house, saying, "They're in here." Mr. McMurtery had not only seen Ms. Wofford as previously described but had been to the rear of the house and had found Mark on a bed in Ms. Wofford's bedroom with his wrists cut and his eyes open and dilated.

The officers entered the house without a warrant shortly after 3 p.m. and spent ten or fifteen seconds checking Ms. Wofford's vital signs. Officer Boyd, Jr., remained with Ms. Wofford while Officer Ohm followed Mr. McMurtery to the bedroom to examine Mark. By 3:29 p.m., Officer Ohm had determined that Mark was deceased. He returned to the living room and told Officer Boyd, Jr., to secure the area. In the meantime, Officer Boyd, Jr., had attempted to learn what had happened from Ms. Wofford. She appeared to be dazed and said only, "I can't die. I cannot die," and she asked, "Why won't he wake up?" When asked about her cut wrists she replied that she had cut them with a knife that was in "the back room."

At around 3:40 p.m., Officer Ohm called for a supervising officer, an additional police unit, and an emergency medical services ("EMS") unit for Ms. Wofford. The EMS unit arrived around 3:50 p.m. As Officers Ohm and Boyd, Jr., were securing the perimeter of the home, they noticed a door leading from the outside into Ms. Wofford's bedroom. The door appeared to have been kicked in or struck with a sharp object. There were drops of blood and shattered glass. After securing the area, Officer Boyd, Jr., began keeping a detailed log of entries and exits.

At 4:00 p.m. Ms. Wofford left for a hospital emergency room in an ambulance. Officer Chris Boyd, Sr., had arrived at the scene at 4:05 p.m. At 4:41 p.m. Officer Boyd, Sr., left for the hospital where he was later to question Ms. Wofford. On her way to the hospital Ms. Wofford told an emergency medical technician, "He wouldn't breathe, so, I cut his wrists to match mine."

At 4:05 and 4:15 p.m., respectively, Officer Risley and Sergeant Lonetree arrived. Officer Risley entered the home at 4:05 p.m. with other officers but withdrew because of a strong odor of gas or petroleum. Sergeant Lonetree had brought a video camera and equipment to be used to gather evidence. He was, however, initially unable to enter the house on account of safety concerns relating to the gas or oil fumes. After the crime scene had been secured, firemen arrived at 4:32 p.m. and left at 5:20 p.m. Personnel from the gas company arrived at 5:07 p.m., turned off the gas, and left at 5:35 p.m. The coroner left with Mark Wofford's body at 5:38 p.m.

After receiving assurance that it was safe to enter the premises, Sergeant Lonetree and Officer Risley did so without a warrant. As they walked through the rooms of the house, they took photographs and made a videotape. At 6:10 p.m., they seized the first piece of evidence. By 8:55 p.m., they had seized 29 additional items. Sergeant Lonetree testified that the items seized were in plain view.

In denying Ms. Wofford's motion to suppress the evidence seized from her home, the Trial Court found that the officers' initial, warrantless entry was justified by "exigent circumstances." The Trial Court also found the officers had obtained "some form

of consent" to enter the home. The Trial Court further indicated that the seizure of evidence was permissible as it was in plain view. Ms. Wofford contends that none of the established exceptions to the Fourth Amendment's warrant requirement justified the entry into, and search of, her home.

a. Officers Ohm and Boyd, Jr.

Ms. Wofford correctly states in her brief that, as Officers Ohm and Boyd, Jr., entered her residence without a warrant, their entry must be viewed as illegal unless the State established the availability of an exception to the warrant requirement. *Williams v. State,* 327 Ark. 213, 939 S.W.2d 264 (1997); *Willett v. State,* 298 Ark. 588, 769 S.W.2d 744 (1989). Ms. Wofford maintains the State failed to satisfy its burden and that the Trial court erred by finding that the officers had consent to enter her home and that their entry was justified by exigent circumstances. In her view, therefore, the evidence obtained by the police as a result of the officers' initial entry into her home should be suppressed as the fruits of an entry made in violation of the Fourth Amendment. *See Wong Sun v. United States,* 371 U.S. 471 (1963).

When we review a ruling on a motion to suppress, we make an independent determination based on the totality of the circumstances, viewing the evidence in the light most favorable to the State. We reverse only if the ruling is clearly against the preponderance of the evidence. *Norman v. State,* 326 Ark. 210, 931 S.W.2d 96 (1996).

Applying this standard, we affirm the Trial Court's ruling that the officers' initial entry was justified by exigent circumstances. Given the testimony adduced at the suppression hearing, that ruling was correct under Ark. R. Crim. P. 14.3, which establishes the "emergency exception" to the warrant requirement and provides in part as follows:

> An officer who has reasonable cause to believe that premises or a vehicle contain:
>
> (a) individuals in imminent danger of death or serious bodily harm . . .

* * *

> may, without a search warrant, enter and search such premises and vehicles, and the persons therein, to the extent reasonably necessary for the prevention of such death, bodily harm, or destruction.

The United States Supreme Court has repeatedly recognized the emergency exception in its Fourth Amendment jurisprudence. *See, e.g., Thompson v. Louisiana,* 469 U.S. 17 (1984); *Mincey v. Arizona,* 437 U.S. 385 (1978). In the *Mincey* case, the Court said that it does

> not question the right of the police to respond to emergency situations. Numerous state and federal cases have recognized that the Fourth Amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid. Similarly, when the police come upon the scene of a homicide they may make a prompt warrantless search of the area to see if there are other victims or if a killer is still on the premises. Cf. *Michigan v. Tyler,* [436 U.S. 499, 509-10 (1978)]. "The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency." *Wayne v. United States,* 115 U.S. App. D.C. 234, 241, 318 F.2d 205, 212 (opinion of Burger, J.). And the police may seize any evidence that is in plain view during the course of their legitimate emergency activities. *Michigan v. Tyler, supra,* at 509-510; *Coolidge v. New Hampshire,* [403 U.S. 443, 465-66 (1971)].
>
> But a warrantless search must be "strictly circumscribed by the exigencies which justify its initiation," *Terry v. Ohio,* [392 U.S. 1, 25-26 (1968)] . . . .

Mincey v. Arizona, 437 U.S. at 392-93 (footnotes omitted). *See generally* 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 6.6(a), at pp. 390-403 (3d ed. 1996).

[redacted] It is true that Officer Ohm entered Ms. Wofford's bedroom in search of Mark Wofford despite Mr. McMurtery's statement that he believed the child was already dead. This aspect of the search was nonetheless consistent with Rule 14.3(a) because Mr. McMurtery's assessment of the child's condition could well

have been incorrect. "Frequently, the report of a death proves inaccurate and a spark of life remains, sufficient to respond to emergency police aid." *Patrick v. State,* 227 A.2d 486, 489 (Del. 1967). In short, the officer's entry into the bedroom was clearly related to the objectives of the authorized intrusion into the residence. *See generally* LAFAVE, *supra,* at p. 393-94 and n.19-23.

As the Supreme Court of Wisconsin has noted, the Fourth Amendment's "reasonableness" requirement is satisfied in the case of an emergency entry into a home "by the compelling need to render immediate assistance to the victim of a crime, or insure the safety of the occupants of a house when the police reasonably believe them to be in distress and in need of protection." *State v. Kraimer,* 298 N.W.2d 568, 572 (Wis. 1980). "[T]he purpose of assisting the victim if still alive supplie[s] a compelling reason for immediate entry, quite apart from the purpose of prosecuting for crime." *State v. Hoyt,* 128 N.W.2d 645, 651 (Wis. 1964).

Thus, under the emergency exception, a warrantless entry into a home may be upheld if the State shows that the intruding officer had "reasonable cause" to believe that someone inside the home was "in imminent danger of death or serious bodily harm." Ark. R. Crim. P. 14.3(a). Any search that follows the emergency entry may be upheld under this rule only if the search was "reasonably necessary for the prevention of such death, bodily harm, or destruction," *id.*, and is "strictly circumscribed by the exigencies" that necessitated the emergency entry in the first place. *Mincey v. Arizona,* 437 U.S. at 393, *quoting Terry v. Ohio,* 392 U.S. at 25-26. *See People v. Mitchell,* 357 N.E.2d 607, 610 (N.Y. 1976)("There must be a direct relationship between the area to be searched and the emergency."). However, as the Supreme Court noted in the *Mincey* case, the police may seize evidence that they observe in plain view while conducting "legitimate emergency activities." *Mincey v. Arizona,* 437 U.S. at 393. We applied the exception in *Combs v. State,* 270 Ark. 496, 606 S.W.2d 61 (1980).

The record does not indicate that the entry of Officers Ohm and Boyd, Jr., exceeded the scope of the emergency that justified it. Moreover, it is clear that they did not seize any evi-

dence in the home, although they could have done so had they observed the evidence in plain view "during the course of their legitimate emergency activities." *Mincey v. Arizona,* 437 U.S. at 392-93.

We note Ms. Wofford's suggestion that Rule 14.3(a) cannot apply to the case at bar because Officer Ohm and Boyd, Jr., at the time of entering her home, lacked probable cause to believe that a crime had been, or was being, committed. In support of her suggestion, she cites *Mitchell v. State,* 294 Ark. 264, 742 S.W.2d 895 (1988). In the *Mitchell* case, we held the officer's warrantless entry into the appellant's home was illegal because the officer lacked probable cause to believe a crime had been, or was being, committed and because there were no exigent circumstances. Thus, the entry was not covered by the exception to the warrant requirement discussed in *Payton v. New York,* 445 U.S. 573 (1980). We also said that the officer's entry was not justified by the need to render emergency aid. We did not suggest, however, that the exigent-circumstances exception contained in Rule 14.3(a) requires an officer to have probable cause to believe a crime has been, or is being, committed on the premises. Probable cause is, of course, the basis upon which a warrant to search may be granted. *See* Ark. R. Crim. P. 13.1(d); *Century Theaters, Inc., v. State,* 274 Ark. 484, 625 S.W.2d 511 (1981).

Finally, in light of our agreement with the conclusion that Officers Ohm and Boyd, Jr., were justified by exigent circumstances in entering Ms. Wofford's home, we do not resolve the question of whether the officers had consent to enter the residence. The officers conceded at the hearing that they lacked consent to enter the residence.

b. Sergeant Lonetree and Officer Risley

Our holding that Officers Ohm and Boyd, Jr., legally entered Ms. Wofford's home does not, by itself, answer the question whether the subsequent warrantless intrusion made by Sergeant Lonetree and Officer Risley comports with the Fourth Amendment's requirement that searches and seizures be reasonable. As with any warrantless search and seizure, the one with which we

are concerned here must be viewed as illegal unless the State has established the availability of a warrant-requirement exception. *Williams v. State, supra*; *Willett v. State, supra.*

As mentioned, the Trial Court ruled that the evidence seized by Sergeant Lonetree and Officer Risley was admissible because it was in plain view when the officers observed it. Ms. Wofford maintains that the Trial Court erred in relying on the plain-view exception to the warrant requirement because (1) Sergeant Lonetree and Officer Risley were not lawfully present in the house when they observed the evidence; and (2) their discovery of the evidence was not inadvertent. Viewing the evidence favorably to the State, we cannot say that the Trial Court's ruling on the admissibility of the evidence seized by Sergeant Lonetree and Officer Risley is clearly against the preponderance of the evidence, *Norman v. State, supra,* assuming the items seized had been observed in plain view by Officers Ohm and Boyd, Jr.

Ms. Wofford first contends that the plain-view exception does not apply here because Sergeant Lonetree and Officer Risley were not lawfully present in her home when they observed in plain view the thirty items of evidence that they ultimately seized. According to the decisions of this Court and the Supreme Court of the United States, one of the prerequisites for applying the plain-view exception is that "the initial intrusion that brings the police within plain view of such [evidence] is supported," if not by a warrant, then "by one of the recognized exceptions to the warrant requirement." *Arizona v. Hicks,* 480 U.S. 321, 326 (1987) (citations omitted). *See Williams v. State,* 327 Ark. at 218, 939 S.W.2d at 267 (stating an element of the plain-view exception is that "the initial intrusion was lawful"); *Johnson v. State,* 291 Ark. 260, 263, 724 S.W.2d 160, 162, *cert. denied,* 484 U.S. 830 (1987).

Thus, in order to uphold the officers' search and seizure of evidence in Ms. Wofford's home pursuant to the plain-view exception, we must find that the officers' initial warrantless intrusion into the residence was lawful. Ms. Wofford contends that their initial intrusion was not lawful because it was covered by none of the exceptions to the warrant requirement. Because the evidence was obtained as the result of an illegal entry, argues Ms.

Wofford, the evidence should be suppressed as the fruits of an illegal entry and search. *See Wong Sun v. United States, supra.*

At first glance, Ms. Wofford's argument appears convincing. There is no question that Sergeant Lonetree and Officer Risley lacked consent to enter and conduct a search of the premises. It also is clear that exigent circumstances were no longer extant when Sergeant Lonetree and Officer Risley entered the home and commenced their search.

The emergency that validated the entry of Officers Ohm and Boyd, Jr., at 3:26 p.m. had ceased shortly thereafter when those officers ascertained the condition of Ms. Wofford and her son and secured the crime scene. By 4:00 p.m., the police had concluded that Mark Wofford was dead, the coroner had arrived, and Ms. Wofford had been taken to the emergency room. The exigent circumstances that justified the first two officers' entry at 3:26 p.m. simply did not exist when Sergeant Lonetree and Officer Risley entered Ms. Wofford's residence. Thus, those circumstances alone could not have validated the subsequent entry made by Sergeant Lonetree and Officer Risley. *See La Fournier v. State,* 280 N.W.2d 746, 749 (Wis. 1979)(stating the emergency exception "may not be relied upon where the entry is secured *after* the emergency is terminated")(emphasis added).

Moreover, as the crime scene had been secured, there was no emergency concerning "the risk of removal or destruction of evidence," *Humphrey v. State,* 327 Ark. 753, 766, 940 S.W.2d 860, 867 (1997), that might have justified Sergeant Lonetree's and Officer Risley's entry. Nor were the officers permitted to enter the home simply because they may have suspected that a murder had occurred there. The Supreme Court of the United States has consistently held that a warrantless search of a home cannot be validated under the emergency exception "simply because a homicide recently occurred there." *Mincey v. Arizona,* 437 U.S. at 395. The Court in the *Mincey* case declined "to hold that the seriousness of the offense under investigation itself creates exigent circumstances of the kind that under the Fourth Amendment justify a warrantless search." *Id.* at 394. *See also Thompson v. Louisiana,* 469 U.S. at 21 (stating that, in the *Mincey* case, the Court

"unanimously rejected the contention that one of the exceptions to the Warrant Clause is a 'murder scene exception'"). We noted the Supreme Court's rejection of the "murder scene exception" in our opinions in *Mitchell v. State,* 294 Ark. 264, 742 S.W.2d 895 (1988), and *Alford v. State*, 291 Ark. 243, 724 S.W.2d 151 (1987).

Even if the police collectively had acquired probable cause to arrest Ms. Wofford, probable cause to arrest Ms. Wofford could not have supplied a basis for entering her home without a warrant, at least in the absence of exigent circumstances and Ms. Wofford's *presence* in the home. *See Payton v. New York, supra.* Finally, any emergency arising from the gas or oil fumes could not have justified the officers' entry given Sergeant Lonetree's testimony that he and Officer Risley entered the residence *after* having been assured that the "crisis" was over.

Thus, we cannot say that Sergeant Lonetree's and Officer Risley's initial intrusion into Ms. Wofford's home was lawful because they had consent or because exigent circumstances were prevailing at the time of their initial entry. These exceptions to the warrant requirement simply do not cover their intrusion.

Nonetheless, we conclude that Sergeant Lonetree's and Officer Risley's entry into Ms. Wofford's home was lawful and that their seizure of evidence may have been valid under the plain-view exception. In reaching this conclusion, we rely on the holding in *La Fournier v. State,* 280 N.W.2d 746, 751 (Wis. 1979), that, where the police enter a private residence in accordance with the emergency exception but are unable to preserve the evidence that they observe in plain view while rendering assistance, a second entry by other officers without a warrant is lawful, even though the emergency has passed, if the search that follows is restricted in nature and scope to securing the evidence observed in plain view by the officers who entered pursuant to the emergency exception.

Other courts have found the rationale of the Wisconsin court persuasive and have relied on it to uphold certain warrantless "second entries" made by the police following the termination of the emergency that justified an initial entry. *See, e.g., Hunter v. Commonwealth,* 378 S.E.2d 634 (Va.App. 1989); *Smith v. State,* 419

So.2d 563 (Miss. 1982), *cert. denied,* 460 U.S. 1047 (1983), *overruled on other grounds, Willie v. State,* 585 So.2d 660 (Miss. 1991). *See also State v. Tidwell,* 888 S.W.2d 736 (Mo.App. S.D. 1994); *State v. Jolley,* 321 S.E.2d 883 (N.C. 1984); *State v. Norman,* 302 S.2d 254 (Miss. 1974).

The facts in the case at bar are analogous to those in the *La Fournier* case and the other cases cited above. Officers Ohm and Boyd, Jr., made a valid emergency entry into Ms. Wofford's home. They secured the crime scene and called for assistance, and Sergeant Lonetree and Officer Risley arrived within a reasonable amount of time to process the crime scene and complete the search begun by Officers Ohm and Boyd, Jr. If Sergeant Lonetree and Officer Risley seized only evidence that was observed by Officers Ohm and Boyd, Jr., in plain view without expanding the scope and nature of the initial entry made by Officers Ohm and Boyd, Jr., then the seizure was proper. The record does not establish that the evidence seized by Sergeant Lonetree and Officer Risley was in fact observed in plain view by Officers Ohm and Boyd, Jr. Thus we must remand for the Trial Court to make that determination. *See State v. Spears,* 560 So.2d 1145 (Ala. Cr. App. 1989); *People v. Reynolds,* 672 P.2d 529 (Colo. 1983).

Ms. Wofford next contends that the plain-view exception cannot apply here because Sergeant Lonetree's and Officer Risley's discovery of the evidence was not inadvertent. Ms. Wofford points us to Sergeant Lonetree's testimony that he arrived at the crime scene and entered the house for the very purpose of collecting evidence. Thus, says Ms. Wofford, his discovery of evidence inside the house was intentional rather than inadvertent.

In a different case, Ms. Wofford's argument might be persuasive. We have said that another of the prerequisites for applying the plain-view exception is that the discovery of the evidence must be inadvertent. *See Williams v. State, supra; Johnson v. State, supra.* Here, the record clearly supports Ms. Wofford's contention that Sergeant Lonetree's and Officer Risley's discovery of the evidence in question was anything but inadvertent. It is clear to us, however, that the inadvertency requirement applies to the

initial officers' observations and not to those of officers who follow. Again, if the items seized were inadvertently viewed by Officers Ohm and Boyd, Jr., then it does not matter that the later officers entered the house with the purpose of seizing them.

The Supreme Court of the United States has held that "inadvertence" is not a "necessary condition" for application of the plain-view exception in any type of case brought under the Fourth Amendment. *Horton v. California,* 496 U.S. 128 (1990). Thus, insofar as Ms. Wofford's "inadvertence" argument concerns the Fourth Amendment, the *Horton* case supplies a sufficient basis for rejecting the argument. However, Ms. Wofford's motion to suppress alleged that the seizure of evidence from her home also violated the Arkansas Constitution. We need not decide here whether we will follow the *Horton* case and dispense with the inadvertence requirement for all cases brought under the Arkansas Constitution. Thus, insofar as Ms. Wofford's inadvertence argument concerns only the Arkansas Constitution, we reject it because we believe it is unnecessary for an officer who enters a residence for the purpose of continuing another officer's search and collecting evidence that the other officer observed in plain view to discover the evidence inadvertently.

2. Ms. Wofford's statements

Ms. Wofford contends her statements should have been suppressed because (1) they were the fruits of the police's illegal entry into her home; (2) they were not preceded by adequate *Miranda* warnings; and (3) Ms. Wofford neither voluntarily, nor knowingly and intelligently, waived her constitutional rights before making the statements. Because we cannot say the Trial Court's ruling on the admissibility of Ms. Wofford's statements is clearly against the preponderance of the evidence, we affirm the ruling. *Norman v. State, supra.*

a. Fruit of the poisonous tree

We already have established that the warrantless entry of Officers Ohm and Boyd, Jr., into Ms. Wofford's home was justified under the emergency exception contained in Ark. R. Crim.

P. 14.3(a). Thus, to the extent that Ms. Wofford's incriminating statements were the result of this entry, they are not inadmissible because the officers' entry into her home was not unconstitutional. We need not address this point further.

b. Miranda *warnings*

When Ms. Wofford was taken by ambulance to the hospital emergency room, she was not under arrest. She was neither handcuffed nor told that she was a suspect in the death of her son. She rode in the ambulance unaccompanied by any police officer.

Officer Chitwood followed the ambulance in his patrol unit and arrived at the emergency room behind Ms. Wofford. He had not been instructed to arrest Ms. Wofford. The officer learned from an emergency medical technician that Ms. Wofford had said in the ambulance that she had cut her son's wrists.

Attendants at the hospital removed Ms. Wofford's clothes, glasses, and personal effects and changed her into a hospital gown. Although Officer Chitwood did not request them, he received Ms. Wofford's possessions and placed them in a paper bag next to where he was standing in the treatment room. He later placed the items into the police's evidence locker.

Officer Boyd, Sr., arrived at the hospital at some point thereafter. He had been asked to go to the hospital and talk with Ms. Wofford. Before he entered Ms. Wofford's treatment room, Officer Chitwood told him about the statement that Ms. Wofford had made in the ambulance. Nevertheless, Officer Boyd, Sr., testified that, at the time he began to question Ms. Wofford, he did not consider her a suspect in her son's death. He testified that, in light of the condition of the outside door leading to Ms. Wofford's bedroom and the area around the door, he had not ruled out the possibility that there had been an intruder. The officer wanted to question Ms. Wofford about who the perpetrator might have been.

Officer Boyd, Sr., confirmed with the attending doctor that Ms. Wofford's condition would permit a discussion with her. He then entered the treatment room. He was out of uniform, but he

was wearing his weapon. Also present in the room were Officers Chitwood, Colter, and Pitts, all of whom were uniformed and wearing their weapons. As Officer Boyd, Sr., entered the room, he heard the nurse ask Ms. Wofford if she was all right and Ms. Wofford respond that she was. The nurse also asked Ms. Wofford if she knew where she was, and Ms. Wofford answered that she was in a hospital. Officer Pitts left the treatment room shortly after Officer Boyd, Sr., arrived there.

Officer Boyd, Sr., began to question Ms. Wofford. He initially asked Ms. Wofford if she was all right and told her that he needed to talk to her about what had happened at her house. Ms. Wofford indicated that would be "okay." The officer testified that Ms. Wofford did not appear reluctant to speak with him. She answered the questions and provided him with general information about her name, address, date of birth, and the name and age of her son. She told the officer that her son attended kindergarten. Ms. Wofford also told Officer Boyd, Sr., where she worked, how long she had worked there, and that she had worked the day before but was missing a shift on the day in question. Officer Boyd, Sr., then asked Ms. Wofford what had happened to her son. She answered, "I did it. I killed him, that's why I'm going to prison." Prior to making this statement, Ms. Wofford had not received *Miranda* warnings.

Ms. Wofford's surgeon then entered the treatment room and readied her for surgery. When the surgeon left, Officer Boyd, Sr., resumed his interrogation. He told Ms. Wofford that he needed to discuss what had happened at her house and that he would need to advise her of her rights. He asked Ms. Wofford if she understood that, and she answered that she did. The officer asked Ms. Wofford about her education and verified that she could read and write and that she had a high school diploma. She said she understood what he was saying to her. The officer testified that he then gave Ms. Wofford the following *Miranda* warnings:

> I advised her that she had the right to remain silent. That anything she said can and will be used against her in court. I advised her that she had a right to an attorney present before, during or after questioning, and that if she could not afford one, then the

> Court would appoint one at no cost to her before any questioning if she wished.

Thereafter, Officer Boyd, Sr., asked Ms. Wofford if she understood the warnings, and she answered affirmatively.

After advising Ms. Wofford of her rights, Officer Boyd, Sr., again asked her what had happened. Ms. Wofford answered that she killed her son and attempted to set fire to the house so that Mark's father would not get it. She told the officer that she and Mark did not like the fact that Mark's father had obtained visitation rights. She confessed that she killed her son so that he would not have to see his father. Ms. Wofford explained that she had smothered her son to death by placing her hand over his mouth and nose during the previous night. The surgeons then came to take Ms. Wofford to surgery, and Officer Boyd, Sr., terminated the interrogation without arresting Ms. Wofford.

Ms. Wofford now contends that the Trial Court should have suppressed her initial incriminating statement because it was not preceded by *Miranda* warnings. *Miranda* warnings are required only in the context of custodial interrogation. *Solomon v. State,* 323 Ark. 178, 913 S.W.2d 288 (1996); *State v. Spencer,* 319 Ark. 454, 892 S.W.2d 484 (1995). The question here is whether Ms. Wofford was "in custody" at the time she made her initial incriminating statement in response to the officer's interrogation. We hold that she was not in custody.

A person is "in custody" for purposes of the *Miranda* case when he or she is

> deprived of his freedom of action by formal arrest or restraint on freedom of movement of the degree associated with a formal arrest. In resolving the question of whether a suspect was in custody at a particular time, the only relevant inquiry is how a reasonable man in the suspect's shoes would have understood his situation.

Solomon v. State, 323 Ark. at 186, 913 S.W.2d at 292 (citation omitted). "The initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person

being interrogated." *State v. Spencer,* 319 Ark. at 457, 892 S.W.2d at 486.

A reasonable person in Ms. Wofford's situation could not have believed that she was restrained *by the police* prior to the time she made her initial incriminating statement. Ms. Wofford had been taken to the hospital on account of her injuries and was not escorted there by the police. When the police entered her room, they neither arrested her nor indicated in any manner that she was a suspect. Officer Boyd, Sr., specifically testified that he did not view Ms. Wofford as a suspect during this segment of the interrogation and that he suspected that an intruder might have been responsible. Ms. Wofford suggests that the officer did in fact suspect her from the outset of his questioning. We point out that "an officer's subjective and undisclosed view concerning whether the person being interrogated is a suspect is irrelevant to the assessment whether the person is in custody." *Stansbury v. California,* 511 U.S. 318, 319 (1994). *See State v. Spencer, supra.* Even if Officer Boyd, Sr., did harbor suspicions about Ms. Wofford, nothing in the record suggests such a viewpoint was communicated in any way to Ms. Wofford.

Although three of the officers in the room were in uniform, and although *all* of the officers wore their weapons, none of them restrained Ms. Wofford or threatened her with the weapons, and only one of them, Officer Boyd, Sr., confronted Ms. Wofford with any questions. The tone of the questions, moreover, does not appear to have been hostile or antagonistic, and the duration of the questioning was brief. In addition, hospital personnel had, and appear to have exercised, access to the treatment room throughout a portion of the interrogation.

Finally, we point out that, while Ms. Wofford's freedom of movement may have been restrained somewhat during the interrogation, that confinement resulted only from the hospitalization that was necessary in light of her injuries rather than from any conduct on the part of the police. As other courts have recognized, "confinement to a hospital bed is insufficient *alone* to constitute custody." *People v. Milhollin,* 751 P.2d 43, 50 (Colo. 1993)(emphasis added)(citations omitted). We agree with the

Supreme Court of Delaware that "there is no *per se* 'hospital rule' in a custody inquiry because each case must be decided on its own facts." *DeJesus v. State,* 655 A.2d 1180, 1191 (Del. 1995). In the absence of other indicia of custody, we cannot say that Ms. Wofford's health-related confinement alone produced a custodial situation because her confinement was not the result of police compulsion. Given the totality of the circumstances, we cannot say that the Trial Court erred in concluding that Ms. Wofford was not in custody at the time she made her first incriminating statement.

Ms. Wofford also contends that the Trial Court should have suppressed her second incriminating statement that she made after receiving *Miranda* warnings from Officer Boyd, Sr. She maintains that the warnings were deficient because they failed to apprise her that she had the right to terminate the interrogation at any time.

Even if we could assume, and we need not do so, that Ms. Wofford was in custody after she confessed she had killed her son, we cannot say that the warning given to her was deficient. The *Miranda* case establishes that a defendant has a right to cut off questioning, but it does not require the police to give a warning advising a defendant of this particular right. Although certain passages in the opinions of this Court and the Supreme Court of the United States have suggested that such a warning is required or at least desirable, *see Colorado v. Spring,* 479 U.S. 564, 574 (1987); *Oregon v. Elstad,* 470 U.S. 298, 315 n.4 (1985); *Mauppin v. State,* 309 Ark. 235, 247, 831 S.W.2d 104, 110 (1992), *quoting Colorado v. Spring, supra; Bushong v. State,* 267 Ark. 113, 122, 589 S.W.2d 559, 564 (1979), neither Ms. Wofford nor our own research has produced a case actually *holding* that such a warning is required by the *Miranda* decision. In fact, many courts have considered this question and have held that the police are not required to give the warning proposed by Ms. Wofford. *See, e.g., State v. Fecteau,* 568 A.2d 1187 (N.H. 1990); *Commonwealth v. Lewis,* 371 N.E.2d 775 (Mass. 1978); *United States v. Davis,* 459 F.2d 167 (6th Cir. 1972). *But see United States v. DiGiacomo,* 579 F.2d 1211, 1214 (10th Cir. 1978)(stating that the warning is not required under *Miranda* but that the failure to give it could be a factor in determining whether custodial statements are voluntary).

Although we agree with the Supreme Judicial Court of Massachusetts that it is "the better practice" for the police to advise an arrested person that he or she may cut off questioning at any moment, *Commonwealth v. Lewis,* 371 N.E.2d at 777, we are not prepared to say that Officer Boyd, Sr.'s failure to give it to Ms. Wofford violated the Supreme Court's holding in the *Miranda* case.

c. Waiver

Finally, Ms. Wofford contends that the Trial Court should have suppressed her statements because they did not follow a voluntary waiver of her rights or a knowing and intelligent waiver of her rights. The Trial Court ruled that the waiver was voluntary but did not rule on the issue of whether the waiver was also knowing and intelligent. We have recognized that the question of voluntariness and the question of a knowing and intelligent waiver are distinct and separate inquiries. *See Mauppin v. State, supra.* Thus, the Trial Court's ruling with respect to the voluntariness issue could not have encompassed Ms. Wofford's argument that she did not knowingly and intelligently waive her constitutional rights. Because she failed to obtain a ruling on that discrete issue, it is not preserved for appeal, and we do not address it. *Bowen v. State,* 322 Ark. 483, 911 S.W.2d 555, *cert. denied,* 116 S. Ct. 1861 (1996).

A statement must be voluntary "in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception." *Mauppin v. State,* 309 Ark. at 246-47, 831 S.W.2d at 109 (1992), *quoting Moran v. Burbine,* 475 U.S. 412, 421 (1986).

> When voluntariness of a statement is an issue, we make an independent determination based on the totality of the circumstances surrounding the statement. We will reverse the ruling of the trial court only if that ruling was clearly against the preponderance of the evidence. A custodial statement is presumed involuntary, and the burden is on the state to show that the statement was voluntarily given. . . . . In making a determination of whether a statement was voluntarily made, this court will consider many factors, among which are the age, education and

> intelligence of the accused; the length of questioning; the advice or lack of advice on constitutional rights; the repeated or prolonged nature of questioning; and the use of mental or physical punishment.

McCoy v. State, 325 Ark. 155, 160, 925 S.W.2d 391, 393-94 (1996) (citations omitted). *See also Stephens v. State,* 328 Ark. 81, 85, 941 S.W.2d 411, 413-14 (1997).

The testimony at the suppression hearing supports the Trial Court's ruling finding Ms. Wofford's statement to be voluntary. There was no testimony of police-sponsored coercion or duress or any other type of misconduct. Although Ms. Wofford may have been in a weakened physical or mental condition at the time of making her statements, that fact would not render the statements involuntary absent a finding of police misconduct. *See Stephens v. State, supra.* Although Ms. Wofford may have been dazed earlier in the day, and although the medical evidence indicates she suffered from depression, the testimony of Officers Chitwood and Boyd, Sr., shows that Ms. Wofford was alert in the treatment room and able to converse coherently with those around her. The questioning was preceded by adequate *Miranda* warnings where necessary, and it was not unduly long. Ms. Wofford obtained a high-school education and was holding down a job. In these circumstances, we cannot say that the Trial Court's ruling that the statements were voluntarily made is clearly against the preponderance of the evidence.

3. Rule 4-3(h)

In closing, we note that, in the typical case involving a life sentence, we would ordinarily examine the record pursuant to Ark. Sup. Ct. R. 4-3(h) to determine whether there were other rulings not briefed by the parties that constituted prejudicial error. We have not done so in this case, as it arises from a conditional plea of *nolo contendere.* As mentioned above, we have reviewed only the adverse determination of Ms. Wofford's pretrial motion to suppress evidence. Ark. R. Crim. P. 24.3(b). In appeals from pleas of guilty or *nolo contendere,* we are not required to undertake the additional review prescribed by Rule 4-3(h). *Smith v. State,* 321 Ark. 580, 906 S.W.2d 302 (1995).

We remand the case to the Trial Court to conduct an additional hearing to determine whether Officers Ohm and Boyd, Jr., observed in plain view the items later seized by Sergeant Lonetree and Officer Risley. The transcript of the hearing shall be forwarded to this Court along with the Trial Court's written findings.

Remanded.

Sophocles LOVETT *v.* STATE of Arkansas

CR 97-436 952 S.W.2d 644

Supreme Court of Arkansas
Opinion delivered October 2, 1997

Bramblett & Pratt, by: *James M. Pratt, Jr.*, for appellant.

Winston Bryant, Att'y Gen., by: *Kent G. Holt*, Asst. Att'y Gen., for appellee.

TOM GLAZE, Justice. Appellant Sophocles Lovett by information was charged with the crimes of aggravated assault, second-degree battery, and with being a felon in possession of a firearm. He was convicted of all charges, and received respective sentences of fifteen years, fifteen years, and forty years to run concurrently. Sophocles testified in his own defense at trial, but on appeal, he does not challenge the sufficiency of the evidence. Instead, he argues only that the trial court erred by (1) allowing the State to amend its information the day before trial, and (2) denying him a continuance to permit his defense counsel more time to prepare for trial. We affirm.

Before addressing Sophocles's first point, a brief summary of the facts leading to his charges is necessary. The State's case showed that, on May 8, 1995, Deborah Williams had a medical appointment for her son in Pine Bluff, and asked her cousin, Patrece Gregory, to go with her. Patrece had been staying at Deborah's house in Fordyce to get away from Sophocles, who was Patrece's boyfriend. Sophocles saw Deborah and Patrece in a car driving to Pine Bluff, and he followed them to the parking lot at Deborah's doctor's office. After Deborah went into the office,

Patrece remained outside and talked with Sophocles. Sophocles accused Patrece and her family members of having taken $10,000.00 of his money. An altercation ensued, and Sophocles struck Patrece in the head with a handgun, causing her serious injury. Patrece, bleeding from the head, ran into the doctor's office with Sophocles in pursuit. She ran to Deborah, screaming, "He is trying to kill me," and Sophocles, among other things, was heard saying, "I'm not going to put up with this anymore." Sophocles pulled his gun, told Deborah "this" was her fault, and he was going to kill Deborah. He pointed the gun at Deborah's head and pulled its trigger four times. Although loaded, the gun misfired. Several witnesses who were present in the doctor's office testified they had seen Sophocles beat Patrece with a gun, and had observed blood flowing from her head.[1]

As a result of the foregoing events, the State filed its information three days afterwards, on May 11, 1995, and charged Sophocles with the following three crimes:

> Count 1: Aggravated Assault — under circumstances manifesting extreme indifference to the value of human life, purposely engaged in conduct that created a substantial danger of death or serious physical injury to Debra (sic) Williams.
>
> Count 2: Battery in Second Degree — with the purpose of causing physical injury to another person, cause physical injury to Debra (sic) Williams by means of a deadly weapon.
>
> Count 3: Felon in Possession of a Firearm — having been previously convicted of a felony, possess a firearm, to-wit: .38 caliber revolver.

Apparently, on the day before trial, September 4, 1996, the State learned it had mistakenly named Deborah Williams instead of Patrece Gregory as the victim in count 2, and it requested the trial court to allow the State to correct its mistake by amending the information. The trial court granted the State's request. The

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[1] No one but Deborah witnessed Sophocles's pointing his gun at Deborah, but an officer testified Sophocles admitted he "pointed the gun at the two women below [their] waist."

next day, before trial, Sophocles moved to strike the State's amended information; alternatively, he asked for a continuance.

In support of his motion to strike the State's amended information, Sophocles argued the amended charge would require "an entire change in [his] defense, and that change would cause great prejudice to the defense." The State rejoined that the requested amendment was consistent with the investigative material and was not a surprise to the defense. It added that both Patrece and Deborah had been called as witnesses to testify concerning what had transpired on May 8, 1995, the day of the alleged crimes.

In denying Sophocles's motions, the trial judge made a point of Sophocles's having failed to help his counsel in preparing for trial, even though the trial court had previously warned Sophocles that his case was about "to get stale," since he had received earlier continuances. The judge also emphasized that Sophocles had made no efforts to contact his counsel to discuss his case or to prepare for trial. In fact, even though counsel tried to reach Sophocles at his last known residence and by contacting family members, the trial judge observed that Sophocles never made any attempt to contact or see his attorney until the morning of trial.

We hold the trial court correctly denied Sophocles's motions. While defense counsel on appeal claims the State's amended information changed the nature of the crime and prejudiced him, he fails to show how. First, we would note that Sophocles failed to specify at trial that the nature of the second-degree battery crime had been changed by the State's motion; but even if he had, he still never indicated how the change prejudiced his defense.

■■ The court has held that an amendment of an information will be allowed by a court during trial so long as the nature and degree of the crime is not changed and the defendant is not prejudiced through surprise. *McElhanon v. State*, 329 Ark. 261, 948 S.W.2d 89 (1997). Here, the defense counsel's statements made in support of his motion to strike were conclusory, stating that he had not talked to Patrece concerning the amended information, that his entire defense had been changed by the amendment, and that he had been caused great prejudice by the change.

As pointed out by the State, Sophocles's remarks ignored the fact that Patrece, Deborah, and other witnesses who had been involved or had seen the events of May 8, 1995, were known to Sophocles. They had been called and were present to testify on the date of trial. He had sixteen months to talk to Patrece and the other witnesses to learn what their stories would be at trial. In fact, Sophocles was living with Patrece at the time of trial. Moreover, Sophocles never suggested other witnesses or evidence that might be warranted as a result of the State's amendment. Undoubtedly, Sophocles could express little surprise in the State naming Patrece as the victim who was battered since he was well aware that Patrece was the one he had physically injured, not Deborah. In sum, Sophocles's argument falls short of showing he has sustained any surprise or prejudice.[2]

In conclusion, we believe if Sophocles suffered any prejudice in presenting a defense, it was of his own doing. Again, Sophocles through his own actions was unavailable for four months prior to trial, making it impossible for his counsel to prepare his defense. He had had a number of continuances, and the trial court had every right to believe Sophocles was trying to stall. The decision to grant or deny a motion to continue is within the sound discretion of the trial court, and such a decision will not be reversed absent an abuse of discretion amounting to a denial of justice. *Travis v. State*, 328 Ark. 442, 944 S.W.2d 96 (1997). The trial court was well within its discretion to deny Sophocles's continuance request in the circumstances found here.

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[2] We note that the General Assembly has enacted a statute, Ark. Code Ann. § 16-85-405(a)(2)(c) (1987) that purports to permit such amendment as the one here. Because Sophocles was not surprised or prejudiced by the State's amendment in this case, we need not rely on it here to sustain the trial judge's ruling. Nonetheless, that provision provides as follows:

> (c) Where an offense involves the commission of or an attempt to commit an injury to person or property and is described in other respects with sufficient certainty to identify the act, then *an erroneous allegation as to the person injured, or attempted to be injured is not material*. (Emphasis added.)

See Sutton v. State, 163 Ark. 468, 260 S.W.403 (1924).

Monroe McGHEE *v.* STATE of Arkansas

CR 97-195 954 S.W.2d 206

Supreme Court of Arkansas
Opinion delivered October 2, 1997

Steve Inboden, for appellant.

Winston Bryant, Att'y Gen., by: *David R. Raupp*, Senior Asst. Att'y Gen., for appellee.

DONALD L. CORBIN, Justice. Appellant Monroe McGhee appeals the judgment of the Mississippi County Circuit Court, Chickasawba District, convicting him of possession of a controlled substance (cocaine) with intent to deliver, first-degree battery, simultaneous possession of drugs and firearms, and being a felon in possession of a firearm. The trial court sentenced Appellant to a total of forty years' imprisonment. In addition, the trial court revoked Appellant's probation in a prior case and sentenced him to a concurrent term of ten years' imprisonment. Our jurisdiction of this appeal is pursuant to Ark. Sup. Ct. R. 1-2(a)(2). Appellant raises five points for reversal, none of which has merit.

The record reveals the following facts. On February 14, 1996, Appellant shot Clifton Robinson in the throat, apparently in retaliation for shots being fired approximately one hour earlier at a vehicle in which Appellant's cousin was riding. Persons present at the scene informed police officers that Appellant was the person who shot Robinson. Robinson later confirmed that it was Appellant who had shot him. Officers arrested Appellant the following day and recovered a gun from him and numerous bags of marijuana and crack cocaine from his pockets.

Motions for Continuance and Severance of Offenses

Appellant's first two points for reversal are that the trial court erred in denying defense counsel's motions for a continuance and for severance of the offenses. Both of the motions were made by defense counsel during a pretrial hearing, and both were objected to by Appellant.

Defense counsel requested a continuance on the grounds that he had only recently been appointed to handle Appellant's case and he wanted more time to prepare for trial. Counsel indicated that Appellant had given him a list of seven or eight witnesses and that he needed more time to interview them. Appellant informed the trial court that he was ready for trial and did not want a continuance. He stated that he had been in jail awaiting trial for nine months and that he did not want to wait any longer. He stated that he was pretty sure that he could explain his case to the jury in about one and one-half hours, and that if he was convicted, "just let it lie like that." In response to inquiry by the trial court, Appellant stated that he was aware of the seriousness of the charges against him and that he knew he could receive a sentence of life imprisonment. He stated that he was willing to take that chance and proceed to trial. He also indicated that he really only needed three of the witnesses that he had listed for defense counsel. At that point in the discussion, defense counsel indicated that he could have the case ready to go as scheduled, and that he had a copy of the State's file and he understood the State's theory of the case.

As to the severance motion, defense counsel moved to sever the charge of first-degree battery, pertaining to the shooting of Robinson, from the remaining charges, which resulted from Appellant's arrest the day after the shooting. Appellant again expressed his desire to proceed to trial as scheduled on all charges. He stated that the reason he was charged with the subsequent offenses was because of the shooting of Robinson, and that he wanted to have all the charges tried at the same time. In response to questions from the trial court, Appellant stated that he understood that being tried on five or six different charges at once may prejudice his case. He stated further that he understood that his

punishment may be harsher, even if he was only convicted of one charge, because the jury would be aware of the other charges.

The trial court denied the motion for continuance on the ground that it was Appellant's right to have a trial and that he had made the decision to proceed with the trial knowing that his counsel wished for more time to prepare. Likewise, the trial court denied the motion to sever on the ground that Appellant wanted all the charges tried at the same time and was willing to risk any prejudice to his case. Appellant now argues that the trial court erred in denying both motions. We disagree.

We adhere to the familiar principle that a defendant may not agree with a ruling by the trial court and then attack that ruling on appeal. *Goston v. State*, 326 Ark. 106, 930 S.W.2d 332 (1996); *Meadows v. State*, 324 Ark. 505, 922 S.W.2d 341 (1996). Under the doctrine of invited error, one who is responsible for error cannot be heard to complain of that for which he was responsible. *Morgan v. State*, 308 Ark. 627, 826 S.W.2d 271 (1992). Appellant chose to proceed to trial as scheduled, knowing that defense counsel wanted more time to prepare his defense. Appellant further chose to have all the offenses tried at once, after being warned of the potential consequences of being tried on multiple charges simultaneously. Appellant's decision to be tried on all the charges at once, without delay, was thus made with the knowledge and understanding that he was facing serious felony charges and that he could receive a sentence of life imprisonment. Hence, we conclude that Appellant has waived any challenge on appeal to the trial court's denial of both motions.

Suppression of Evidence

For his third point for reversal, Appellant argues that the trial court erred in denying his motion to suppress physical evidence, which he alleged was gathered as a result of the issuance of an invalid arrest warrant. He argues further that officers lacked the authority to enter Fred Gay's residence to arrest Appellant. We do not address the merits of these arguments, as Appellant has failed to demonstrate that he obtained a ruling from the trial court on his motion to suppress.

Where the abstract does not reveal that a ruling was obtained from the trial court, this court will not address the issue on appeal. *See Bayless v. State*, 326 Ark. 869, 935 S.W.2d 534 (1996). The burden of providing a record sufficient to demonstrate that reversible error occurred is upon the appellant. *Laudan v. State*, 322 Ark. 58, 907 S.W.2d 131 (1995). Without the trial court's ruling, this court has no basis for a decision and is, thus, precluded from a review of the issue. *See Hood v. State*, 329 Ark. 21, 947 S.W.2d 328 (1997); *Danzie v. State*, 326 Ark. 34, 930 S.W.2d 310 (1996); *Donald v. State*, 310 Ark. 197, 833 S.W.2d 770 (1992). Appellant's failure to obtain a ruling on his motion to suppress is fatal to this claim.

Simultaneous Possession of Drugs and Firearms

Appellant's fourth and fifth points for reversal pertain to his conviction for the charge of simultaneous possession of drugs and a firearm. Arkansas Code Annotated § 5-74-106(a)(1) (Repl. 1993) provides that a person who commits a felony violation of § 5-64-401 (controlled substances) while in possession of a firearm is guilty of a Class Y felony. Appellant first argues that there was insufficient evidence to convict him of this crime because the State failed to produce evidence of gang-related activity. He argues that because the offense is situated within the subchapter known as the "Arkansas Criminal Gang, Organization, or Enterprise Act," it is necessary for the State to produce evidence of gang-related activity for every offense contained within that subchapter. We recently disposed of this argument in *State v. Zawodniak*, 329 Ark. 179, 946 S.W.2d 936 (1997).

In *Zawodniak*, the defendant moved for a directed verdict on the ground that the State had failed to prove that he was involved in criminal gang activity. The trial court agreed and granted the motion. On appeal, we held that the defendant's and the trial court's reading of section 5-74-106 was contorted and failed to give the language of that statute its plain meaning. We stated that this court is very hesitant to interpret a legislative act in a manner contrary to its express language, where there is no drafting error or omission that may have circumvented the legislature's intent. We held further that the statute not only serves the pur-

pose of deterring organized gang and criminal activities, but also serves the broader purpose of curtailing any person's use of a firearm when he or she is involved in the illegal possession or trafficking of controlled substances. Accordingly, we conclude that the trial court did not err in denying Appellant's motion for directed verdict on this charge.

Appellant's second argument is that section 5-74-106 is unconstitutionally vague and is therefore void. We do not reach the merits of this contention, as Appellant's abstract does not demonstrate that the argument was raised below. This court has repeatedly held that it will not address arguments, even constitutional arguments, raised for the first time on appeal. *Travis v. State*, 328 Ark. 442, 944 S.W.2d 96 (1997); *Dulaney v. State*, 327 Ark. 30, 937 S.W.2d 162 (1997); *Mayo v. State*, 324 Ark. 328, 920 S.W.2d 843 (1996).

Affirmed.

John Phillip PONDER *v.* STATE of Arkansas

96-1269 953 S.W.2d 555

Supreme Court of Arkansas
Opinion delivered October 2, 1997

Depper Law Firm, by: *Robert L. Depper, Jr.*, for appellant. *Winston Bryant*, Att'y Gen., by: *Vada Berger*, Asst. Att'y Gen., for appellee.

DONALD L. CORBIN, Justice. Appellant John Phillip Ponder appeals the order of the Union County Circuit Court denying his motion to transfer the charge against him to juvenile court. We have jurisdiction of this interlocutory appeal. Ark. Sup. Ct. R. 1-2(a)(11); Ark. Code Ann. § 9-27-318(h) (Supp. 1995). We cannot say the trial court's decision to retain jurisdiction of the case was clearly erroneous, and therefore we affirm.

Pursuant to the prosecutor's discretion in section 9-27-318(b)(1), Appellant was charged in circuit court with one count of capital murder for the death of seventy-five-year-old Violet Willett. The information alleged that Appellant was born February 6, 1981, and that the crimes occurred on June 21, 1995. Appellant was thus fourteen years old when the crime was committed.

Appellant filed a motion to transfer the charge to juvenile court. During the April 1, 1996 hearing, Deputy Michael Fife, of the Union County Sheriff's Department, described the crime scene to the court and testified as to portions of two statements given by Appellant to police. Appellant admitted to entering Violet Willett's home two times on June 21, 1995, with the intention of taking items. While he was there the second time, he took a watch, a necklace, and some guns. After Appellant had remained at the home for approximately one hour, Willett returned. As she entered her home, Appellant stated that he hid next to a chair.

As to what happened after Willett returned and the actual cause of her death, Appellant's two statements differ. In his first statement, he stated that he stood up with Willett's .22 caliber rifle in his hands. He indicated that he had previously unloaded the gun and then reloaded it with different ammunition. He then told Willett to give him her truck keys, when the gun went off. In the second statement, however, he contended that the gun went off when he placed the barrel of the rifle on a wall partition, striking Willett and causing her death. Appellant stated in both interviews that he then threw down the gun and another shot fired. He admitted to looking in Willett's pocket for her keys while she lay bleeding on the floor. He also took two guns and seized money from Willett's purse before driving off in her truck. After wreck-

ing the vehicle, he was found wearing the stolen watch and was charged with capital murder.

The State also provided testimony from Dr. Frank Peretti, an associate medical examiner who performed the autopsy on Willett. Dr. Peretti testified that the trajectory of the bullet went from the front part of Willett's skull to the back in a downward path. He stated that the cause of death was a gunshot wound of the head, with neck injuries.

Phillip Taylor, a juvenile probation officer, testified that Appellant had been involved in the juvenile court system three times prior to the incident. On April 26, 1994, he was involved in the unauthorized use of a vehicle in which he took a truck without permission. The victim did not wish to pursue charges, as long as restitution was paid for the damage done to the truck. On May 12, 1995, after skipping school, Appellant was charged with arson for setting fire to a wooden podium in a shower stall of the boy's locker room at Barton Middle School in El Dorado. Also in May 1995, he damaged the front and rear windshield of a vehicle owned by a school teacher at Barton Middle School. After Appellant pleaded "true" to the charges of criminal mischief and arson, the juvenile court judge ordered that Appellant be placed on six months' probation and sent to South Arkansas Youth Services Center. The present incident occurred while Appellant was waiting for an available space at the youth facility.

Appellant presented the following testimony. Joe Ogden, the director of the Central Arkansas Serious Offender Program for juveniles, testified regarding the fact that out of the twenty-four males in the program, five, between the ages of fourteen and one-half to seventeen years of age, had committed the offense of capital murder. Jan Nelson, a clinical social worker from the South Arkansas Regional Health Center, testified that her initial diagnosis of Appellant was adjustment disorder with mixed conduct and emotional features. She also stated that Appellant was not mature for his age because of his impulsiveness. On cross-examination, she stated that Appellant's age was a factor in determining that he could be rehabilitated. She admitted, however, that she could not be considered an expert in the rehabilitation of juveniles. John

Huey Ponder, Appellant's father, confirmed the incidents dealt with in juvenile court and acknowledged that he and his wife had left Appellant by himself on the day of the shooting.

After hearing all the testimony, the trial court denied the motion to transfer the case to juvenile court. In a written opinion, the court stated that "the offense charged is a serious one and was committed in a violent manner while in the process of a burglary of the victim's home." The court also noted that Appellant was on probation for arson and criminal mischief at the time of the murder, and he was therefore beyond rehabilitation in existing juvenile programs. Consequently, the court found clear and convincing evidence to retain the charge in circuit court.

Pursuant to section 9-27-318(f), the determination that a juvenile should be tried as an adult must be supported by clear and convincing evidence. *Butler v. State*, 324 Ark. 476, 922 S.W.2d 685 (1996). Clear and convincing evidence is defined as that degree of proof that will produce in the trier of fact a firm conviction regarding the allegation sought to be established. *Id.* The supreme court will not reverse a circuit court's denial of a juvenile transfer unless the denial was clearly erroneous. *Wilkins v. State*, 324 Ark. 60, 918 S.W.2d 702 (1996).

Section 9-27-318(e) provides in part the factors to be considered in a juvenile transfer hearing as follows:

> (1) The seriousness of the offense, and whether violence was employed by the juvenile in the commission of the offense;
>
> (2) Whether the offense is part of a repetitive pattern of adjudicated offenses which would lead to the determination that the juvenile is beyond rehabilitation under existing rehabilitation programs, as evidenced by past efforts to treat and rehabilitate the juvenile and the response to such efforts; and
>
> (3) The prior history, character traits, mental maturity, and any other factor which reflects upon the juvenile's prospects for rehabilitation.

A circuit court is not required to give equal weight to each of these statutory factors. *Green v. State*, 323 Ark. 635, 916 S.W.2d

756 (1996). Proof need not be introduced against the juvenile on each factor. *Lammers v. State*, 324 Ark. 222, 920 S.W.2d 7 (1996).

Appellant asserts that the trial court erred in denying the motion to transfer because of the juvenile's age and his probability of rehabilitation. He also argues that the trial court erred because he contends the crime was accidental and did not involve the employment of violence. In support of this argument, he relies heavily on this court's decision in *Green*, 323 Ark. 635, 916 S.W.2d 756. The facts present in this case are distinguishable from those in *Green*, where the appellant was charged with manslaughter. Here, the evidence demonstrates that Appellant was involved in the serious offense of capital murder and that he employed a gun in committing the offense. The fact that the offense charged was serious in nature and was accomplished with the use of violence is enough to warrant a denial of transfer of Appellant's case to juvenile court. No element of violence beyond that required to commit the crime is necessary under section 9-27-318(e)(1). *Lammers*, 324 Ark. 222, 920 S.W.2d 7.

Notwithstanding the violent and serious nature of the offense, the trial court's decision is further supported by the fact that Appellant had committed two prior adjudicated offenses, approximately one month before the murder, and had been placed on juvenile probation. Where there is evidence that the current felony charges were part of a repetitive pattern of offenses, that past efforts at rehabilitation in the juvenile court system have not been successful, and that the pattern of offenses has become increasingly more serious, these factors alone prevent a holding that the trial court's ruling on the transfer motion was clearly erroneous. *Sebastian v. State*, 318 Ark. 494, 885 S.W.2d 882 (1994). Thus, the trial court did not err by concluding that Appellant was beyond rehabilitation.

Based upon the foregoing reasons, we conclude that the decision of the trial court denying Appellant's motion to transfer the charge to juvenile court is supported by clear and convincing evidence.

GLAZE and IMBER, JJ., concur.

TOM GLAZE, Justice, concurring. I concur. While I disagree with this court's attempt to distinguish *Green v. State*, 323 Ark. 635, 916 S.W.2d 756 (1996), from the present case, that is not the reason I write this concurring opinion. Rather, I address appellant's reliance on *Sanders v. State*, 326 Ark. 415, 932 S.W.2d 315 (1996), and his request for us to review his case in light of a statement in *Sanders* indicating this court's intention to reconsider its past interpretations of Ark. Code Ann. § 9-27-318 (Supp. 1995). The court in *Sanders* did state a concern that, under our current interpretation of the juvenile code, prosecuting attorneys can file a serious charge against a juvenile in circuit court and do nothing more. The *Sanders* court further said it did not intend for its earlier interpretations of the code to do away with the need for a meaningful hearing. The *Sanders* court issued a caveat that, in juvenile cases tried after *Sanders*, the court would consider anew its interpretation of the juvenile code when the issues are fully developed and briefed.

The present case is not the type the court had in mind in *Sanders*, since here a meaningful hearing was conducted. The State offered ample evidence that the crime with which Ponder was charged was serious and involved the employment of violence. In addition, the State offered evidence that the current felony charges reflected a repetitive pattern of offenses, that past efforts at rehabilitation have been unavailing, and that the pattern has become increasingly more serious.

In contrast to the case at bar, our court, in *Walker v. State*, 304 Ark. 393, 803 S.W.2d 502 (1991), affirmed the trial court's denial to transfer Walker's case to juvenile court even though the State's only argument was that its information, describing the offense charged as serious and involving violence, outweighed the lack of repetitive pattern and positive character traits which were shown by Walker at the transfer hearing. This court approved the State's use of its information, only, to affirm the trial court, and stated the following:

> While it might have been desirable and even preferable for the prosecutor to present additional evidence at the hearing to support retaining [Walker] in circuit court, we hold that the

criminal information provided a sufficient basis for the trial court's decision.

In conclusion, while this court said in *Sanders* that it would reconsider our prior interpretation of the code, its concern involved prosecuting attorneys filing serious charges against a juvenile in circuit court and offering no further proof in transfer-motion hearings. That situation does not exist here, since a meaningful hearing was held. However, when the court is again confronted with a case such as *Walker*, where the State offers nothing but an information at a hearing on a transfer motion, it will then be appropriate for this court to consider anew its ruling in *Walker* and cases like it.

IMBER, J., joins this concurrence.

Anthony David SMITH *v.* STATE of Arkansas

CR 96-1167 953 S.W.2d 870

Supreme Court of Arkansas
Opinion delivered October 2, 1997
[Petition for rehearing denied November 6, 1997.]

Donald J. Adams, *Griffin Smith*, and *Roy Danuser*, for appellant.

Winston Bryant, Att'y Gen., by: *David R. Raupp*, Sr. Asst. Att'y Gen., and *J. Brent Standridge*, Asst. Att'y Gen., for appellee.

DONALD L. CORBIN, Justice. Appellant Anthony David Smith appeals the judgment of the Marion County Circuit Court convicting him of the capital murder of his wife Christine Smith and sentencing him to life imprisonment without the possibility of parole. Our jurisdiction is pursuant to Ark. Sup. Ct. R. 1-2(a)(2). Appellant raises two points for reversal, namely that the trial court erred in failing to grant his motion for mistrial due to the prosecutor's comments during opening statement on his right to remain silent and in excluding the testimony of one of his witnesses. We find no error and affirm.

In the early morning hours of October 6, 1994, officers and medical personnel responded to a call from the Smith residence concerning a possible drowning. At the scene, they found thirty-two-year-old Christine Smith wet and lying on her back on a wooden deck next to the family's swimming pool. She had blood coming from the back of her head and out of her nose and mouth. Her body was sent to the Arkansas State Medical Examiner's Office for an autopsy, where it was determined that Mrs. Smith had died as the result of both a contact gunshot wound to the back of her head and strangulation. Appellant was subsequently arrested and convicted for the capital murder of his wife and sentenced to life imprisonment.

I. Prosecutor's Remarks on Appellant's Right to Remain Silent

For his first point for reversal, Appellant argues that the trial court erred in failing to declare a mistrial due to the following remarks made by the prosecutor in opening statement:

> The presentation of this case which you're going to hear about are the events, primarily, of the early morning of the 6th day of October, 1994. And the thing that you have to realize is that, from the start of this, Mr. Smith was the only person alive who was present. He's the only person alive who was present on the scene. On that morning, he got an opportunity then and he will get an opportunity in this courtroom, through the tapes and

> the other evidence we'll introduce, to present what he claims happened.

The prosecutor then went on to recite what he expected the State's evidence would prove during the course of the trial, including the substance of a taped interview that Appellant gave to police that same day. At the conclusion of the prosecutor's opening statement, Appellant moved for a mistrial on the ground that the remarks amounted to an improper reference to his right to remain silent. The trial judge denied the motion because he did not believe the reference to be significant.

On appeal, Appellant contends that the prosecutor's remarks violated his rights under the Fifth Amendment to the United States Constitution to remain silent and not be compelled to be a witness against himself. Specifically, Appellant argues that the remarks emphasized the fact that he was the only person present at the scene and intimated that only his personal testimony could rebut the evidence against him. We do not reach the merits of this argument because Appellant failed to make a contemporaneous objection below.

In order to be timely, an objection must be contemporaneous, or nearly so, with the alleged error. *Jones v. State*, 326 Ark. 61, 931 S.W.2d 83 (1996). To preserve a point for appeal, a proper objection must be asserted at the first opportunity after the matter to which objection has been made occurs. *Asher v. State*, 303 Ark. 202, 795 S.W.2d 350 (1990), *cert. denied*, 498 U.S. 1048 (1991). Where the allegation of error concerns a statement made by the prosecutor during argument, the defendant must make an immediate objection to the statement at issue in order to preserve the allegation for appeal. *Wallace v. State*, 53 Ark. App. 199, 920 S.W.2d 864 (1996) (citing *Butler Mfg. Co. v. Hughes*, 292 Ark. 198, 729 S.W.2d 142 (1987)). In *Butler*, this court specifically rejected the Eighth Circuit Court of Appeals' holding in *Lange v. Schultz*, 627 F.2d 122 (8th Cir. 1980), that counsel may reserve his or her objection to statements made in closing argument until the end of the argument, before the case is submitted to the jury. This court held:

> We decline to follow the Eighth Circuit's position and instead require a timely objection, made at the time the alleged error occurs, so that the trial judge may take such action as is necessary to alleviate any prejudicial effect on the jury.

Butler Mfg. Co., 292 Ark. 198, 202, 729 S.W.2d 142, 144. *See also Steffen v. State*, 267 Ark. 402, 590 S.W.2d 302 (1997). Such reasoning is equally applicable to alleged errors made in opening statement.

Similarly, this court has repeatedly held that motions for mistrial must be made at the first opportunity. *Esmeyer v. State*, 325 Ark. 491, 930 S.W.2d 302 (1996); *Turner v. State*, 325 Ark. 237, 926 S.W.2d 843 (1996); *Johnson v. State*, 325 Ark. 197, 926 S.W.2d 837 (1996). In *Dixon v. State*, 310 Ark. 460, 839 S.W.2d 173 (1992), this court held that the appellant's motion for mistrial based upon improper comments made by the prosecutor during opening statement was untimely because it was not made until after the conclusion of appellant's opening statement. This court reasoned that it was proper to deny a motion for a mistrial when the request was not made at the first opportunity, even though the motion had been preceded by two defense objections sustained by the trial court. *Id.* (citing *Dumond v. State*, 290 Ark. 595, 721 S.W.2d 663 (1986)).

Here, the particular comments were made by the prosecutor in the middle of his opening statement. Appellant did not object or move for a mistrial at the time the statements were made; instead, he waited until the prosecutor had finished his entire opening statement before bringing the alleged error to the trial court's attention through his motion for mistrial. Accordingly, it was not error for the trial court to deny the motion as it was untimely made.

II. Exclusion of Expert Testimony

For his second point for reversal, Appellant argues that the trial court erred in excluding the testimony of Carl Rainey as an expert on the subject of firearms. Appellant contends that Rainey, who had years of experience in hunting and using firearms, should have been permitted to testify about experiments he

conducted involving the firing of .22 caliber bullets into various objects to check for bullet fragmentation. Appellant contends that he was prejudiced by the exclusion of this testimony as it was relevant to counter the State's evidence that bullet fragments found in the victim's skull were consistent with .22 caliber bullets found in Appellant's home. The State argues that Rainey was not an expert in firearms and that his experiments were not conducted in the same manner and under circumstances substantially similar to those surrounding the homicide. The evidence presented by the State Medical Examiner's Office was that the gunshot wound to Mrs. Smith's head was a contact wound.

The trial court heard argument from counsel as to Rainey's expected testimony. Rainey would have testified that through his personal experience as a hunter in shooting animals using a .22 caliber weapon, he had never encountered a fragmented .22 caliber bullet. Additionally, Rainey would have described his experiments involving his firing .22 caliber bullets into various surfaces, such as wood, plastic, and metal, from a distance of between one to two feet, and on one occasion, from a point of contact. The only time a bullet fragmented was when Rainey fired into the metal surface; most other times, the bullet failed to even penetrate the surfaces. It was not disputed that Rainey had no academic credentials that would qualify him as an expert in the field of firearms or ballistics.

The trial court excluded the testimony on the ground that the defense had failed to establish a proper foundation demonstrating that the experiments were conducted in a scientific manner, using comparable circumstances. The trial court concluded further that Rainey's experiences as nothing more than a hunter, lacking any formal training or expertise, did not qualify him as an expert in the field of ballistics.

Whether a witness qualifies as an expert in a particular field is a matter within the trial court's discretion, and we will not reverse such a decision absent an abuse of that discretion. *Mace v. State*, 328 Ark. 536, 944 S.W.2d 830 (1997). If some reasonable basis exists demonstrating that the witness has knowledge of the subject beyond that of ordinary knowledge, the evi-

dence is admissible as expert testimony. *Id.* The general test of admissibility of expert testimony is whether it will assist the trier of fact in understanding the evidence presented or determining a fact in issue. A.R.E. Rule 702; *Matthews v. State*, 327 Ark. 70, 938 S.W.2d 545 (1997); *Stout v. State*, 320 Ark. 552, 898 S.W.2d 457 (1995). In addition, expert testimony must be relevant and not misleading or confusing to the jury. *Stewart v. State*, 316 Ark. 153, 870 S.W.2d 752 (1994). In determining the relevance of the testimony, the proponent must show that the evidence is reliable and sufficiently related to the facts of the case to aid the trier of fact in resolving the dispute. *Prater v. State*, 307 Ark. 180, 820 S.W.2d 429 (1991).

In the present case, it was undisputed that Rainey had no formal training as an expert in the field of firearms or ballistics; rather, Rainey's knowledge came only from his experiences as a recreational hunter. It is further undisputed that none of Rainey's experiments were conducted in a manner similar to the factual situation of the victim's death, as he used only plastic, wood, or metal surfaces and the majority of the tests were conducted from a firing range of one to two feet, with only one test being from a point of contact. Accordingly, we conclude that the trial court did not abuse its discretion in excluding this testimony, as a proper scientific foundation was not provided and it was not demonstrated that the results of the tests would have assisted the jury in understanding the evidence presented and in determining any fact in issue.

III. Rule 4-3(h)

In accordance with Rule 4-3(h) of the Arkansas Supreme Court Rules, the record has been reviewed for adverse rulings objected to by Appellant but not argued on appeal, and no such errors were found. For the aforementioned reasons, the judgment of conviction is affirmed.

NEWBERN and THORNTON, JJ., dissent.

DAVID NEWBERN, Justice, dissenting. The position taken by the majority in this case takes the contemporaneous-objection rule to a new and dizzying height. I assume the reason for the rule

is to assure that an objection or, as in this case, motion for mistrial is made while the facts giving rise to the motion are fresh and the court is in the best possible position to rule on the matter at hand. I can understand the notion that a waiver had occurred in *Dixon v. State,* 310 Ark. 460, 839 S.W.2d 173 (1992), because the motion for a mistrial was made by the defendant after two objections had been dealt with during the opening statement of the prosecution and after the *defendant's* opening statement had occurred. It was almost as if the motion for a mistrial were an afterthought.

The holding in *Butler Mfg. Co. v. Hughes,* 292 Ark. 198, 729 S.W.2d 142 (1987), is that an objection must be made at the time an objectionable statement occurs during closing argument "so that the trial judge may take such action as is necessary to alleviate any prejudicial effect on the jury." It apparently was our perception that in the case of a closing argument, which often involves reiteration of evidence in great detail, it would be most helpful to avoid confusion by clearing up possible misstatements as they occurred, rather than waiting until the conclusion of an argument which could be quite lengthy. Be that as it may, it is unnecessary to apply that rule to opening statements by counsel which usually amount to no more than an abbreviated prospective summation. In this case, there is no doubt in my mind that the Trial Court could have taken "such action as is necessary to alleviate any prejudicial effect on the jury" at the close of the prosecutor's opening statement, and it would have been no less effective than if taken the moment the objectional reference was made.

While I can tolerate, in the case of a closing argument, a rule that breaches the common courtesy usually accorded to a speaker of allowing him or her to finish a speech, I cannot do so with respect to an opening statement. That is especially so in a case such as this one where that which was said had the potential of casting a taint upon all of the remainder of the trial.

In this case, the mistrial motion came after the prosecution's opening statement in which it was said that "he [Smith] will get an opportunity in this courtroom, through the tapes and other evidence we'll introduce, to present what he claims happened." Unlike the *Dixon* case, no other objections had been considered,

the defense had not made its opening statement, the matter was fresh before the court, and the motion was made. Not only should we consider the merits of the motion, we should reverse the conviction because of the egregious error in declining to grant the motion after the reference to the "opportunity in this courtroom" Smith would have to prove his innocence — a burden no accused need bear. *Aaron v. State,* 312 Ark. 19, 846 S.W.2d 655 (1993); *Bailey v. State,* 287 Ark. 183, 697 S.W.2d 110 (1985).

I respectfully dissent.

THORNTON, J., joins in this dissent.

Tammy J. SUBLETT *v.* Sharon L. HIPPS and Daniel Berry

96-1340 952 S.W.2d 140

Supreme Court of Arkansas
Opinion delivered October 2, 1997

[redacted]

Helen Rice Grinder and *George D. Ellis*, for appellant.

Barber, McCaskill, Jones & Hale, P.A., by: *Thomas E. Osment, Jr.*, for appellee Sharon L. Hipps.

Matthews, Sanders & Sayes, by: *Margaret M. Newton* and *Mel Sayes*, for appellee Daniel Berry.

ROBERT L. BROWN, Justice. Appellant Tammy J. Sublett appeals an order granting summary judgment in favor of appellees Sharon L. Hipps and Daniel Berry. We find no error in the trial court's order, and we affirm.

On January 3, 1995, Sublett filed a complaint against Hipps and Berry to recover damages for personal injury arising from an automobile accident. Sublett alleged that at about 8:15 a.m. on January 8, 1992, she was travelling south on Interstate 430 in Little Rock when Hipps, who was moving in the same direction in an adjacent lane, abruptly moved in front of her and decelerated rapidly. Sublett alleged that Hipps's maneuver caused her to strike the rear of Hipps's pickup truck, and she in turn was rear-ended by Berry's sport-utility vehicle. Sublett asked for joint and several liability against Hipps and Berry on several theories of negligence and damages in the amount of $175,000.00.

On April 5, 1995, Hipps answered, denying all allegations of fault and affirmatively pleading for the application of comparative fault. On September 29, 1995, Hipps filed a pleading designated as a third-party complaint against Berry, asking for indemnification or, in the alternative, for contribution. On November 27, 1995, Berry filed his answer to the original complaint as well as the third-party complaint and denied all allegations of fault. He also pled the statute of limitations as an affirmative defense.

Berry next moved for summary judgment on the ground that both the complaint and third-party complaint were barred by the three-year statute of limitations for negligence actions under Ark. Code Ann. § 16-56-105 (1987). He asserted that although Sublett filed her complaint in a timely manner, she did not obtain service on him within 120 days pursuant to Rule 4(i) of the Arkansas Rules of Civil Procedure and also failed to move for an extension within that same period.

Sublett responded to Berry's motion for summary judgment and argued that any objection to the untimely service of the complaint under Rule 4(i) was waived when he filed his answer. She contended that while Berry's answer raised the statute of limitations as a defense, his defense was waived because he answered the complaint without moving to dismiss or otherwise raising the issue of insufficiency of process, as required by Rule 4(i).

Hipps then moved for summary judgment and maintained that the undisputed facts showed the following: that Hipps was driving in the lane to the left of Sublett; that Sublett admitted there was adequate distance between the cars when Hipps made the lane change; that Sublett admitted Hipps signaled before entering Sublett's lane; and that Sublett applied her brakes, began sliding, and rear-ended Hipps.

Sublett responded to Hipps's motion for summary judgment and cited three factual bases to support her allegations of negligence: (1) traffic was heavy; (2) the pavement was wet; and (3) Hipps turned into Sublett's lane 50 feet in front of her, which a juror could conclude was done in violation of the statute which creates a duty to change lanes only when it can be done "with safety." Ark. Code Ann. § 27-51-302(1) (Repl. 1994).

The trial court issued a letter opinion in which it determined that Sublett's claim against Berry was barred by the statute of limitations and that Sublett's deposition testimony established that Hipps did nothing wrong and, thus, did not cause the accident. Orders dismissing Sublett's claims against both Berry and Hipps were entered.

I. Berry's Motion for Summary Judgment

The standard of review for appealing the grant of summary judgment is well-established:

> In these cases, we need only decide if the granting of summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of the motion left a material question of fact unanswered. The burden of sustaining a motion for summary judgment is always the responsibility of the moving party. All proof submitted must be viewed in a light most favorable to the party resisting the motion, and any doubts and inferences must be resolved against the moving party. Our rule states, and we have acknowledged, that summary judgment is proper when a claiming party fails to show that there is a genuine issue as to a material fact and when the moving party is entitled to summary judgment as a matter of law.

Milam v. Bank of Cabot, 327 Ark. 256, 261-62, 937 S.W.2d 653, 656 (1997). *See Renfro v. Adkins*, 323 Ark. 288, 914 S.W.2d 306 (1996). Once a moving party establishes *prima facie* entitlement to summary judgment by affidavits, depositions, or other supporting documents, the opposing party must meet proof with proof and demonstrate the existence of a genuine issue of material fact. *Milam v. Bank of Cabot, supra; Renfro v. Adkins, supra.*

Sublett contends, as her first point, that Berry waived a defense of insufficiency of service of process under Ark. R. Civ. P. 12(h)(1) because he failed to move to dismiss the complaint on that ground and further failed to raise the defense in his answer. She concedes that service was not accomplished on Berry within 120 days because counsel was under the false impression that he had died without insurance coverage. Sublett further admits that no attempt was made to seek an extension from the court within the 120-day period from the filing of the complaint. Nevertheless, she contends that *Farm Bureau Mut. Ins. Co. v. Campbell*, 315 Ark. 136, 865 S.W.2d 643 (1993), and *Lawson v. Edmondson*, 302 Ark. 46, 786 S.W.2d 823 (1990), support her contention that Berry waived his argument regarding insufficiency of process.

The issue for this court to resolve is whether Berry's defense raised in his answer is in truth a limitations defense or whether, in

actuality, it is a contention of insufficiency of process. We conclude that the defense is one of limitations that is decided by when the litigation was commenced.

Under Rule 3 of the Arkansas Rules of Civil Procedure, an action is commenced by filing a complaint with the clerk of the proper court. *Forrest City Mach. Works, Inc. v. Lyons*, 315 Ark. 173, 866 S.W.2d 372 (1993); *Green v. Wiggins*, 304 Ark. 484, 803 S.W.2d 536 (1991). But this court has also held that the effectiveness of the commencement date is dependent upon meeting the requirements of Rule 4(i), which provides in part that service of process on a defendant must be accomplished within 120 days after the filing of the complaint. *See Edwards v. Szabo Food Serv., Inc.*, 317 Ark. 369, 877 S.W.2d 932 (1994); *Hicks v. Clark*, 316 Ark. 148, 870 S.W.2d 750 (1994); *Forrest City Mach. Works, Inc. v. Lyons, supra*; *Green v. Wiggins, supra.*

In *Green v. Wiggins, supra*, the appellant filed a medical-malpractice action against several defendants, including the appellees who were two doctors. No attempt at service was made on those appellees, and appellant obtained a voluntary dismissal without prejudice after the two-year medical-malpractice statute of limitations expired. Appellant then refiled his action and attempted unsuccessfully to serve appellees through certified mail. Appellant moved the trial court for an extension 148 days after the filing of his second complaint. We held that because the appellant did not complete service on appellees within 120 days under Rule 4(i), his medical-malpractice action was not commenced, and the savings statute could not be invoked on his behalf. A similar failure by Sublett to commence her cause of action against Berry within the limitations period occurred in the instant case.

Moreover, while Rules 12(b)(5) and 12(h)(1) clearly set forth the procedure for raising an insufficiency-of-service-of-process defense, they do not set the conditions for mounting a limitations defense. The touchstone for a limitations defense to a tort action is when the cause of action was commenced. *See* Ark. Code Ann. § 16-56-105 (1987). Berry raised the statute of limitations as an affirmative defense in his answer and has shown failure to commence the litigation within three years as required by

our caselaw. *See Forrest City Mach. Works, Inc. v. Lyons, supra*; *Green v. Wiggins, supra.* That is all that is required.

Finally, we view the cases of *Lawson v. Edmondson, supra*, and *Farm Bureau Mut. Ins. Co. v. Campbell, supra*, as clearly distinguishable. The *Lawson* case did not involve the statute of limitations but solely concerned a Rule 12(b)(5) defense of insufficient service. Similarly, the issues of commencement of a cause of action and the running of a limitations period were not before this court in the *Farm Bureau* case. Hence, neither case is authority for the question at hand.

Because the accident occurred on January 8, 1992, and service on Berry was not obtained within 120 days after Sublett filed her complaint on January 3, 1995, and no extension was sought, the statute of limitations ran on this cause of action. The trial court was correct in granting summary judgment in favor of Berry.

II. Hipps's Motion for Summary Judgment

We turn next to Sublett's contention that summary judgment in favor of Hipps was also error. In order to establish a *prima facie* case of negligence, a plaintiff must prove that he sustained damages; that the defendant was negligent; and that such negligence was a proximate cause of the damages. *Anslemo v. Tuck*, 325 Ark. 211, 924 S.W.2d 798 (1996); *Mason v. Jackson*, 323 Ark. 252, 914 S.W.2d 728 (1996); *Morehart v. Dillard Dep't Stores*, 322 Ark. 290, 908 S.W.2d 331 (1995).

In support of her motion for summary judgment, Hipps attached portions of Sublett's deposition. In that deposition, Sublett made the following relevant admissions: (1) that appellee Hipps did not cut her off, although traffic ahead was already stopped; (2) that there were approximately 50 feet between their vehicles when Hipps entered her lane; (3) that she had already applied her brakes when Hipps signaled to enter her lane; (4) that she briefly took her foot off the brake pedal to contemplate a maneuver into the next lane but did not attempt to do so; (5) that she subsequently applied more pressure to the brakes and began sliding on the wet pavement; (6) that there was adequate space for

appellee Hipps's vehicle to pull into her lane; and (7) that she was not aware of anything Hipps did wrong.

Hipps contends that Sublett's version of the events as set out in her deposition presents no genuine issue of material fact and directly refutes a number of the allegations in her complaint. Hipps further contends that the deposition testimony, especially Sublett's final admission, reflects that Sublett was the sole proximate cause of her own accident. We agree.

Again, Sublett responds as she did in the trial court that the conditions on the road and the statute on lane changes present a fact question. She cites this court to AMI Civ. 3d 903 ("Violation of Statute or Ordinance as Evidence of Negligence"), and Ark. Code Ann. § 27-51-302(1) (Repl. 1994), which provides:

> A vehicle shall be driven as nearly as practical entirely within a single lane and shall not be moved from the lane until the driver has first ascertained that movement can be made with safety[.]

Id. She maintains that, given the circumstances, an issue of fact exists as to whether Hipps made the lane change "with safety" when only 50 feet of space separated the two vehicles.

We are aware, as we have already stated, that in reviewing a grant of summary judgment, we must consider the evidence in the light most favorable to Sublett. However, road conditions in and of themselves do not constitute negligence. The issue, rather, is how people perform under those conditions. Sublett admits that Hipps did not cut her off when she changed lanes and further that Hipps did nothing wrong. These drastic admissions, which contradict her complaint, not only fail to create a genuine issue of material fact under Ark. R. Civ. P. 56(c), but they appear to concede lack of fault on Hipps's part. We have affirmed grants of summary judgment in the past when the plaintiff/appellant makes a pivotal admission that goes to the heart of the case. *See, e.g., Bushong v. Garman Co.*, 311 Ark. 228, 843 S.W.2d 807 (1992); *King v. Jackson*, 302 Ark. 540, 790 S.W.2d 904 (1990). This is such a case. We affirm this facet of the trial court's order as well due to Sublett's failure to meet proof with proof. *Milam v. Bank of Cabot, supra.*

Affirmed.

Richard BURRIS *v.* STATE of Arkansas

CR 97-494 954 S.W.2d 209

Supreme Court of Arkansas
Opinion delivered October 2, 1997

John W. Settle Law Firm, by: *John W. Settle*, for appellant.

Winston Bryant, Att'y Gen., by: *Vada Berger*, Asst. Att'y Gen., for appellee.

ANNABELLE CLINTON IMBER, Justice. The appellant, Richard Burris, was convicted of possession of methamphetamine with intent to deliver, possession of amphetamine with intent to deliver, and carrying a weapon. For these crimes, Burris was sentenced to a concurrent term of forty years' imprisonment. On appeal, Burris challenges the sufficiency of the evidence to sustain

his convictions, and the court's denial of his motion to suppress evidence seized from his vehicle. We affirm.

On July 10, 1996, Captain Dale Best of the Arkansas State Highway Patrol noticed a 1988 Dodge pulling a trailer traveling along Interstate 40. The Florida license plate was fastened to the trailer in such a fashion that the wind caused the plate to flip upwards making it difficult to read. The last letters of the license plate were also obscured by the corner of the trailer. Captain Best testified that he had to follow the vehicle for "some distance" before he was able to read the entire license plate. In addition, the lens covering the left brake light on the trailer was partially broken causing the light to shine white instead of red.

Captain Best stopped the vehicle for the improperly displayed license plate and for the broken brake light. After telling the driver, Richard Burris, why he had been stopped, Captain Best asked Burris for his license, proof of insurance, and registration. While verifying this information, Captain Best learned that Burris had previously been arrested for weapons and drug charges, and convicted of a misdemeanor drug offense. Captain Best then asked Burris to come to the back of the trailer where he explained to him that his license plate was improperly attached and that his brake light was broken. According to Captain Best, Burris appeared to be unusually nervous and would not make eye contact.

On three occasions, Captain Best asked Burris if he had ever been arrested for criminal charges, including drugs, and Burris answered that he had never been arrested for a crime other than speeding. Because Burris appeared nervous and had previously been arrested on weapon charges, Captain Best became concerned for his safety and asked Burris if he had any weapons. Twice, Burris answered in the negative. Captain Best asked Burris for a third time if he had any weapons in the car, and Burris answered that he had a .22 caliber derringer "in the passenger's compartment, next to the driver's seat, toward the floorboard, on a console type arrangement." Burris refused to give consent to search the vehicle but offered to retrieve the gun for Captain Best. Captain Best refused the offer, and asked Burris to show him where the gun

was. Burris did so, and Captain Best retrieved the loaded gun from the front seat of the car.

Captain Best placed Burris under arrest, and began an inventory search of the vehicle. Captain Best estimated that Burris was arrested fifteen to twenty minutes after the initial stop. During the inventory of Burris's vehicle, the officers found in the trunk several plastic bags containing amphetamine and methamphetamine, and a loaded .44 revolver. Burris was subsequently charged with possession of methamphetamine with intent to deliver, possession of amphetamine with intent to deliver, and carrying a weapon

The trial court denied Burris's motion to suppress the evidence seized from his trunk, found him guilty of all three crimes, and sentenced him to a concurrent term of forty years' imprisonment. Burris filed a timely notice of appeal from his judgment and commitment order.

I. Sufficiency of the Evidence

For his first argument on appeal, Burris challenges the sufficiency of the evidence to support all three of his convictions. When an appellant challenges the sufficiency of the evidence, we address the issue prior to all others in order to preserve the defendant's right to freedom from double jeopardy. *Rankin v. State*, 329 Ark. 379, 948 S.W.2d 397 (1997); *Williams v. State*, 329 Ark. 8, 946 S.W.2d 678 (1997). The test for determining the sufficiency of the evidence is whether there is substantial evidence to support a verdict. *Williams, supra*; *Ladwig v. State*, 328 Ark. 241, 943 S.W.2d 571 (1997). Substantial evidence is direct or circumstantial evidence that is forceful enough to compel a conclusion one way or another and which goes beyond mere speculation or conjecture. *Williams, supra*; *Ladwig, supra*. In making this determination, we review the evidence in the light most favorable to the State, and consider only the evidence that supports the verdict. *Williams, supra*; *Ladwig, supra*.

Burris's sole challenge to the sufficiency of the evidence is his argument that his conviction must be reversed if we find that the court erred in denying his motion to suppress the evidence seized from his car. We find no merit to this argument

because we have continuously held that when reviewing the sufficiency of the evidence upon appeal we must consider both properly and improperly admitted evidence. *Martin v. State*, 328 Ark. 420, 944 S.W.2d 512 (1997); *Hicks v. State*, 327 Ark. 652, 941 S.W.2d 387 (1997). Because the police found the drugs and guns in Burris's vehicle, we find that there was substantial evidence to support his convictions.

II. Motion to Suppress

Burris's second argument is that the trial court erred when it denied his motion to suppress the evidence that the police seized from his car. Burris contends that the drugs and guns should have been suppressed because the initial stop, detainment, and subsequent search of his vehicle were unlawful under the Fourth Amendment.

In reviewing the trial court's denial of a suppression motion, we make an independent examination based on the totality of the circumstances, and reverse only if the trial court's ruling was clearly against the preponderance of the evidence. *Norman v. State*, 326 Ark. 210, 931 S.W.2d 96 (1996); *Bohanan v. State*, 324 Ark. 158, 919 S.W.2d 198 (1996). In making this determination, we view the evidence in the light most favorable to the State. *Norman, supra*; *Beshears v. State*, 320 Ark. 573, 898 S.W.2d 49 (1995).

A. Initial Stop

First, Burris claims that the initial traffic stop was unlawful, and thus, evidence seized thereafter is inadmissible pursuant to the Fruit of the Poisonous Tree doctrine as discussed in *Wong Sun v. United States*, 371 U.S. 471 (1963). We disagree with this assertion.

In *Whren v. United States*, 116 S. Ct. 1769 (1996), the United States Supreme Court recently explained that a police officer may stop and detain a motorist where the officer has probable cause to believe that a traffic violation has occurred. For example, in *Wilburn v. State*, 317 Ark. 73, 876 S.W.2d 555 (1994), we held that an officer had probable cause to stop a motorist when

he discovered that the vehicle bore a license plate which was issued to a different car in violation of Ark. Code Ann. § 27-14-306 (Repl. 1994). Thus, the relevant inquiry is whether Captain Best had probable cause to believe that Burris was committing a traffic offense at the time of the initial stop.

We have previously explained that probable cause exists when the facts and circumstances within an officer's knowledge are sufficient to permit a person of reasonable caution to believe that an offense has been committed by the person suspected. *Hudson v. State*, 316 Ark. 360, 872 S.W.2d 68 (1994); *Johnson v. State*, 299 Ark. 223, 772 S.W.2d 322 (1989). In assessing the existence of probable cause, our review is liberal rather than strict. *Brunson v. State*, 327 Ark. 567, 940 S.W.2d 440 (1997).

During the suppression hearing, Captain Best testified that he had difficulty reading Burris's license plate because it was fastened to the trailer in such a fashion that the license plate flipped upwards in the wind, and because the last digits of the plate were obscured by the corner of the trailer. Based on these facts, we find that Captain Best had probable cause to believe that Burris was violating Ark. Code Ann. § 27-14-716(b) (Repl. 1994), which provides that:

> Every license plate shall, at all times, be securely fastened in a horizontal position to the vehicle for which it is issued so as to prevent the plate from swinging and at a height of not less than twelve inches (12") from the ground, measuring from the bottom of such plate, in a place and position to be clearly visible and shall be maintained free from foreign materials and in a condition to be clearly legible.

Although a further justification for the initial stop is unnecessary, Captain Best also testified during the suppression hearing that he stopped Burris because the lens of the trailer's left tail light was partially broken causing it to shine white instead of red. According to Ark. Code Ann. § 27-36-215(a)(1) (Repl. 1994):

> Every motor vehicle, trailer, semitrailer, and pole trailer, and any other vehicle which is being drawn at the end of a train of vehicles, shall be equipped with at least one (1) tail lamp

> mounted on the rear, which, when lighted as required, shall emit a red light plainly visible from a distance of five hundred feet (500') to the rear.

Because we find that Captain Best had probable cause to believe that Burris was committing two traffic violations, we find that the initial stop was lawful.

In reply, Burris argues that he was not guilty of violating either Section 27-14-716(b) or 27-36-215(a)(1). According to *Whren*, all that is required is that the officer had probable cause to believe that a traffic violation had occurred. *Whren, supra.* Whether the defendant is actually guilty of the traffic violation is for a jury or a court to decide, and not an officer on the scene. For example, in *State v. Jones*, 310 Ark. 585, 589, 839 S.W.2d 184, 186 (1992), we emphasized that "it should be kept in mind that we are not dealing with the guilt or innocence under the [traffic] ordinance, [but] merely with whether there was probable cause to conclude the ordinance had been violated." Moreover, we have repeatedly held that the degree of proof sufficient to sustain a finding of probable cause is less than that required to sustain a criminal conviction. *Baxter v. State*, 324 Ark. 440, 922 S.W.2d 682 (1996). Thus, we find no merit to this argument.

B. Detainment

Next, Burris argues that the evidence should have been suppressed because Captain Best had no legal reason to detain him for fifteen to twenty minutes after he was initially stopped for the traffic violations. Although Burris did not raise this argument in his motion to suppress, he clearly developed this argument during the suppression hearing, and the State failed to object. Thus, we find that the issue is properly preserved for appeal.

According to *Terry v. Ohio*, 392 U.S. 1 (1968), given the lawfulness of the initial stop, the question is whether the resulting detention was "reasonably related in scope to the circumstances which justified the interference in the first place." Arkansas Rule of Criminal Procedure 3.1 states that an officer may detain a suspect for not more than fifteen minutes or "for such time as reasonable under the circumstances" if the officer has a

reasonable suspicion that the person is committing, has committed, or is about to commit either "1) a felony, or 2) a misdemeanor involving danger of forcible injury to persons or of appropriation of or damage to property." A reasonable suspicion has been defined as a suspicion based upon facts or circumstances that give rise to more than a bare, imaginary, or purely conjectural suspicion. *Hammons v. State*, 327 Ark. 520, 940 S.W.2d 424 (1997); *Williams v. State*, 321 Ark. 344, 902 S.W.2d 767 (1995). In making this determination, the trial court may consider several factors, including, but not limited to: (a) the demeanor of the suspect; (b) the gait and manner of the suspect; (c) any knowledge the officer may have of the suspect's background or character; and (d) any apparent effort of the suspect to avoid identification or confrontation by the police. Ark. Code Ann. § 16-81-203 (1987).

In this case, Captain Best detained Burris for approximately fifteen to twenty minutes to explain to him the traffic violations for which he was stopped and to question him about his possible possession of guns and drugs. Captain Best testified that he detained and questioned Burris because: 1) he was aware that Burris had been previously arrested on drug and gun charges; 2) Burris lied to him about his prior arrests; 3) Burris appeared unusually nervous and avoided eye contact; and 4) he was concerned for his own safety.

Burris argues that Captain Best should not have been able to consider his prior convictions and arrests under Ark. Code Ann. § 16-81-201(1) (1987), which states that the subchapter shall not be construed to:

> Permit an officer to *stop* just any passerby and search him, nor allow the search of any person *merely* because he has a criminal record.

(Emphasis added.) We find that this argument fails for two reasons. First, the statute states that an officer may not "*stop*" a passerby and search him because he has a criminal record. Captain Best stopped Burris for traffic violations, not because of his criminal record. Additionally, the statute says that a person may not be searched "*merely*" because he or she has a criminal record. Captain

Best retrieved a loaded weapon from Burris's car only after Burris disclosed that he had the weapon in his vehicle, and not merely because he had a criminal record. Furthermore, the inventory search of Burris's car occurred after Burris's arrest and not merely because he had a criminal record.

For these reasons, we find that Captain Best had a reasonable suspicion that Burris was in possession of drugs which is a felony under Ark. Code Ann. § 5-64-401 (Supp. 1995). Moreover, Captain Best detained Burris for only fifteen or twenty minutes which we find is "reasonable under the circumstances" as required by Rule 3.1. Thus, we conclude that Captain Best lawfully detained Burris.

C. Warrantless Search of the Vehicle

Finally, Burris contends that the warrantless search of his vehicle violated his rights under the Fourth Amendment. Because Burris failed to raise this argument in his motion to suppress or during the suppression hearing, we refuse to consider it for the first time on appeal. *Oliver v. State*, 322 Ark. 8, 907 S.W.2d 706 (1995); *Rhoades v. State*, 319 Ark. 45, 888 S.W.2d 654 (1994).

For these reasons, we conclude that there was sufficient evidence to support Burris's convictions, and that the trial court did not err when it denied Burris's motion to suppress. Accordingly, we affirm Burris's convictions.

Affirmed.

Willie Gaster DAVIS *v.* STATE of Arkansas

CR 97-401 953 S.W.2d 559

Supreme Court of Arkansas
Opinion delivered October 2, 1997

[redacted]

Arkansas Public Defender Commission, by: *Teri Chambers*, for appellant.

Winston Bryant, Att'y Gen., by: *David R. Raupp*, Asst. Att'y Gen., for appellee.

ANNABELLE CLINTON IMBER, Justice. The appellant, Willie Gaster Davis, appeals his judgments of conviction for first-degree murder, robbery, theft of property, and false imprisonment. On appeal, he argues that the trial court erred in failing to suppress his statement and that uncounseled misdemeanor convictions were impermissibly introduced against him during sentencing. We find no error and affirm.

Because Davis does not challenge the sufficiency of the evidence on appeal, we provide only a brief recitation of the facts adduced at trial. Traci Noble testified that she was best friends with the victim, Nikki Muse. On April 21, 1995, Muse (who was driving) and Noble went out riding in a white Grand Am belonging to Noble's sister. They eventually went to Dumas to find Odis Madden, "Mane," a friend of Noble's. While driving in Dumas, they saw some boys on the corner who flagged them down. Noble explained that they were looking for Madden, and the boys answered that they could show them where he lived. Noble and Muse allowed these three boys to enter the back seat of the vehicle, although Noble said that neither she nor Muse knew who they were.

Noble testified that these boys led them to a dead-end street, and told them that Madden lived at a house that did not have lights on at the time. The boy on Noble's side of the car began to get out of the vehicle, pulled her out of the car, and grabbed the gold chains she was wearing, telling her to "give him my money." Noble testified that the boy on Muse's side of the vehicle "[did] the same thing with her, Nikki." Noble later identified the man

behind her who took her chains as Willie Spencer. She thought the boy in the middle, who ran away, was named Bryan. The third boy pushed Muse into the passenger seat, sat in the driver's seat, and drove away. Noble saw this boy demand money from Muse, who in turn gave money to him. Noble testified that there was no doubt in her mind that Muse did not want to go with this boy. She never saw Muse alive again. She made an in-court identification of Davis as the man who demanded money from Muse and drove off with her. Noble managed to ultimately escape from Spencer after which she contacted the police. At the police station Noble was shown a photo lineup and eventually identified Davis as the man who drove off with Muse.

Spencer testified that on April 21, 1995, he was standing around with Willie Davis and Bryan Woods on Cherry Street in Dumas. He said that two girls approached them driving a white Grand Am; he knew the names of both girls. He testified that Noble asked them if they wanted to go riding, and if they knew where Odis Madden lived. The boys got in the car and led the girls to a dead-end street. Spencer testified that Davis got in the car first, behind Muse, then he got in, and then Bryan Woods. They directed the girls to a dead-end street, Peach Street, when Spencer grabbed Noble and took her chains; Bryan Woods then ran away. Spencer testified that he demanded money from her, but that he gave Noble her chains back.

Spencer saw Davis get out of the car telling Muse "to scoot over," adding that Davis "[m]ight of did choke [Muse]." Spencer was then presented with his testimony from his own trial, where he testified that Davis "wasn't acting right. As soon as the car stopped. . . he said this is a robbery and he just grabbed her." Spencer also testified that he knew that Muse did not want to leave with Davis, and that it was Davis who directed the girls to Peach Street, which was not where Odis Madden lived.

A police officer found a vehicle matching the description of the missing Grand Am in front of 405 West Banks Street. Inside the police discovered Davis, who appeared to be asleep on a couch, as well as Muse in a sprawled position on the same couch. Muse was dead with what appeared to be blood coming from her

vaginal and anal areas. At this time Davis came up off the couch and said "did you get the other two." When asked who he was talking about, he said, "Willie Spencer and Bryant. They left with the other girl."

While in custody, Davis gave a statement to Everett Cox, the Dumas Chief of Police, which was admitted at trial. In this statement, Davis admitted that he told Muse to give him the money that she had and that he told her to get in the passenger side of the car. Davis said that they rode around looking for Noble and Spencer, and that Muse later consented to having sex.

The medical examiner's testimony established that Muse had neck injuries consistent with manual strangulation. Her injuries also suggested that she had been sexually assaulted.

The jury convicted Davis of first-degree murder, robbery, theft of property, and first-degree false imprisonment. The jury was unable to reach a verdict on the rape charge, and the trial court granted a mistrial on that count. For sentencing purposes, the underlying robbery and false-imprisonment convictions were merged with the first-degree murder conviction. The trial court, on the State's motion, dismissed the theft of property misdemeanor conviction. The jury sentenced Davis to a term of life imprisonment.

1. Voluntariness of Davis's April 28 Statement.

At the suppression hearing, Chief of Police Everett Cox testified that at 5:47 a.m. on April 22, after Davis was read his *Miranda* rights, Davis said that he would not make a statement. Later that morning, Davis was taken to Dumas Municipal Court for his arraignment. Cox was aware that at the time, attorney Bing Colvin was appointed as Davis's public defender. Cox conceded that any subsequent contact with Davis would have been after the appointment of counsel for Davis. Cox testified that at 1:54 p.m. on April 22 he initiated contact with Davis in an attempt to take a statement from him. On April 23, Cox recalled that someone from the police again initiated contact with Davis in an attempt to take a statement. Cox was not sure who initiated this contact, but believed it was Investigator Donigan.

Cox testified that on April 28, Davis contacted him "through the jail," saying that he wanted to talk with him. When asked whether anyone made contact with Davis prior to that request, Cox answered in the negative. After Cox received this request, he conducted a videotaped interview with Davis. Cox testified that on the videotape, he "asked [Davis] to state why he wanted to talk and he said that he did make initial contact with me before anything was done." Cox added that he read Davis his *Miranda* rights, and that no threats or other coercive acts were directed toward Davis off of the camera. Additionally, Davis was not restrained, and he made no requests that were denied him. Davis also executed a rights-waiver form that was filled out by Cox as Davis answered the questions; Davis initialed the individual responses. Cox also wrote out the substance of Davis's statement; Davis signed this statement at the end.

Officer Michael Donigan testified that on the afternoon of April 22, at 1:54 p.m., he came into contact with Davis to question him about the homicide. Donigan read Davis his *Miranda* rights from a rights form, which Davis executed. Donigan wrote down the substance of Davis's statement. Donigan also testified that he was present at 1:19 p.m. on April 23, when he and Officer Monty Kilibrew again executed a rights waiver with Davis, however Davis declined to make a statement at this time.

Chester Lee James, Jr., an inmate at the Dumas City Jail while Davis was also incarcerated there, testified that the police contacted Davis. James recalled that either Officer Donnahoe [sic?] or Kilibrew "consulted with [Davis] at one time. . . asked [Davis]. . . why he killed the girl." James testified that Davis became upset at this questioning. After this, the officer told Davis that he "want[ed] to make sure you get the chair." When asked to recall how long Davis had been in jail when this contact occurred, James answered three or four days. James also testified that on April 28, he contacted the chief of police at Davis's request.

Prior to trial, the State conceded that the statements taken at 1:54 p.m. on April 22 and the one taken at 1:19 p.m. on April 23[1] were inadmissible because the interrogating officers could not recall who initiated the questioning with Davis. However, the trial court overruled the motion to suppress with respect to the April 28 statement, which was ultimately admitted at trial.

On appeal, Davis contends that the trial court erred in denying his motion to suppress his April 28 statement. He first argues that this court's holding in *Bradford v. State* 325 Ark. 278, 927 S.W.2d 329 (1996), *cert. denied* 117 S. Ct. 583 (1996), mandates suppression of his April 28 statement, and alternatively argues that his waiver of rights and subsequent statement on April 28 was not voluntarily made due to the intervening police-initiated contacts.

Davis initially relies on *Bradford v. State, supra*, where this court held that an inculpatory statement taken without the presence of counsel, but after counsel had been appointed at a probable cause hearing, was a violation of the appellant's Sixth Amendment right to counsel. *Bradford* involved an analysis of *Michigan v. Jackson*, 475 U.S. 625 (1986), where the United State Supreme Court held that "if police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation in invalid."[2] In *Bradford*, the appellant had not requested counsel, but counsel had nonetheless been appointed. This court concluded that the appellant's unawareness that she had been appointed counsel was irrelevant, "Just as a police officer who wishes to initiate an interrogation

[1] Actually, Davis did not give a statement on April 23.

[2] Both the Fifth and Sixth Amendments provide a right to counsel. Under the Fifth Amendment, the right to counsel is derived from the amendment's prohibition against self incrimination while in custody. *See Miranda v. Arizona*, 384 U.S. 436 (1966). In other circumstances, there may be a Sixth Amendment right to counsel. *See Kirby v. Illinois*, 406 U.S. 682 (1972) (Sixth Amendment right to counsel at critical stages of the prosecution). Under *Edwards v. Arizona*, 451 U.S. 477 (1981), once a defendant invokes his Fifth Amendment right to counsel at a custodial interrogation, the police may not interrogate any further until counsel is provided, or the "[defendant] himself initiates further communication[.]" *Michigan v. Jackson, supra*, may be seen as an application of the *Edwards* rule to the Sixth Amendment right to counsel. *See* David M. Nissman & Ed Hagen, *Law of Confessions* § 7:10 (2d ed. 1994).

during the custody stage must determine if a request for counsel has been made [citation omitted], simple diligence requires that police officers take pains to learn whether counsel was appointed at a probable cause hearing." *Bradford, supra.*

In the present case, Davis appears to concede that the holding in *Michigan v. Jackson* is limited to police-initiated interrogation, yet maintains that this court in *Bradford v. State, supra,* did not "specify that its ruling was based on the fact that police officers rather than Bradford initiated the contact." This argument is misplaced. A plain reading of *Bradford v. State* suggests that this court had no intention of broadening the Supreme Court's holding found in *Michigan v. Jackson.* Rather, the question presented in *Bradford* was whether the appellant's failure to actually request counsel affected her right to counsel under *Michigan v. Jackson,* and if knowledge of the municipal court's appointment of counsel could be imputed to police. Davis concedes that "on April 28, 1995, it was undisputed that [Davis] initiated the contact with Chief Everett Cox." Because Davis himself initiated contact with the police on April 28, nothing in *Bradford v. State* or *Michigan v. Jackson* mandates a result opposite of that reached by the trial court. As one treatise has noted, "Even after counsel is appointed at arraignment, a defendant may choose to waive counsel without notice or consultation with an attorney. Under *Jackson,* police cannot initiate the contact, but the defendant is free to initiate the contact." DAVID M. NISSMAN & ED HAGEN, LAW OF CONFESSIONS § 7:10 (2d ed. 1994) (citing *Missouri v. Owens,* 827 S.W.2d 226 (Mo. Ct. App. 1991)).

Davis alternatively argues that even if he effectively waived his right to counsel, this action was coerced by the police efforts in contacting him after the appointment of counsel on April 22 and 23. A custodial confession is presumptively involuntary and the burden is on the State to show that the waiver and confession was voluntarily made. *Clark v. State,* 328 Ark. 501, 944 S.W.2d 533 (1997). In examining the voluntariness of confessions, this court makes an independent determination based on the totality of the circumstances, and reverses the trial court only if its decision was clearly erroneous. *Kennedy v. State,* 325 Ark. 3, 923 S.W.2d 274 (1996). As explained in *Mauppin v. State,* 309

Ark. 235, 831 S.W.2d 104 (1992), the inquiry into the validity of the defendant's waiver has two separate components: whether the waiver was voluntary, and whether the waiver was knowingly and intelligently made. In determining voluntariness, we consider the following factors: age, education, and intelligence of the accused, lack of advice as to his constitutional rights, length of detention, the repeated and prolonged nature of questioning, or the use of physical punishment. *Hood v. State*, 329 Ark. 21, 947 S.W.2d 328 (1997). Other relevant factors in considering the totality of the circumstances include the statements made by the interrogating officer and the vulnerability of the defendant. *Id.* In addition, the accused must have a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it in order for his waiver to be knowingly and intelligently made. *Esmeyer v. State*, 325 Ark. 491, 930 S.W.2d 302 (1996).

In the present case the thrust of Davis's argument is that the intervening police contacts on April 22 and 23 rendered his waiver and statement on April 28 involuntary. Davis emphasizes that after his initial expression of his intent not to make a statement and his appointment of counsel on the morning of April 22, the police made two separate attempts to take a statement from him. Chief Cox himself testified that this occurred at 1:54 p.m. on April 22 and later on April 23. The encounter at 1:54 p.m. on April 22 yielded a statement, not admitted at trial, while Davis did not give a statement at the interview at 1:19 p.m. on April 23. In the present case, the immediate fruits of the two police-initiated contacts were not admitted at trial. Additionally, there was a five-day gap between the police-initiated contact on April 23, and the defendant-initiated contact on April 28. To the extent that it can be argued the police-initiated contacts were an attempt at repeated questioning designed to wear down Davis's resistance or change his mind, this five-day gap would serve to avoid the effects of repeated questioning. *See Hatley v. State*, 289 Ark. 130, 709 S.W.2d 812 (1986).

Some courts have refused to recognize a defendant's initiation of contact with police when it is the result of an earlier, illegal interrogation. Nissman & Hagen, *supra*, § 6:35 at n.91. For example, in *Wainwright v. Delaware*, 504 A.2d 1096 (Del. 1986),

cert. denied, 479 U.S. 869 (1986), the defendant initiated a conversation and gave an inculpatory statement some forty-five minutes after an illegal police-initiated interrogation under *Edwards v. Arizona, supra.* That the defendant's response came forty-five minutes afterward did not "sanitize it". *Wainwright v. Delaware, supra.* The Delaware Supreme Court further explained:

> Nor does the fact that the defendant's statement was made after he was placed alone in a cell render it a purely spontaneous one. Indeed, the opportunity to mull over the effect of [the codefendant's] accusatory statements could reasonably have had the opposite effect — to impress upon the defendant the seriousness of his predicament and the need to rebut his codefendant's accusations. Any attempt to "spark" the accused's initiative to make a statement in the absence of counsel through presentation of evidence will contaminate the waiver. [citations omitted].

Wainwright v. Delaware, supra.

In the present case, the record does not show that the police were attempting to "spark" Davis's initiative in making the April 28 contact. Significantly, the defendant-initiated contact came some five days after the last police-initiated contact. The evidence also suggests that Davis voluntarily waived his rights and elected to make a statement on April 28. Davis was nineteen years of age at the time of the statement. He had completed at least the ninth grade, and could read and write. A forensic mental evaluation showed that Davis's intellectual functioning was within the low-average range. The record also demonstrates that Davis was fully advised of his constitutional rights, as is evidenced by the execution of the rights-waiver form as well as Chief Cox's testimony. There was little or no evidence of threats of physical violence against Davis, promises of leniency, or other misrepresentations of fact. Based on the foregoing, we cannot say that the trial court was clearly erroneous in denying Davis's motions to suppress.

2. *Admissibility of Uncounseled Misdemeanor Convictions.*

During the sentencing phase of trial, the State introduced into evidence two misdemeanor convictions of third-degree bat-

tery that Davis obtained in 1994. Davis was only fined for these convictions, and was not sentenced to any time in prison. The record shows that Davis was not represented by counsel during these misdemeanor proceedings. On appeal, Davis argues that the admission of these uncounseled misdemeanor convictions constitutes reversible error.

Davis initially cites to *Baldasar v. Illinois*, 446 U.S. 222 (1980) (*per curiam*) (plurality opinion), *overruled by Nichols v. United States*, 511 U.S. 738 (1994), where the United States Supreme Court held that a constitutionally valid misdemeanor conviction obtained under *Scott v. Illinois*, 440 U.S. 367 (1979),[3] could not be used under an "enhanced penalty statute" to convert a subsequent misdemeanor into a felony with a prison term. This court followed suit in *State v. Brown*, 283 Ark. 304, 675 S.W.2d 822 (1984), where the trial court granted the defendant's motion to suppress three prior DWI convictions under a charge of DWI, fourth offense. The trial court suppressed these convictions because the defendant had not been represented by counsel in the earlier proceedings. This court affirmed, framing the issue as "whether [*Baldasar*] bars prior uncounseled misdemeanor convictions from being used to enhance punishment for a subsequent offense." *State v. Brown, supra.* This court observed that the case presented a similar situation to the enhancement statute in *Baldasar*, as the first DWI offense was punishable by imprisonment from twenty-four hours to one year, while the second, third, and fourth offenses were punishable in increasing ranges cumulating in imprisonment for one to six years on the fourth offense. The *Brown* court concluded that *Baldasar* controlled the facts of the case, and affirmed the trial court's suppression of the convictions.[4]

Davis fails to point out that in *Nichols v. United States*, 511 U.S. 738 (1994), the Supreme Court expressly overruled *Baldasar* in a case involving a criminal sentencing point assessed for a prior,

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[3] In *Scott* the Supreme Court held that an uncounseled misdemeanor conviction is constitutionally valid if the defendant is not incarcerated.

[4] For subsequent Arkansas cases citing to *Brown* and *Baldasar* for this proposition, *see, e.g.*, *Neville v. State*, 41 Ark. App. 65, 848 S.W.2d 947 (1993); *Rodgers v. State*, 31 Ark. App. 159, 790 S.W.2d 911 (1990); *Steele v. State*, 284 Ark. 340, 681 S.W.2d 354 (1984); *Lovell v. State*, 283 Ark. 425, 678 S.W.2d 318 (1984).

uncounseled misdemeanor conviction under the United States Sentencing Commission's Guidelines. The Court noted that "[e]nhancement statutes, whether in the nature of criminal history provisions such as those contained in the Sentencing Guidelines, or recidivist statutes that are commonplace in state criminal laws, do not change the penalty imposed for the earlier conviction." *Id.* Moreover, reliance on such a conviction was consistent with the "traditional understanding of the sentencing process," recognized as less exacting than the determination of guilt. *Id.* Accordingly, the Supreme Court overruled *Baldasar* and held that a valid misdemeanor conviction under *Scott v. Illinois, supra,* is also admissible to enhance punishment at a subsequent conviction.

The present case does not squarely present this court with an opportunity to reconsider the continuing validity of *Brown.* Notably, the uncounseled misdemeanor convictions were not admitted against Davis pursuant to a recidivist or enhancement statute as contemplated in *Baldasar* and *Brown.* Rather, the misdemeanor convictions were introduced under Ark. Code Ann. § 16-97-103(2) (Supp. 1995), which merely includes prior felony and misdemeanor convictions within the definition of "[e]vidence relevant to sentencing." This statutory scheme simply allows the jury or court to exercise its discretion in considering all evidence relevant to sentencing, and does not mandate automatic enhancement due to prior misdemeanor convictions. We have no doubt that this procedure for admitting uncounseled misdemeanor convictions otherwise valid under *Scott v. Illinois, supra,* would withstand scrutiny under *Nichols v. United States, supra.* Accordingly, we reject Davis's argument that the admission of these convictions constituted reversible error.

3. Rule 4-3(h) Compliance.

The record has been reviewed for prejudicial error pursuant to Ark. Sup. Ct. R. 4-3(h), and no reversible errors were found.

Affirmed.

Collin A. PYRON *v.* STATE of Arkansas

CR 97-499 953 S.W.2d 874

Supreme Court of Arkansas
Opinion delivered October 2, 1997
[Petition for rehearing denied November 6, 1997.]

Mashburn & Taylor, by: *Scott E. Smith*, for appellant.

Winston Bryant, Att'y Gen., by: *Kent G. Holt*, Asst. Att'y Gen., for appellee.

RAY THORNTON, Justice. Collin Andrew Pyron, appellant, was arrested by the Fayetteville Police Department on July 19, 1996, and charged with driving while intoxicated and refusal to submit to a chemical analysis. On August 20, his driver's license was suspended by the Office of Driver Services for 120 days on

the basis of his arrest for the DWI and for 180 days for his refusal to submit to chemical analysis. He was convicted in Fayetteville Municipal Court for both offenses on October 2, 1996, and appealed to Washington County Circuit Court.

In circuit court, he filed a motion to dismiss, alleging that the prosecution violates the Double Jeopardy Clause of the United States Constitution. He argued that the length of the administrative suspension of his license for 180 days, "rises to the level of punishment due to its retributive and deterrent effect." The trial court found that because the suspension was that of a privilege, not a right, to operate a motor vehicle, the Double Jeopardy Clause was not violated by his trial and subsequent conviction on criminal charges. We agree.

Both the United States and Arkansas Constitutions provide that no person shall be subjected to two punishments based on the same offense. However, remedial civil sanctions may be properly imposed without placing the person in jeopardy. As the Supreme Court stated long ago in *Helvering v. Mitchell*, 303 U.S. 391 (1938): "Remedial sanctions may be of varying types. One which is characteristically free of the punitive criminal element is revocation of a privilege temporarily granted."

In *Sims v. State*, 326 Ark. 296, 930 S.W.2d 381 (1996), we articulated a standard for determining whether a civil forfeiture is "punishment" for double jeopardy purposes, and we hold that this standard pertains to the suspension provision. The test first asks whether the legislature intended for the statute to be a remedial civil sanction or a criminal penalty. Second, it asks whether the administrative proceedings are so punitive in nature as to establish that they may not legitimately be viewed as civil in nature, "despite any legislative intent to establish a civil remedial mechanism." *Id.* at 298, 930 S.W.2d at 382 (citing *United States v. Ursery*, 116 S. Ct. 2135 (1996)).

With regard to the first prong of this test, we note that Ark. Code Ann. § 5-65-104 (Supp. 1995) states:

> The administrative suspension or revocation of a driver's license as provided for by this section shall be supplementary to and in

> addition to the suspensions or revocations of driver licenses which are ordered by a court of competent jurisdiction [.]

Id. § 5-65-104(f).

We also note that the standard for administrative license suspension established by section 5-65-104(a)(8) is based on the civil standard of proof by a preponderance of the evidence. This is, of course, a lower standard than that required by a criminal conviction, which is beyond a reasonable doubt.

The purpose for the sanctions is to prevent drunk driving, as stated in the Emergency Clause, as follows: "the act of driving a motor vehicle while under the influence of intoxicating alcoholic beverages or drugs constitutes a serious and immediate threat to the safety of all citizens of this State . . . ." Act 549 of 1983, § 19 (emergency clause).

Additionally, the proceedings for imposition of the sanctions are conducted by the executive branch of government, and not the judiciary. It is clear that the legislative intent was to provide remedial civil sanctions.

We next consider the language and application of the statute. Arkansas Code Annotated § 5-65-104(a)(4)(A)(iii) provides:

> (a)(4) The Office of Driver Services of the Revenue Division of the Department of Finance and Administration or its designated official shall suspend or revoke the driving privilege of an arrested person or shall suspend any nonresident driving privilege of an arrested person when it receives a sworn report from the law enforcement officer that he had reasonable grounds to believe the arrested person had been operating or was in actual physical control of a motor vehicle while intoxicated or while there was one-tenth of one percent (0.1%) or more by weight of alcohol in the person's blood, § 5-65-103, which is accompanied by a written chemical test report reflecting that the arrested person was intoxicated or had an alcohol concentration of one-tenth of one percent (0.1%) or more, or is accompanied by a sworn report that the arrested person refused to submit to a chemical test of blood, breath, or urine for the purpose of determining the alcohol or controlled substance contents of the person's blood, as provided in § 5-65-202. The suspension or revocation shall be based on the number of previous offenses as follows:

> (A)(iii) Suspension for one hundred eighty (180) days for the first offense of refusing to submit to a chemical test of blood, breath, or urine for the purpose of determining the alcohol or controlled substance contents of the person's blood, § 5-65-202 [.]

The interpretation of this statute is a question of first impression for this court. Appellant argues that the statute imposes "multiple punishments" and that it fails the second prong of the test articulated in *Sims*. We do not find that the penalty "is so divorced from any remedial goal that it constitutes 'punishment' [under] double jeopardy analysis." *United States v. Halper*, 490 U.S. 435, 443 (1989). We hold that the temporary revocation of the privilege of driving for refusal to submit to a chemical analysis is rationally related to the purpose of the statute, which is to protect the public from intoxicated drivers and to reduce alcohol-related accidents.

Further, we note that in order to relieve any extraordinary hardship that might occur by an administrative license suspension, the legislature enacted provisions to allow those with no alternate means of commuting to and from work to apply for a restricted driving permit. Arkansas Code Annotated § 5-65-120 (Supp. 1995) provides in pertinent part:

> (a) On July 1, 1996, and thereafter, the Office of Driver Services or its designated agent, following the administrative hearing for suspension or revocation of a driver's license as provided for in § 5-65-104, or upon the request of the person whose privilege to drive has been denied or suspended, may modify the denial or suspension in cases of extreme and unusual hardship by the issuance of a restricted driving permit when it is determined by the Office of Driver Services or its agent that no other adequate means of transportation exists for that person to allow driving in any or all of the following situations:
>
> (1) To and from his or her place of employment; or
>
> (2) In the course of his or her employment; or
>
> (3) To and from an educational institution for the purpose of attending classes if the person is enrolled and regularly attending classes at the institution; or

(4) To and from the alcohol safety education and treatment course for drunk drivers.

This provision rebuts any argument concerning the punitive effect of the sanction upon a person whose license has been suspended, as a result of which his ability to maintain his means of livelihood is impaired. It is a further reflection of the legislative intent to establish a remedial civil sanction for the purpose of protecting the public from intoxicated drivers and to reduce alcohol-related accidents while softening the sanctions in order to allow the person to continue to operate a vehicle for appropriate purposes.

In summary, we do not find that the statute violates the constitutional prohibition on double jeopardy by imposing multiple punishments for the same offense. The judgment of the trial court is affirmed.

Affirmed.

Johnny Ray HAWTHORNE *v.* STATE of Arkansas

CR 97-1021 950 S.W.2d 806

Supreme Court of Arkansas
Opinion delivered October 2, 1997

John F. Stroud, III, for appellant.

No response.

PER CURIAM. Appellant, Johnny Ray Hawthorne, by and through his attorney, has filed a motion for a rule on the clerk. We treat this motion as a motion for belated appeal. His attorney, John F. Stroud, III, admits in his motion that the filing of the notice of appeal was premature due to a mistake on his part. We find that such an error, admittedly made by the attorney for a criminal defendant, is good cause to grant the motion. *See In re Belated Appeals in Criminal Cases*, 265 Ark. 964 (1979) (per curiam). The motion for belated appeal is therefore granted.

Appellant has also filed a pro se motion for appointment of counsel and rule on the clerk. Because we are granting his attorney's motion for belated appeal, we find that appellant has not been prejudiced by this delay. We accordingly deny this motion for appointment of counsel and rule on the clerk.

A copy of this opinion will be forwarded to the Committee on Professional Conduct.

Don SELLERS *v.* FAULKNER COUNTY CIRCUIT COURT, Third Division

CR 97-1044 950 S.W.2d 805

Supreme Court of Arkansas
Opinion delivered October 2, 1997

Tim D. Williams, for petitioner.

Winston Bryant, Att'y Gen., by: *David R. Raupp*, Sr. Asst. Att'y Gen., for appellee.

PER CURIAM. Don Sellers petitions this court for a writ of prohibition against the Faulkner County Circuit Court, directing the circuit court be prohibited from trying him on a theft by receiving charge. The basis for Sellers's petition is his claim of double jeopardy.

The State filed its criminal theft charge against Sellers on July 28, 1994, but when his case came to trial two years later, the State was unable to produce a material witness. Because the trial court refused the State a continuance, the State requested a dismissal, which the court granted and filed on July 18, 1996. On August 13, 1996, the State filed a motion to reconsider, asking the trial court to reconsider its earlier dismissal order and to reinstate Sellers's case. The trial court granted the State's request on November 13, 1996 — almost four months after its July 18 dismissal order. Sellers then moved for the court to set aside the November 13 order, but the court declined to do so by order filed on February 18, 1997. On May 14, 1997, the trial court again denied Sellers's second motion to set aside the November 13 order. The trial

court has set Sellers's case for trial, which prompts his request to this court for a writ of prohibition.

Citing the case of *U.S. v. Martin Linen Supply Co.*, 430 U.S. 564 (1977), and *Reaves v. City of Little Rock*, 25 Ark. App. 14, 751 S.W.2d 18 (1988), Sellers argues double jeopardy attached when the trial court dismissed his case on July 18, 1996. The State counters, stating among other things, that jeopardy does not attach prior to the swearing of a jury or the taking of evidence in a bench trial. *Smith v. State*, 307 Ark. 542, 821 S.W.2d 774 (1992); *see also McKinney v. State*, 215 Ark. 712, 223 S.W.2d 185 (1949).

Besides the foregoing double-jeopardy argument, Sellers suggests the circuit court had lost jurisdiction under Ark. R. App. P. — Civ. 4(c) (1997) (*see also* Ark. R. App. P. — Crim. 2) because the court entered an order beyond the "deemed denied" date provided in that rule. The State argues Rule 4(c) merely delineates the jurisdictional requirements for filing a notice of appeal and does not apply here. The State also contends Rule 4(c) is inapplicable because the motion for reconsideration the trial court granted on November 13, 1996 was not a post-judgment motion covered by that rule. The trial court adopted the State's contention.

Another question bearing on the trial court's jurisdiction which is not raised by the State or Sellers is what power, if any, the trial court had to "reinstate" the theft charge against Sellers when more than thirty days (almost four months) had passed from when the charge was dismissed (July 18, 1996) and when the case was reinstated on November 13, 1996. Moreover, was the State relegated to refiling its theft charge against Sellers, assuming jeopardy had not yet attached?

■ We request the parties brief the foregoing issues that bear on the lower court's jurisdiction to proceed against Sellers in the case. Because Sellers is the moving party, he should proceed first in the preparing and filing of his brief. This court's clerk shall establish the briefing calendar for both parties. A temporary stay

shall be entered in the pending trial below until this court renders its opinion in this proceeding.

Jesse Dewayne WICKLIFFE *v.* STATE of Arkansas

TEN 96-108 952 S.W.2d 144

Supreme Court of Arkansas
Opinion delivered October 2, 1997

No response.

Winston Bryant, Att'y Gen., by: *Kelly K. Hill*, Asst. Att'y Gen., for appellee.

PER CURIAM. Appellee the State of Arkansas, by and through counsel, Winston Bryant, Attorney General, and Kelly K. Hill, Deputy Attorney General, has filed a motion to dismiss Appellant Wickliffe's appeal.

On April 23, 1996, the Pulaski County Circuit Court entered a judgment convicting appellant of simultaneous posses-

sion of drugs and firearms, possession of a controlled substance with intent to deliver, and possession of drug paraphernalia. On May 20, 1996, appellant filed a motion for new trial, which, by operation of law, was deemed denied on June 20, 1996. Ark. R. App. P.—Crim. 2(a)(3). However, the circuit court proceeded to enter a written order denying the motion for new trial on July 16, 1996.

Appellant filed a notice of appeal on July 12, 1996. On October 11, 1996, appellant tendered a partial record to this court for filing. The partial record did not contain appellant's motion for new trial, nor did it contain a notice of appeal filed after the motion for new trial was denied. Based upon the partial record as tendered by appellant, the Clerk of this court notified appellant's attorney that the record could not be filed because the notice of appeal was not timely.

By letter dated January 7, 1997, the Clerk of this court advised appellant's attorney that a motion for rule on the clerk would be necessary to get the record filed and to proceed with the appeal. By letter dated July 15, 1997, the court's Office of the Criminal Justice Coordinator notified appellant regarding the status of his appeal from the conviction on April 23, 1996. Specifically, appellant was advised that his attorney had not filed the appropriate motion requesting permission to proceed with the appeal.

Appellant's attorney has taken no action in the appeal since tendering the partial record on October 11, 1996.

We find that appellant's failure to perfect this appeal in a timely manner is good cause to grant appellee's motion to dismiss appeal.

The motion is, therefore, granted.

A. Wayne Davis is also ordered to appear before this court on the 16th day of October, 1997, at 9:00 a.m. to show cause why he should not be held in contempt of this court for his failure to perfect appellant Wickliffe's appeal in a timely manner.

Sterling BOSTON *v.* STATE of Arkansas

CR 97-589 952 S.W.2d 671

Supreme Court of Arkansas
Opinion delivered October 9, 1997

William R. Simpson, Jr., Public Defender, by: *Deborah H. Sallings*, Deputy Public Defender, for appellant.

Winston Bryant, Att'y Gen., by: *Kelly Terry*, Asst. Att'y Gen., for appellee.

W.H. "DUB" ARNOLD, Chief Justice. Appellant Sterling Boston was convicted in violation of Ark. Code Ann. § 5-73-120

(Supp. 1995), the unauthorized carrying of a weapon. An officer approached Boston while he was sitting in his taxicab and asked for his license and registration. The officer requested that Boston get out of the vehicle; upon getting out, Boston informed the officer that he had a weapon in his back pocket. The officer arrested Boston for carrying a weapon without a license. Boston appeals the conviction claiming that the statutory defense for carrying a weapon in one's place of business authorized Boston's carrying the weapon in his taxicab because this was his place of business.

This case involves interpretation of the Arkansas Code and whether the term "business" includes a taxi cab or any motor vehicle used for commercial purposes. Specifically, Ark. Code Ann. §5-73-120 provides:

> (a) A person commits the offense of carrying a weapon if he possesses a handgun, knife, or club on or about his person, in a vehicle occupied by him, or otherwise readily available for use with a purpose to employ it as a weapon against a person.
>
> . . . .
>
> (c) It is a defense to a prosecution under this section that at the time of the act of carrying:
>
> > (1) The person is in his own dwelling, place of business, or on property in which he has a possessory or proprietary interest.

There is no definition of the term "place of business" in this statute.

Appellant contends that a vehicle should be considered a "business" in certain instances for purposes of §5-73-120(c)(1); although this specific code section does not define the term "place of business," appellant contends that a definition in the commercial burglary statute should be persuasive. Ark. Code Ann. § 5-39-101 (2)(A) criminalizes commercial burglary; this statute defines "commercial occupiable structure" as any "vehicle where any person carries on a business or calling." Relying upon the definition contained in the commercial burglary statute, appellant argues that his cab should be considered a business for Ark. Code Ann. §5-73-120(c)(1).

In subsection (a) of §5-73-120, the legislature clearly criminalized the carrying of a weapon in "a vehicle." Appellant relies on the term "business" in the exemptions to the rule found in subsection (c)(1). However, the specific language of that section exempts certain areas clearly relating to real property. Specifically, (c)(1) excludes from criminal prosecution the carrying of a gun in a person's "own dwelling, place of business, or on property in which he has a possessory or proprietary interest." The plain meaning of this exception does not include automobiles, nor is there general language which suggests that the list is expandable.

The fundamental rule in considering the meaning of a statute is to construe the meaning of the statute just as it reads, giving the words their ordinary and usually accepted meaning. *Rush v. State*, 324 Ark. 147, 151, 919 S.W.2d 933 (1996). The rule of construction applicable in this case is *nonscitur a sociis*. This doctrine means "it is known from its associates." The practical application means that a word can be defined by accompanying words. *See, McKinney v. Robbins,* 319 Ark. 596, 892 S.W.2d 502, *citing Weldon v. Southwestern Bell Telephone Co.*, 271 Ark. 145, 607 S.W.2d 395 (1980).

The exemption for a "business" is contained in a subsection of the statute which pertains to real property; therefore, we conclude that the legislature did not intend for this exception to include automobiles. In three of the other exemption sections, the legislature created exceptions in instances where a person was in an automobile. In §5-73-120 (c)(8), a person is free to carry a weapon in an automobile if he or she has a license to carry a concealed weapon. In §5-73-120 (c)(4) persons may carry weapons when on a journey and in §5-73-120 (c)(6) while traveling to and from hunting. It is clear that the legislature considered vehicles when it crafted the exemptions. If the legislature had intended for a vehicular business to be included, it would have specified. This is particularly clear given the fact that the legislature has utilized such a definition before, in the commercial burglary section.

We apply the principle of construction *nonscitur a sociis*, and we hold that the word "business" does not include vehicular

businesses. Therefore, the statute does not provide a defense to Boston, and the trial court is affirmed.

Affirmed.

EQUITY FIRE & CASUALTY COMPANY *v.*
Laurence TRAVER

96-1220 953 S.W.2d 565

Supreme Court of Arkansas
Opinion delivered October 9, 1997

Horne, Hollingsworth & Parker, by: *Cyril Hollingsworth*, for appellant.

Hobbs, Garnett, Naramore & Strause, P.A., by: *Ronald G. Naramore*, for appellee.

W.H. "DUB" ARNOLD, Chief Justice. This case was certified to this Court from the court of appeals pursuant to Ark. Sup. Ct. R. 1-2(17)(d)(2) as a case of significant public interest involving a legal issue of major importance. This case involves the renewal of an insurance contract; specifically, we must address the issue of what constitutes an acceptance of a renewal notice for an insurance contract. Appellee, Traver, urges this court to adopt the postal-acceptance rule by holding that an insured accepts a renewal offer by placing a renewal premium payment in the mail. Appellant, Equity, contends that the plain language of the policy requires actual receipt of the payment, so the mailbox rule is not applicable.

Traver was involved in an automobile accident on March 19, 1994. The other party involved in the accident filed a claim with his insurance carrier; after payment of that claim, the insurance carrier filed a subrogation action against Traver. Traver then filed a third-party action against his insurance carrier Equity pursuant to a non-standard automobile policy contract.

Equity denied coverage of the accident claiming that Traver's policy was not in effect on the date of the accident. Specifically, Equity contended that the original policy had lapsed on March 14, 1994.

Traver received a renewal notice from Equity giving the due date of the renewal as March 9, 1994. The expiration date of the policy was March 14, 1994. Traver included a check and a handwritten note stating he had lost the renewal form in an envelope addressed to his local Hot Springs insurance agent, Roberson and Associates. He gave the envelope to his mother who mailed it from a mail drop-off in the Hot Springs mall to the Hot Springs

agent on March 11, 1994. The envelope was postmarked March 12, 1994; it was postmarked a second time with March 21, 1994.

The local agent did not receive the envelope until March 22, 1994; the agent forwarded the payment to Equity which received it on March 25, 1994. Equity accepted the check and reinstated the policy effective March 22, 1994. This gave a seven day period between March 14, the expiration date of the policy, and March 22, the new policy effective date, when Traver was not insured.

The Equity document entitled "YOUR PLAIN LANGUAGE CAR POLICY" was entered into evidence. Its "Renewal Provisions" section is as follows:

> We won't refuse to renew this policy solely because of your age, sex, marital status, residence, race, color, creed, national origin, ancestry or occupation. Subject to our consent you may renew this policy. When we consent to renew this policy, you must pay the renewal premium in advance. We will mail you a notice telling you when your premium must be paid. Your policy will expire if we don't receive the required payment by the renewal date.

The original policy listed the term from September 14, 1993, until March 14, 1994. An Equity employee, Tammy Warrier, testified that it was Equity's policy to extend renewal offers every six months. The renewal offer issued to Traver listed a due date of March 9, 1994. According to Ms. Warrier, the March 9, 1994, due date was an arbitrary date selected by the company to give the customer enough time to mail the payment before the expiration date. She indicated that company policy provides that "to renew a policy, the proper down payment must be postmarked by the U.S. Postal Service on or before the due date." Ms. Warrier explained that company policy was such that if the payment was postmarked before the arbitrary March 9, 1994, due date, but received late, even later than the March 14, 1994, expiration date, the company would have used the postmarked date and renewed the policy effective March 14, 1994. Conversely, if the postmark was before the expiration date, but after the due date, no such leniency would be given to a customer.

The trial court ruled that Traver's timely deposit in the United States mail of his renewal premium before the due date March 14, 1994, was an effective renewal and that the policy was in effect continuously, with no lapse. The trial court noted that there was no legal authority for this ruling, yet determined that the public policy of the State of Arkansas weighs heavily against forfeiture, so a timely deposit of a renewal premium in the U.S. mail, in the absence of fraud or deceit, constitutes an effective acceptance of the policy.

There is no Arkansas case directly addressing this issue. In *Kempner v. Cohn*, 47 Ark. 519, 1 S.W. 869 (1886), we recognized the mailbox rule for the acceptance of a contract. Once an offer has been made, a contract is completed when the acceptance is mailed if the acceptance is made in a reasonable amount of time. If a letter of withdrawal is mailed, before the mailing of the acceptance, it is effective only if the party to whom the offer was made receives the withdrawal before making the acceptance. *Id.*

Despite the fact that this case was decided in the 1800s, there are few cases following it which expound upon this theory. The *Kempner* decision has been followed as a routine matter of contract theory, with the proviso that parties are free to dictate the terms of offers and acceptances as they deem necessary.

In *Michelsen v. Patterson*, 9 Ark. App. 275 (1983), the court of appeals addressed a situation where a tenant mailed his rent on December 31, 1981, and it was received by the owner on January 2, 1982. The rent was due on January 1, 1982, and this day was a legal holiday. The owner refused the payment, and the tenant sought a court order deeming the payment timely under the mailbox acceptance rule. The court of appeals determined that the express language of a contract making time of the essence can eliminate the application of the mailbox acceptance rule. While there was no express language in the contract between the two parties, the tenant had received two letters during the year in which the owner indicated that no late payments for rent would be accepted and notified the tenant that strict adherence to all terms of the agreement was expected. The court of appeals found that these two correspondences were enough to put the tenant on

notice that time was of the essence and a delay in receiving the payment was a breach of the contract. The court of appeals affirmed the finding that the payment was not timely; however, this decision was limited to the particular facts of the case.

In the case before us, the policy language requires actual receipt of a premium payment prior to the expiration date of the policy to constitute acceptance of a renewal offer. The actual renewal notice gave the due date as a date five days before the expiration date. It does not contain the language requiring actual receipt of the premium payment; it instructs the insured to pay the amount listed as due in order to renew the policy.

In *Farmers Insurance Company of Arkansas v. J. W. Hall*, 263 Ark. 734, 567 S.W.2d 296 (1978), a dispute arose when an insured mailed his premium payment approximately seven days after the expiration date. The insured was involved in an accident several hours after mailing his insurance premium payment. Upon attempting to collect from the insurance carrier, the insurer refused coverage claiming that the policy had lapsed and was not in effect. The trial court ruled that Arkansas statutes that required notice before cancellation of an insurance policy precluded the policy from lapsing. We reversed holding that notice is not required when an insurance contract is for a specified term.

The outcome of *Hall, supra*, is not particularly helpful to the case at bar; however, the decision does provide insight into the manner in which these term policies have been interpreted in the past. In *Hall,* we classified the renewal notice as an offer to renew the policy which the insured could either accept or reject. The expiration date was the date that the offer expired by the terms on the face of the offer. Failure by the insured to accept the offer before the expiration of the term it was held open caused the policy to expire by its own terms; thus, the offer expires, and there is technically no cancellation. *Id.* at 737.

In *Hall,* we classified a renewal notice as an offer and the payment of the renewal premium as acceptance; however, the issue of what constitutes acceptance was not addressed. By utilizing the *Hall* analysis, Equity made an offer of renewal when it sent the notice of renewal. The offer, by its terms was open until the

underlying policy expired on March 14, 1994. Traver was free to accept or reject the offer up until that date by paying the premium. As evidenced by the language of the policy, Equity does not intend to be bound by acceptance of the contract until actual receipt of the premium; however, the language of the renewal notice does not require such receipt.

Equity relies upon 43 AM. JUR. 2d *Insurance* §447 as controlling the situation at bar. Specifically, this section states: "Where a policy makes the advance payment of the premium a condition for renewal, such payment must be made in advance to effect a renewal of the policy." This particular passage quotes the Arkansas case, *Hall*, discussed *supra*. However, it does little to render a solution to the actual issue here. There is no dispute that the payment of the premium was a condition precedent for acceptance; the question is at what point was the acceptance made, upon placing payment it in the mail or upon its receipt by the insurer?

Traver relies on a passage from AM. JUR. 2d which states:

> Under insurance policies providing that payment of premiums shall be made at a certain place by a certain time under penalty of forfeiture, where the insurer requests, authorizes, or acquiesces in the sending of the premiums by mail, a deposit thereof in the mail, properly addressed, and in time, according to the usual course of the mail, to reach the prescribed place by the time it is due, will prevent a forfeiture, even though it does not in fact reach its destination at all, or until after the date when due, and this notwithstanding that time is regarded as the essence in the contract.

43 AM. JUR. 2d *Insurance* §909 (emphasis supplied). This section then cites cases from various jurisdictions that follow this theory. However, this section is not particularly helpful because we are not dealing with an instance of mere payment on an existing insurance contract. Absent an existing insurance contract, there is no contractual right to be forfeited; therefore, the equitable rule weighing against forfeitures is not controlling.

In *Mississippi Insurance Underwriting Association v. Maenza*, 413 So.2d 1384 (Miss. 1982), the Mississippi Supreme Court examined a situation closely analogous to the case at bar. A prop-

erty and casualty policy renewal notice/offer was sent to the insured with an expiration date of September 10, 1979. The insured mailed payment on September 8, 1979, but it was not received by the insurer until September 11, 1979. A hurricane destroyed the insured's property on September 11, 1979. The insurer accepted the payment, but claimed the policy had lapsed because payment was not received on or before the due date. The insurer then treated the payment as an application for new coverage and issued a policy with the effective date of September 14, 1979.

The insured brought a claim before the Mississippi Insurance Commission, and it rendered a ruling that the renewal was effective when the premium payment was deposited in the United States mail, as long as it was deposited in time to reach the insurer on or before the expiration date. The insurance commission determined that neither party was to blame for a delay within the postal service; however, the insurer was the party that should bear the imputed burden because it adopted the postal service as its agent when allowing premiums to be transported via mail. 413 So.2d at 1386.

The Mississippi Supreme Court affirmed the findings of the insurance commission. Specifically, that court held that the insurer's renewal notice is an offer that is accepted by the offeree/insured sending premium payments. The insurer in this instance required that payment be *received* before acceptance became effective; the Mississippi court rejected this notion because there was no clear language to suggest that acceptance was not effective until receipt. However, the court went on to conclude that in circumstances where an insurer invites premiums to be forwarded through the mail, it adopts the postal service as its agent and deposit of a payment with that agent constitutes acceptance of coverage. According to the Mississippi court, adopting the postal service as an agent imputed any negligence on their behalf to the insurer despite any contract language to the contrary; therefore contract language requiring receipt before acceptance was valid does not render the mailbox acceptance rule inapplicable. *Id.* at 1388.

In *Maenza*, the Mississippi court based the finding that the insurer invited the use of the postal service on several factors. First of all, the renewal notice itself indicated that payment could be made via mail, and the insurer utilized the mail to send the renewal notice. The insurer's office was over 100 miles from most of its insureds, so personal delivery would have been impractical. There are two other important factors to note in the *Maenza* decision. First, the payment was deposited with the postal service *prior* to the expiration date, in apt time to reach the insurer in a timely manner. Second, upon receipt of the payment it deemed late, the insurer made no attempt to refund the money, but caused a new policy to become into effect with a gap in the coverage.

In the case before us, Equity did have written language requiring receipt of the payment in order for acceptance to be effective; however, that language was in the policy and not on the actual renewal notice. Equity utilized the postal service as a carrier for its offer and expected to receive the acceptance via the mail. Traver mailed the premium payment in a timely manner where, absent negligence or mistake by the postal service, it had ample time to reach Equity prior to the termination date. Upon receipt of Traver's check, Equity did not refuse the payment, yet accepted it as an application for a new policy.

■ Based upon the facts of this case, it is our determination that Traver's placing the renewal premium in the mail in a timely manner constituted acceptance of Equity's renewal offer. Due to the peculiar factual scenario provided here, this holding is limited to the particular facts and circumstances of this case. We do not institute an absolute rule of applying the "mailbox rule" to all renewal premium payments, nor do we hold that parties are not free to dictate the terms of acceptance of offers. The facts before us present a unique situation where Traver was not afforded notice through the actual offer that receipt of payment was required before acceptance was effective. Given the fact that there was no fraud or negligence on behalf of Traver and the fact that Traver placed the payment in the mail with ample time for it to reach Equity prior to the expiration of the offer, we hold that in this instance there was a manifest acceptance of the renewal offer.

Therefore, Traver's policy did not lapse, and it was effective beginning on March 14, 1984.

Affirmed.

BROWN and IMBER, JJ., concur.

NEWBERN, J., dissents.

ROBERT L. BROWN, Justice, concurring. I concur in the result but do so for different reasons than those expressed in the majority opinion.

The instant case involves a renewal of insurance which is effected by an initial payment. There is no disagreement between the parties that the payment was made. There is also no disagreement that the premium was mailed by Traver to Equity Fire two days before the renewal date of March 14, 1994. Finally, it is clear that once the premium was received by the insurance agent on March 22, 1994, the policy was renewed, effective as of that date.

Equity Fire relies on this language in its policy to deny coverage between March 14 and March 22, 1994:

> "RENEWAL PROVISIONS"
> We won't refuse to renew this policy solely because of your age, sex, marital status, residence, race, color, creed, national origin, ancestry or occupation. Subject to our consent, you may renew this policy. When we consent to renew this policy, you must pay the renewal premium in advance. We will mail you a notice telling you when your premium must be paid. Your policy will expire if we don't receive the required payment by the renewal date.

This language is buried on page 19 of a 21-page insurance contract. In addition, Equity Fire sent out a "Renewal Offer" specifying a Due Date of March 9, 1994, which differed from the Renewal Date of March 14, 1994. The Renewal Offer did not state that the policy would expire if payment was not received by March 9 or March 14.[1]

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[1] The terms of the actual Renewal Offer sent to Traver are unknown because that specific Renewal Offer was either not received by Traver or was misplaced.

Equity Fire, by practice, amended its insurance contract by adopting its own version of the mailbox rule. According to Ms. Tammy Warrier, who held the title of Supervisor for the carrier, the practice of her employer was to permit renewals when the premium was mailed before the due date (here, March 9, 1994) even though the premium was received long after the renewal date of March 14, 1994. Equity Fire's own mailbox rule regarding the due date clearly modified the insurance contract. The practice may have benefitted the insured to some extent, but it primarily benefitted Equity Fire by encouraging payment of premiums five days before the renewal date.

In short, Equity Fire's practice modified the insurance contract and resulted in an earlier payment of premiums than required by the insurance contract. Yet, Equity Fire refuses to acknowledge Traver's payment of his premium made two days before the renewal date and couches its refusal on contract language which the carrier itself did not follow in all instances.

Equity Fire's inconsistent treatment of the mailbox rule, depending on which party is benefitted, runs counter to sound public policy. Moreover, the fact that the insurance coverage would lapse absent receipt of the first payment by the renewal date was not made as clear as it could have been to Traver. That fact should have been highlighted on renewal notices and boldly printed in the insurance contract itself. It was not.

Like the majority, I am reluctant to adopt a mailbox rule across the board in all insurance cases. However, under the facts of this case, public policy dictates a decision in favor of the insured.

IMBER, J., joins.

DAVID NEWBERN, Justice, dissenting. The majority holds that Laurence Traver was covered on March 19, 1994, the date of his automobile accident, by a renewed policy of insurance issued by Equity Fire & Casualty Company ("Equity"). That holding is based upon the majority's conclusion that the "actual renewal notice" sent to Mr. Traver by Equity did not inform Mr. Traver of a requirement that the premium for renewal be received prior to expiration of the original policy.

The "actual renewal notice" was not in evidence. Mr. Traver introduced in evidence a letter he sent to Equity with his renewal premium explaining that he had lost his "renewal slip." Lea Fain, an employee of the insurance agent with whom Mr. Traver dealt, testified with respect to a "copy" of the notice received by the agent but stated it was not the same as the notice sent to Mr. Traver. While it is not clear from Ms. Fain's testimony, it may be that the only difference between the "copy" and the "actual" notice is some writing at the bottom of the "copy" concerning the "agent's binding date" about which she testified. At any rate, we cannot say what the "actual renewal notice" received by Mr. Traver contained.

The policy required that the renewal premium be "received" prior to the renewal date. According to the contract evidenced by the policy, there could have been no renewal prior to March 22, 1994, the date the premium was received by the company's agent. That is so unless we adopt a full-blown version of the mailbox rule and the fiction that the postal service is the agent of Equity. The majority is unwilling to go that far; thus it is relegated to consideration of the contract between the parties.

It is basic contract law that an offer which specifies a period of time for its duration terminates upon the lapse of the time specified. *Burnett v. Holiday Inns of America,* 239 Ark. 642, 391 S.W.2d 27 (1965). When the terms of an insurance-policy renewal offer are not met, there is no renewal. *Farmers Ins. Co. v. Hall,* 263 Ark. 734, 567 S.W.2d 296 (1978). Even if we rely upon the "copy" of the renewal offer and assume it is the same as that received by Mr. Traver, despite the testimony of the insurance agent's employee, we should reverse. The "copy" provided a "due date" of March 9, 1994. Whether acceptance was thus "due" at a mailbox or at the office of the insurer, it did not occur until March 12, 1994, at the earliest. Mr. Traver's deposit of the renewal acceptance in the mailbox on March 12, 1994, did not meet the contract terms of the policy or the terms, as best we can determine, of the renewal offer.

I respectfully dissent.

David Ray MULKEY *v.* STATE of Arkansas

CR 97-509 952 S.W.2d 149

Supreme Court of Arkansas
Opinion delivered October 9, 1997

Turbeville & Fowler, by: *Lea Ellen Fowler*, for appellant.

Winston Bryant, Att'y Gen., by: *Kent G. Holt*, Asst. Att'y Gen., for appellee.

W.H. "DUB" ARNOLD, Chief Justice. The appellant, David Ray Mulkey, was charged with capital murder for killing his former stepmother, Martha "June" Barnes. Following a jury trial, he was found guilty of first-degree murder and sentenced to life imprisonment. On appeal, appellant's two points for reversal are a challenge to the sufficiency of the evidence and a challenge to the use of a prior conviction to enhance his sentence. We find that neither point has merit and affirm appellant's conviction and sentence.

On New Year's Day 1996, the burned body of June Barnes was found at a dump site on 36th Street near Interstate 430 in Little Rock. A lamp shade, some bed linens, and various blood-stained personal items were found near the body. Autopsy results indicated that the victim had died earlier from blunt-force injuries and strangulation. The pattern of injuries on her skull indicated that she had been beaten with a lamp, and a laceration over her left eye appeared to have resulted from having been struck by a telephone. The victim's former stepson, appellant David Ray Mulkey, was eventually arrested and charged with Barne's murder.

At trial, appellant admitted that he killed the victim. However, he maintained in his motion for directed verdict at the close of the State's case that the state failed to prove that he purposely caused the victim's death. After the trial court denied his motion, appellant testified during his case in chief that, on New Year's Eve, he went to a party where he became drunk and high on marijuana. After leaving the party, he telephoned the victim and received permission to stay the night at her residence. According to appellant, when he arrived at the victim's home, she began to verbally abuse him and call him names. After the victim hit him

in the head twice with a telephone and began kicking him, he became enraged and hit her "at least five or six times" with a lamp. Appellant then "freaked out" when he saw that the victim was covered with blood and heard her make a "gurgling sound." When the sound stopped, appellant knew that she was dead. Panicked, appellant washed his hands, then gathered various blood-stained items and carried them along with the victim's body to her car. He drove to Boyle Park, parked the car, and dumped the body and evidence nearby. He left the body and drove to a store to purchase a jug of gasoline. The appellant returned to the body, poured the gasoline on it, lit it on fire, and left. According to appellant, he located one of his "running buddies" and "stayed drunk and high" until he was eventually questioned by police.

After a jury found appellant guilty of the lesser-included offense of first-degree murder, the State submitted proof to the trial judge that appellant had been previously convicted of two prior felony offenses. Appellant objected to the submission of one of the priors to the jury. After the trial court instructed the jury that appellant had two prior felony convictions, they recommended that appellant serve a life sentence for the murder. The trial court entered judgment accordingly, and appellant appeals.

Sufficiency of the Evidence

■ We explained our standard of review for directed-verdict motions in *Williams v. State*, 325 Ark. 432, 436, 930 S.W.2nd 297 (1996):

> This court treats the denial of a motion for directed verdict as a challenge to the sufficiency of the evidence. The test for determining the sufficiency of the evidence is whether there is substantial evidence to support the verdict; substantial evidence must be forceful enough to compel a conclusion one way or the other beyond suspicion and conjecture. On appellate review, it is only necessary for this court to ascertain that evidence which is most favorable to appellee, and it is permissible to consider only that evidence which supports the guilty verdict
>
> See also *Choate v. State*, 325 Ark. 251, 254-55, 925 S.W.2d 409, 411 (1996) *(quoting King v. State*, 323 Ark. 671, 916 S.W.2d 732 (1996) (other citations omitted).

To sustain a conviction for first-degree murder, the State was required to prove that the appellant purposely caused the death of June Barnes. See Ark. Code § 5-10-102(a)(2). "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. 1993).

A criminal defendant's intent or state of mind is seldom capable of proof by direct evidence and must usually be inferred from the circumstances of the crime. *Williams*, 325 Ark. At 437. "The intent necessary to sustain a conviction for first-degree murder may be inferred from the type of weapon used, from the manner of its use, and the nature, extent, and location of the wounds." *Id.; citing Walker v. State,* 324 Ark. 106, 918 S.W.2d 172 (1996). Circumstantial evidence of a culpable mental state may constitute substantial evidence to sustain a guilty verdict. *Williams*, 325 Ark. at 437; *Crawford v. State*, 309 Ark. 54, 827 S.W.2d 134 (1992). In order for circumstantial evidence alone to constitute substantial evidence, however, it must exclude every other reasonable hypothesis consistent with innocence. *Williams,* 325 Ark. at 437; *Key v. State*, 325 Ark. 73, 923 S.W.2d 865 (1996). Once the evidence is determined to be sufficient to go to the jury, the question of whether the circumstantial evidence excludes any other hypothesis consistent with innocence is for the jury to decide. *Id.*

In the present case, the jury could have easily inferred from the numerous blunt-force injuries to the victim's skull, as well as from the autopsy evidence that she was strangled, that appellant acted with the purpose to cause the victim's death. The jury also heard evidence that appellant took the victim's body to a dump site, set it on fire, and then left. As attempts to cover up a crime are properly admissible, see *Brenk v. State*, 311 Ark. 579, 847 S.W.2d 1 (1993), the jury could have properly considered this evidence as proof of a purposeful mental state. Moreover, it was within the jury's province to believe or disbelieve appellant's testimony. When considering these circumstances, the jury could have reasonably inferred that appellant acted with the purpose of causing the victim's death. See *Williams, supra.* Thus, we cannot

say that the trial court erred in denying appellant's motion for directed verdict.

Prior Conviction — CR 87-1985

For his second assignment of error, the appellant asserts that the trial court erred in using a 1987 burglary and theft of property conviction in the Pulaski County Circuit Court, Docket No. CR-87-1985, in determining his sentence as an habitual offender under Ark. Code Ann. § 5-4-501 (Repl. 1993).

The State has the burden of proving a defendant's prior conviction for purposes of sentence enhancement. *Byrum v. State*, 318 Ark. 87, 884 S.W.2d 248 (1994). On appeal, the test is whether there is substantial evidence that the defendant was previously convicted of the felony in question. *Id.*

In *Heard v. State*, 316 Ark. 731, 876 S.W.2d 231 (1994), we reviewed the statutory method of proof of previous convictions as follows:

> (a) A previous conviction or finding of guilt of a felony may be proved by any evidence that satisfies the trial court beyond a reasonable doubt that the defendant was convicted or found guilty.
> (b) The following are sufficient to support a finding of a prior conviction or finding of guilt:
> (1) A certified copy of the record of a previous conviction or finding of guilt by a court of record;
> (2) A certificate of the warden or other chief officer of a penal institution of this state or of another jurisdiction, containing the name and fingerprints of the defendant as they appear in the records of his office; or
> (3) A certificate of the chief custodian of the records of the United States Department of Justice, containing the name and fingerprints of the defendant as they appear in the records of his office.

Ark. Code Ann. § 5-4-504 (Repl. 1993).

In the present case, the trial court conducted a hearing outside the presence of the jury, during which the State introduced a certified copy of the trial court's docket sheet in Pulaski County Circuit Court, which indicated that appellant had pleaded

guilty to burglary and theft of property in CR87-1985. While the docket sheet did not reflect an entry of judgment, it indicated that appellant had received a suspended sentence in the case and had been represented by attorney James Phillips. The State offered the testimony of attorney Phillips, who testified during the in-camera hearing that he had appeared in court and had represented appellant on the charges in question. Mr. Phillips recalled that the disposition of the case had taken place in Judge Floyd Lofton's chambers, where appellant pleaded guilty "to something involving bicycles." According to Mr. Phillips, Judge Lofton was going to put appellant in the penitentiary, but appellant convinced him otherwise. After hearing this evidence, the trial court announced that it was convinced that appellant had been convicted of the prior offense in question, and allowed the State to present the evidence to the jury for consideration in the penalty phase.

Appellant first contends that the certified copy of the trial court's docket notation is hearsay. Under A.R.E. 803(8), a record of a public office setting forth its regularly conducted and regularly recorded activities is not hearsay. Thus, appellant's argument is without merit.

Appellant also complains that, because the State's evidence did not reflect that a judgment of conviction was entered in CR87-1985, the conviction for burglary and theft of property could not properly be used to enhance his sentence. We have previously rejected this argument in *Reeves v. State*, 263 Ark. 227, 564 S.W.2d 503, *cert. denied* 439 U.S. 964 (1978). In that case, Reeves questioned the admissibility of the State's proof of previous convictions under the habitual criminal statute. Three of Reeves's four convictions that were proved showed that the sentences had been suspended. On appeal, Reeves argued that the sentences were not "convictions" within the meaning of the habitual criminal law. In rejecting Reeves's argument, we reviewed our previous holdings as follows:

> In *Rogers v. State*, 260 Ark. 232, 538 S.W.2d 300 (1976), we held that under the habitual criminal statute in effect in 1975, a judgment imposing a suspended sentence was admissible as a conviction. Act 228 of 1953, as amended. That statute was superseded by the Criminal Code, which became effective on January

> 1, 1976, under which the case at bar was tried. Act 280 of 1975, 1001 (a section now in turn superseded by Act 474 of 1977, 4; Ark. Stat. Ann. 41-1001 [Repl. 1977]). We do not see, however, any such difference between the language of the statute construed in the Rogers case and that of the 1975 Code as to indicate a change in the legislative intention.

263 Ark. at 230-1. While it is true that a docket notation is not the entry of a final judgment, Ark. Code Ann. § 5-4-404(a) provides that a previous conviction may be proved by *any evidence* that satisfies the trial court beyond a reasonable doubt that the defendant was convicted or found guilty. *Id.* In *Heard, supra,* we noted that the original commentary to the statute provides: "The Commission wished to make clear the fact that the state may prove a previous felony conviction by means other than introduction of the certificates described in the statute." See Original Commentary to Ark. Code Ann. § 5-4-504 (Repl. 1993).

In the present case, appellant makes no suggestion whatsoever that the certified docket sheet offered by the State did not correctly reflect that he had been convicted of burglary and theft of property in CR87-1985. See *Heard, supra.* Appellant's counsel in CR87-1985, Mr. Phillips, did not dispute the conviction; rather, he recalled that appellant had pleaded guilty in the trial judge's chambers and had in fact talked the trial judge out of sentencing him to a term of imprisonment. Under these circumstances, there was substantial evidence to satisfy the trial court beyond a reasonable doubt that appellant had been previously convicted of the felonies in CR87-1985. Thus, we cannot say that the trial court erred in allowing the State to submit evidence of this prior conviction to the jury for consideration in recommending appellant's sentence.

Ark. Sup. Ct. R. 4-3(h)

Reviewing the record in accordance with Ark. Sup. Ct. R. 4-3(h), we find that there are no errors with respect to rulings on objections or motions prejudicial to appellant that would call for reversal.

Affirmed.

Melvin David MURRELL as Successor Administrator of the Estate of Bonnie Marie Murrell, Deceased; Melvin David Murrell, as Special Administrator of the Estate of Melvin Dale Murrell, Deceased, as Surviving Spouse of Bonnie Marie Murrell, Deceased; and Melvin David Murrell, Belinda Gail Burke, and Marie Sue Murrell, Surviving Children of Bonnie Marie Murrell, Deceased, and Melvin Dale Murrell, Deceased *v.* SPRINGDALE MEMORIAL HOSPITAL; John Power, M.D.; and Teryl Ortego, M.D.

97-91 952 S.W.2d 153

Supreme Court of Arkansas
Opinion delivered October 9, 1997

Bob Estes and *Raymond C. Smith*, for appellants.

Bassett Law Firm, by: *Dale Garrett* and *James M. Graves*, for appellee Springdale Memorial Hospital.

Ledbetter, Hornberger, Cogbill, Arnold & Harrison, by: *Charles Ledbetter* and *Virginia C. Trammell*, for appellee John Power, M.D.

Davis, Cox & Wright, by: *Constance G. Clark*, for appellee Teryl Ortego, M.D.

DAVID NEWBERN, Justice. This is an appeal of a dismissal of one wrongful-death action and a summary judgment in a second wrongful-death and survival action. The dismissal and summary judgment favored Springdale Memorial Hospital and Doctors John Power and Teryl Ortego. The claims arose from the death of Bonnie Marie Murrell, who died November 26, 1990, while at Springdale Memorial Hospital for treatment of a bleeding gastro-intestinal tract. We hold that a claim brought by Ms. Murrell's widower, Melvin Dale Murrell, prior to proceedings in probate, did not survive his death and that a subsequent claim brought by Melvin Dale Murrell as Ms. Murrell's personal representative and the claims of her children were barred by the statute of limitations.

On November 23, 1992, Melvin Dale Murrell, as surviving spouse of Ms. Murrell, filed an action pursuant to Ark. Code Ann. § 16-62-102 (Supp. 1995), alleging malpractice on the part of Dr. Power, Dr. Ortego, and the Hospital resulting in Ms. Murrell's death. The lawsuit was styled *Melvin Murrell, as Surviving Spouse of Bonnie Marie Murrell, Deceased v. Springdale Memorial Hospital; John Power, M.D., and Teryl Ortego, M.D.* Mr. Murrell sought damages for medical expenses, funeral expenses, conscious pain and suffering of the decedent prior to her death, loss of services and companionship of the decedent, loss of earnings of the decedent, and mental anguish of the surviving spouse and children of the decedent. Mr. Murrell also sought punitive damages. The complaint listed as statutory beneficiaries Melvin Murrell, Melvin David Murrell, Belinda Gail Burke, and Marie Sue Murrell. When the complaint was filed, there was no estate opened for the decedent; consequently, there was no administrator. On December 28, 1993, the Hospital moved to strike the part of the complaint alleging damages on behalf of the decedent and the children of the decedent who were not named as plaintiffs. On February 17, 1994, Melvin Dale Murrell opened an estate for his deceased wife and was appointed administrator. He moved to be substituted in his new status as administrator in the original suit he had filed personally. Pursuant to Ark. R. Civ. P. 41, Mr. Murrell took a voluntary nonsuit of that claim on March 4, 1994, without any ruling having been entered on the motion to substitute.

On February 28, 1995, a second complaint was filed by Melvin Murrell as administrator of the estate of Bonnie Marie Murrell, deceased, and as surviving spouse of Bonnie Marie Murrell, deceased, and David Murrell, Belinda Gail Burke, and Marie Sue Murrell as the surviving children of Bonnie Marie Murrell, deceased. It repeated the allegations of the earlier complaint.

In September, 1995, the Hospital and the doctors moved for partial summary judgment. They argued that, although the statute of limitations was tolled for Melvin Dale Murrell's claim when he nonsuited, the claims of the estate and the other heirs at law were time barred. The Trial Court denied the motions on the basis that the body of the first complaint sought damages on behalf of the surviving children, the surviving spouse, and the damages that

could be recovered by the estate of the deceased, and thus the defendants were put on notice that these damages were sought and the action was filed by an heir of the deceased.

On August 22, 1996, Melvin Dale Murrell died. His son, Melvin David Murrell, was appointed successor administrator for the estate of Bonnie Marie Murrell. He was also appointed special administrator of the estate of Melvin Dale Murrell to perform all acts as necessary to pursue the claim of Melvin Dale Murrell in the action.

The Hospital and the doctors then moved to dismiss the complaint, arguing that the claim of Melvin Dale Murrell, as the surviving spouse of Bonnie Murrell, did not survive his death. They also moved the Trial Court to reconsider their summary judgment motions. In response, the Trial Court dismissed Melvin Dale Murrell's complaint and granted the summary judgment motions.

Melvin David Murrell and the other surviving children of Bonnie Marie Murrell contend that the Trial Court erred in granting summary judgment and dismissal as to the claims of (1) Melvin Dale Murrell, (2) the children of Bonnie Murrell, and (3) the estate of Bonnie Murrell. They argue that the 1992 complaint alleged two separate causes of action: (1) an action on behalf of the heirs, including the surviving spouse of Bonnie Murrell and the children of Bonnie Murrell, pursuant to the Wrongful Death Act, Ark. Code Ann. § 16-62-102 (1987 and Supp. 1995), and (2) an action on behalf of the estate pursuant to Ark. Code Ann. § 16-62-101 (1987).

1. Melvin Dale Murrell's claim

Melvin Dale Murrell's initial complaint, filed prior to the opening of Bonnie Marie Murrell's estate, was appropriately brought according to § 16-62-102(b), and it was within the applicable two-year statute of limitations. *See* Ark. Code Ann. § 16-114-203(a) (Supp. 1995); *Pastchol v. St. Paul Fire & Marine Ins.*, 326 Ark. 140, 929 S.W.2d 713 (1996); *Hertlein v. St. Paul Fire & Marine Ins. Co.*, 323 Ark. 283, 914 S.W.2d 303 (1996). When he took a voluntary nonsuit on March 4, 1994, pursuant to Ark. R.

Civ. Pro. 41, he had one year from that date to refile. Ark. Code Ann. § 16-56-126 (1987). Melvin Dale Murrell filed the second action on February 28, 1995, which was within the one-year period. When Melvin Dale Murrell died on August 22, 1996, the issue arose as to whether his wrongful-death claim survived his death.

The statutory provision for the survival of actions beyond the death of a claimant is § 16-62-101, which provides:

> For wrongs done to the person or property of another, an action may be maintained against the wrongdoers, and the action may be brought by the person injured or, after his death, by his executor or administrator against the wrongdoer or, after his death, against his executor or administrator, in the same manner and with like effect in all respects as actions founded on contracts.

Melvin Dale Murrell's action for the wrongful death of his wife did not survive his death. We have consistently held that a wrongful-death claimant does not suffer an "injury to his person or property" as those terms are used in the survival statute. *White v. Maddux, Special Admr.*, 227 Ark. 163, 296 S.W.2d 679 (1956); *Jenkins, Admr. v. Midland Valley Rd. Co.*, 134 Ark. 1, 203 S.W. 1 (1918).

2. *The children and estate of Bonnie Marie Murrell*

The wrongful-death claims of the children of Bonnie Murrell and the survival claim of the estate of Bonnie Murrell are barred because the parties did not file suit prior to 1995. The savings statute, § 16-56-126, cannot save their claims because the children were not parties to the first action. It provides that if "*the plaintiff therein* suffers a nonsuit" then "*the plaintiff* may commence a new action within one (1) year . . . ." (Emphasis supplied.) *See Rogers v. Williams, Larson, Voss, et al.*, 777 P.2d 836, 839 (Kan. 1989).

The second action brought by Melvin Dale Murrell as administrator of the estate of Bonnie Marie Murrell was simply filed too late. The fact that Mr. Murrell's first claim might have been the beneficiary of the savings statute, at least until his death, is not relevant to the timeliness or untimeliness of the second

action. A wrongful-death action brought by a plaintiff in his individual capacity pursuant to § 16-62-102 involves neither the same action nor the same plaintiff as a survival action brought by the plaintiff in his representative capacity on behalf of the decedent's estate pursuant to § 16-62-101. *See Smith v. Tang,* 926 S.W.2d 716, 719 (Mo. App. E.D. 1996).

It is argued that, because a personal representative bringing a wrongful-death action is no more than a trustee for the beneficiaries, *Reed v. Blevins,* 222 Ark. 202, 258 S.W.2d 564 (1953) (George Rose Smith, J., dissenting), the beneficiaries of Bonnie Marie Murrell were the "real parties in interest" in the first action in accordance with Ark. R. Civ. P. 17(a). While that rule requires that actions be brought in the name or names of the real parties in interest, we have been cited to no authority in which it has been held that a complaint brought in the name of one party is automatically converted into a complaint on behalf of others as a result of the rule.

Affirmed.

Alvin B. JACKSON *v.* STATE of Arkansas

CR 96-836 954 S.W.2d 894

Supreme Court of Arkansas
Opinion delivered October 9, 1997
[Petition for rehearing denied November 6, 1997.]

Bynum & Kizer, by: *Maxie G. Kizer*, for appellant.

Winston Bryant, Att'y Gen., by: *C. Joseph Cordi, Jr.*, Asst. Att'y Gen., for appellee.

TOM GLAZE, Justice. Appellant Alvin Jackson was serving a life sentence without parole in prison for one count of capital murder and two counts of attempted murder when he stabbed a prison guard to death. In this appeal, Jackson does not challenge the sufficiency of the State's evidence leading to his capital murder conviction for killing the guard, but he raises five other points for reversal. We consider each point in the order presented in his brief.

Jackson first contends that the State unconstitutionally exercised two of its challenges when striking two black persons, Arlene Camp and Carl McCraney. He relies on *Batson v. Kentucky*, 476 U.S. 79 (1986), where the Court held that the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on the basis of race. In determining whether such a violation has occurred, we apply a three-step analysis. First, the defendant must make a prima facie case that racial discrimination is the basis for excluding the juror. Second, if the court concludes that the defendant has made this showing, the State must provide a racially-neutral explanation for striking the juror. The trial court must then determine from all the relevant circumstances the sufficiency of the offered explanation. Third, if the court is not satisfied with the State's explanation, it must conduct a sensitivity inquiry, and the defendant must explain how the State's racially-neutral explanation is merely a pretext. *Roseby v. State*, 329 Ark. 554, ___ S.W.2d ___ (1997).

The first of the three-step analysis above requires us to determine whether Jackson proved a prima facie case of discrimination which may be established by (1) showing that the totality of the relevant facts give rise to an inference of discriminatory purpose, (2) demonstrating total or seriously disproportional exclusion of blacks from the jury, or (3) showing a pattern of strikes, questions or statements by a prosecuting attorney during voir dire. *Mitchell v. State*, 323 Ark. 116, 913 S.W.2d 264 (1996).

In the present case, Jackson made no effort to show a disproportionate exclusion of blacks from the jury, nor did he show a pattern of strikes evidencing a discriminatory purpose. In fact, two black males were seated on the jury, and as this court has

previously stated, the best answer the State can have to a charge of discrimination is to point to a jury which has black members. *Id.*; *see also Roseby*, 329 Ark. at 562. In this respect, we also note that, while the State was entitled to ten peremptory challenges, it used only six. Additionally, Jackson presented no evidence that the prosecutor made any racial statements or asked any racial questions. In sum, Jackson failed to show a prima facie case.

Even if Jackson had shown a prima facie case, the State's explanations for challenging Camp and McCraney were racially neutral, and the circuit court was well within its discretion to deny the *Batson* challenge. Ms. Camp, for example, had an ex-husband who had been charged with past crimes by the same prosecutor who was prosecuting this case. More pertinent, Ms. Camp, too, had been in the prosecutor's office in connection with past serious crimes. While Jackson complains that the prosecutor's "information was not gathered from questioning Ms. Camp," he cites no authority such information must be furnished by the challenged juror. To the contrary, it is accepted practice for the prosecution as well as the defense to undertake a pretrial investigation of prospective jurors. *See* WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 21.3, at 724 (1984).

Jackson's argument concerning the State's peremptory challenge of Mr. McCraney also must fail. When defense counsel raised a *Batson* objection to the State's use of a peremptory challenge to venireman McCraney, the prosecutor explained that he had previously prosecuted McCraney's nephew and the prosecutor's information was that the nephew lived with McCraney. The State added that McCraney was also evasive when asked his opinion about the death penalty. Defense counsel's only rejoinder questioned whether the prosecutor gathered information concerning Mr. McCraney "outside the courtroom" and argued venireman McCraney was no different than white venireperson Ms. Krank who had a nephew who had been previously prosecuted. Again, it is difficult to understand the relevance of Jackson's argument regarding where the State "gathered its information," but the trial judge very clearly pointed out the difference in Ms. Krank's situation from that of McCraney's, stating Krank's nephew had been prosecuted by another prosecutor in a

different circuit. In sum, Jackson failed in showing a prima facie case, but even if he had, the State gave racially neutral explanations for its striking both Camp and McCraney. Once again, we point out that the record reflects the jury contained two black members and the State had exhausted only six of its ten peremptory challenges. Given the proof and record before us, the trial court's ruling on the *Batson* issue was unquestionably correct. *See Cleveland v. State*, 326 Ark. 46, 930 S.W.2d 316 (1996).

Jackson next asks the court to reconsider its decision in *Kemp v. State*, 324 Ark. 17, 919 S.W.2d 943 (1996), cert. denied, 117 S.Ct. 436 (1996), where this court held the introduction of victim impact evidence is not a deprivation of a defendant's right of due process. Specifically, he argues on appeal that Ark. Code Ann. § 5-4-602(4) (Repl. 1994), a procedural statute, created a new aggravating circumstance, which he contends violates the Due Process Clause. Also, he claims it denies his due process rights because the statute represents a wholesale departure without guidelines from the normal sentencing scheme which permits aggravating factors to be weighed against mitigating factors. For whatever reason, the trial court was never asked to rule on these arguments. Thus, because these arguments are not preserved on appeal, we do not consider or discuss them. *Nichols v. State*, 328 Ark. 339, 994 S.W.2d 83 (1997).

In his third point, Jackson argues that the sentencing provisions in Ark. Code Ann. § 5-4-603 (Repl. 1994) are unconstitutional because they prohibit the jury from exercising mercy, and therefore amount to a mandatory death penalty. This identical argument was made in *Nooner v. State*, 322 Ark. 87, 907 S.W.2d 677 (1995), cert. denied, 116 S.Ct. 1436 (1996), and the court rejected it. We need not address it again.

Jackson's fourth point asserts the trial court erred when it refused to prohibit the State from seeking the death penalty. Jackson claims that the State has historically imposed the death penalty in a racially discriminatory manner against blacks who kill whites. While he refers to a Stanford law review article when arguing this point, Jackson presented *no* evidence showing racial

considerations had played a part in his sentence.[1] The Supreme Court and this court have held that for such an argument to prevail under the Equal Protection Clause, the defendant must prove that the decisionmakers in his case acted with discriminatory purpose. *See McCleskey v. Kemp*, 481 U.S. 279 (1987); *Nooner*, 322 Ark. 87, 907 S.W.2d 677.

Finally, Jackson contends the trial court erred by allowing the State to utilize two aggravating circumstances during sentencing. He claims these aggravating factors, Ark. Code Ann. § 5-4-604(1) and (3) (Repl. 1993), were duplications and were unconstitutional "double counting" awry of the eighth amendment. In brief, Jackson's objection was the State should not be permitted to prove two aggravating circumstances with the same evidence. The two provisions and aggravating factors at issue read as follows:

> (1) The capital murder was committed by a person imprisoned as a result of a felony conviction.
>
> * * *
>
> (3) The person previously committed another felony, an element of which was the use or threat of violence to another person or the creation of a substantial risk of death or serious physical injury to another person.

The trial court denied Jackson's argument, reasoning that the legislature intended to cover two separate aggravating factors by the above provisions, one, the evidence showed Jackson had a prior violent criminal history, and two, the proof also showed he was a prison inmate. The trial court was correct.

Terry Campbell, warden at the maximum security unit, testified that Jackson was incarcerated there on November 29, 1995, the day that he murdered the guard. Mr. Campbell also testified that, at the time of the murder, Jackson was serving sentences for one count of capital murder and two counts of attempted capital murder. The State introduced copies of the judgment and commitment orders showing that Jackson had committed these crimes.

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[1] Gross and Mauro, *Patterns of Death, An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 Stan. L. Rev. 27 (1984).

From this evidence, the jury found that the State proved both aggravating factors showing two separate aspects of Jackson's criminal history beyond a reasonable doubt.

Jackson urges this court to adopt the holding in *Collins v. Lockhart*, 754 F.2d 258 (1985), where the Eighth Circuit found that an aggravating circumstance that duplicates an element of a crime is in violation of the eighth amendment. We fail to see the ruling in *Collins* as applicable here. Nevertheless, *Collins* was overruled in *Perry v. Lockhart*, 871 F.2d 1384 (8th Cir. 1989), based upon the U. S. Supreme Court's decision in *Lowenfield v. Phelps*, 484 U.S. 231 (1988). Therefore, *Collins* is no longer good law.

Our decision appears in line with other states that have dealt with this precise issue. For example, appellate courts in North Carolina, Oklahoma, and Florida have found that the aggravating factors of being under sentence of imprisonment and being previously convicted of another felony involving violence do not cover the same aspect of the defendant's criminal history. *State v. Rich*, 484 S.E.2d 394 (N.C. 1997); *Green v. State*, 713 P.2d 1032 (Okl. Cr. 1985); and *Delap v. State*, 440 So.2d 1242 (Fla. 1983). In *Delap*, the court reasoned that the defendant could be under a sentence of imprisonment without having been convicted of a felony involving violence. *Id.* at 1256. Conversely, a defendant could be convicted of a felony involving violence without being under a sentence of imprisonment. *Id.* In short, those aggravating circumstances are exclusive of each other, and including them both in the weighing process does not constitute a doubling of aggravating circumstances. *Id.* Accordingly, for the reasons above, we reject Jackson's "double-counting" argument.

Pursuant to Ark. Sup. Ct. R. 4-3(h), the record has been examined in its entirety and no other rulings adverse to Mr. Jackson involving prejudicial error were found. We affirm.

Eloise TURNER *v.* Calvin STEWART

97-227 952 S.W.2d 156

Supreme Court of Arkansas
Opinion delivered October 9, 1997

Richard N. Dodson, for appellant.

Dunn, Nutter, Morgan & Shaw, by: *W. David Carter* and *Christie G. Adams*, for appellee.

DONALD L. CORBIN, Justice. Appellant Eloise Turner appeals the judgment of the Miller County Circuit Court in favor of Appellee Calvin Stewart and his wife Denise Stewart. Jurisdiction of this appeal is properly in this court pursuant to Ark. Sup. Ct. R. 1-2(a)(15). Appellant raises three points on appeal: (1) Appellee was improperly allowed to amend his answer without making a showing of sufficient reasons why he should be allowed to amend; (2) the trial court erred in submitting a jury instruction on comparative fault; and (3) there was no substantial evidence to support the jury's finding. We find no merit and affirm.

The record reveals the following relevant facts. On July 29, 1989, Appellant called Appellee to borrow some card tables. Appellee agreed to loan her the tables and Appellant stated she would come by Appellee's house to get them. When Appellant arrived at Appellee's home, Appellee was outside in the side yard

with his dog, a male Rottweiler named Thunder. Appellant went to the front porch and rang the bell several times. While on the porch, Appellant saw the dog looking at her from around the side of the house. When no one came to the door, Appellant decided to go around to this same side of the house where she heard water running. When she reached the side of the house, Appellant saw Appellee and his dog.

Appellant testified at trial that after talking briefly with Appellee, Appellee called Thunder's name and the dog started in her direction. She stated that she turned her back and ran from the dog toward the front of the house. She stated that Thunder jumped on her and bit her left arm and that she fell to the ground. She stated that she received injuries to her right shoulder and a wound to her left arm. Appellee, on the other hand, stated that he did not see the dog jump on Appellant. He testified that he saw Thunder running in Appellant's direction, as she was going around the corner. He stated that he then called Thunder and the dog returned to the side of the house. After putting the dog away, Appellee indicated that he took Appellant inside the house to look at her injuries. Appellee asked Appellant if she had seen the dog and inquired as to why she did not stay inside her car and honk for him to come out of the house. Appellee then took Appellant to the hospital, where Appellant stated to hospital personnel that her injuries were a result of falling while running from a dog.

On August 1, 1989, Appellee brought Thunder to Dr. Cynthia Pfluger, the dog's veterinarian, for shots. At that time, Dr. Pfluger advised that the dog should be castrated or undergo obedience training due to what Dr. Pfluger's observation of the dog's aggressive tendencies. Dr. Pfluger also testified that on July 1, 1989, less than one month before the incident in question, Denise Stewart had called and advised that Thunder had bitten her mother, Verneener Stewart. Dr. Pfluger stated that she then recommended to quarantine the dog. At trial, however, Mrs. Stewart denied that Thunder had bit her mother; instead, she stated that the dog had merely scratched her mother's face while he was chasing a cat. Verneener Stewart testified that she did not remember the incident. At the close of Appellant's case, the trial court

entered a directed verdict in favor of Denise Stewart. After deliberation, the jury returned a verdict in favor of Appellee.

Amended Answer

Appellant asserts that the trial court erred when allowing Appellee to amend his answer to an amended complaint. Appellant relies on ARCP Rules 6(b) and 12(a) in arguing that Appellee failed to set forth sufficient reasons showing the necessity for an extension of time to file his answer. Appellee asserts that ARCP Rule 15 provides that amendment of pleadings should be allowed unless prejudice or undue delay is shown by the party opposing the amendment.

The record reflects that after an amended complaint alleging strict liability was filed by Appellant on January 26, 1990, Appellee did not respond within twenty days as required by Rule 15. Appellant argues that but for the amended answer filed on March 22, 1990, Appellee would have been in default and Appellant would have been entitled to a partial summary judgment. On March 30, 1990, the trial court entered an order granting Appellee's motion to file the amended answer, stating that Appellant would not be prejudiced by the amended answer. The question before us is whether the trial court abused its discretion in allowing the amended answer to be filed.

Although amendment of pleadings is encouraged, the trial court is vested with broad discretion in allowing or denying amendments. *Kay v. Economy Fire & Cas. Co.*, 284 Ark. 11, 678 S.W.2d 365 (1984). Arkansas Rule of Civil Procedure 15(a) provides in part:

> [A] party may amend his pleadings at any time without leave of the court. Where, however, upon motion of an opposing party, the court determines that prejudice would result or the disposition of the cause would be unduly delayed because of the filing of an amendment, the court may strike such amended pleading or grant a continuance of the proceeding. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 20 days after service of the amended pleading, whichever period is longer, unless the court otherwise orders.

Under Rule 15, a party may amend his pleadings at any time without leave of the court. If, however, the opposing party files a motion objecting to the amendment, the trial court must determine whether prejudice would result to that party or if the case would be unduly delayed by the amendment. *Webb v. Workers' Compensation Comm'n*, 286 Ark. 399, 692 S.W.2d 233 (1985). An important consideration in determining prejudice is whether the party opposing the motion will have a fair opportunity to defend after the amendment. *Pineview Farms, Inc. v. Smith Harvestore, Inc.*, 298 Ark. 78, 765 S.W.2d 924 (1989). A party should be allowed to amend his pleading absent proof of prejudice, and the failure of the opposing party to seek a continuance is a factor to be considered in determining whether prejudice was shown. *Webb*, 286 Ark. 399, 692 S.W.2d 233. Where neither a continuance was requested nor a demonstration of any prejudice resulting from an amendment was shown, the amendment should be allowed. *Id.*

In this case, Appellant did not request a continuance or demonstrate that she would be prejudiced or that undue delay would result if the court should allow the amendment. By applying Rule 15, the trial court did not abuse its discretion in finding that the amended answer did not prejudice Appellant. Accordingly, it was not error for the trial court to allow the amendment.

Comparative Fault

Appellant argues that the trial court erred in submitting to the jury an instruction on comparative fault. Appellant argues that the comparative-negligence instruction should not have been given because there was no showing that Appellant proximately caused the dog's attack. Appellee replies that the question to be asked is whether Appellant's actions could have proximately caused her injuries. Comparative fault is an affirmative defense. Arkansas Code Annotated § 16-64-122 (Supp. 1995) provides in pertinent part:

> (a) In all actions for damages for personal injuries . . . in which recovery is predicated upon fault, liability shall be determined by comparing the fault chargeable to a claiming party with the fault chargeable to the party . . . from whom the claiming party seeks to recover damages.

. . . .

> (c) The word "fault" as used in this section includes any act, omission, . . . which is a proximate cause of any damages sustained by any party.

Under the express language of the statute, there must be a determination of "proximate cause" before any "fault" can be assessed against the claiming party. *Skinner v. R.J. Griffin & Co.*, 313 Ark. 430, 855 S.W.2d 913 (1993); *Baker v. Morrison*, 309 Ark. 457, 829 S.W.2d 421 (1992). Proximate cause is a cause which, in a natural and continued sequence, produces damage, and without which the damage would not have occurred. *Id.* While the question of proximate cause is usually a question for the jury, when the evidence is such that reasonable minds cannot differ, the issue becomes a question of law to be determined by the trial court. *Id.* In *Ambort v. Nowlin*, 289 Ark. 124, 709 S.W.2d 407 (1986), the trial court's instruction to the jury that it must determine whether appellant was at fault in the incident wherein appellees' dog bit him, was supported by the evidence. This court held that the judge was correct in submitting the case to the jury on the basis of comparative fault, rather than on the theory of strict liability. There was a fact question as to whether appellant was a trespasser or a licensee when he was bitten by appellees' dog, since he was on private property and had not been expressly invited there. There was also a fact question as to whether appellant was guilty of negligence in approaching the fenced yard on private property with two dogs, which were barking and causing him apprehension. This court concluded that although an owner can be held strictly liable in such instances, if there is an issue of the plaintiff's negligence or other fault, the plaintiff's recovery may be diminished by the doctrine of comparative fault.

Just as in *Ambort*, the jury in this case could have concluded that Appellant did not use good judgment, was negligent, and was partly at fault for her injuries. Appellant entered the yard despite the presence of "Beware of the Dog" signs in the front yard, approached the front door, and walked around to the side of the house where she had seen an unfamiliar dog. There was also evidence that could have supported the jury's finding that Appellant's injuries were proximately caused by her running from the

dog, rather than from the dog's attack. From the evidence presented, the jury could have disbelieved that Appellant was attacked and determined that her injuries were a result of her fall. Accordingly, it was not error for the trial court to instruct the jury on comparative fault.

Substantial Evidence

Appellant argues that the jury's verdict in favor of Appellee was not supported by substantial evidence. When reviewing the sufficiency of the evidence, the appellate court reviews the evidence and all reasonable inferences arising therefrom in the light most favorable to the party on whose behalf judgment was entered. *Balentine v. Sparkman*, 327 Ark. 180, 937 S.W.2d 647 (1997). The verdict will be affirmed if there is substantial evidence to support it. *Id.* Substantial evidence is evidence that passes beyond mere suspicion or conjecture and is of sufficient force and character that it will, with reasonable and material certainty, compel a conclusion one way or the other. *Id.*

Appellant asserts that Appellee knew that the dog was a vicious animal due to its previous history and the circumstances surrounding the incident in question. She asserts that she was a licensee on Appellee's property, and that Appellee thus owed a duty to her to exercise ordinary care to avoid injury to her. Appellant additionally points out that there was also a Texarkana city ordinance that she argues Appellee violated by allowing the dog outside the fenced area and that this violation should have also supported a verdict for Appellant.

A "licensee" is one who goes upon the premises of another with the consent of the owner for one's own purposes and not for the mutual benefit of oneself and the owner. *Bader v. Lawson,* 320 Ark. 561, 898 S.W.2d 40 (1995). Appellant was a licensee allowed onto the premises of Appellee to retrieve the card tables. The question of the duty, if any, owed by one person to another is always a question of law and never one for the jury. *Id.* A landowner owes a licensee the duty to refrain from injuring him or her through willful or wanton conduct. *Id.* To constitute willful or wanton conduct, there must be a course of action which

shows a deliberate intention to harm or utter indifference to, or conscious disregard of, the safety of others. *Id.* If, however, a landowner discovers a licensee is in peril, he or she has a duty of ordinary care to avoid injury to the licensee. *Id.* The duty takes the form of warning a licensee of hidden dangers if the licensee does not know or have reason to know of the conditions or risks involved. *Id.*

Here, the jury was instructed on the duty owed to a licensee and on the Texarkana ordinance. The pertinent question was whether Appellee knew his dog was vicious prior to the date of this incident. There was substantial evidence that Appellee had no knowledge that the dog was vicious. In fact, Appellee's wife testified that she had no knowledge of the dog attacking anyone. She stated that the dog had previously scratched her mother when the dog was going towards a cat. Appellee's mother-in-law Verneener Stewart testified that she had never been bitten by the dog. The veterinarian, while recommending obedience training or castration, only established that the dog was aggressive around the office for shots or checkups. Appellee testified that to his knowledge, the dog had never bitten or attacked anyone prior to this incident. We thus conclude that there was substantial evidence to support the jury's verdict.

Affirmed.

Tracy Trinette CALLOWAY *v.* STATE of Arkansas

CR 97-398 953 S.W.2d 571

Supreme Court of Arkansas
Opinion delivered October 9, 1997

Jeff Rosenzweig, for appellant.

Winston Bryant, Att'y Gen., by: *Kelly Terry*, Asst. Att'y Gen., for appellee.

ROBERT L. BROWN, Justice. This appeal arises out of the murders of three children in Little Rock and the attempted murder of their mother. The appellant, Tracy Trinette Calloway, was convicted of three counts of murder in the first degree and one count of criminal attempt to commit murder in the first degree. She was sentenced to a total term in prison of 132 years. Her appeal raises three issues: (1) the propriety of a non-model jury instruction on accomplice liability, (2) the prosecutor's placing her own character at issue in closing argument, and (3) the trial court's discretion in refusing to grant defense counsel surrebuttal argument following the prosecutor's rebuttal argument. We affirm the judgments of conviction.

On June 4, 1995, Riley Dobi Noel, Terry Carroll, Curtis Cochran, and Tracy Calloway were riding in Little Rock in Cochran's car and, according to Calloway, "getting high" on drugs. They went to the home of Mary Hussian, where Calloway got out of the car and followed Noel and Carroll to the house. Just before they entered the house, Noel handed her a handgun, and she testified that she returned it immediately. Noel burst into the house, and Calloway followed, stopping just inside the doorway. Noel told three children in the residence to get down on the floor, and Calloway testified that she told them to do what Noel said. She watched Noel shoot each of the children in the head and kill them. The victims were Malak Hussian, age 10; Mustafa Hussian, age 12; and Marcel Young, age 17. According to Curtis Cochran, the murders were in retaliation for Yashica Young's involvement in the death of Noel's brother. Yashica Young was another child of Mary Hussian. Following the murders, Calloway testified that she ran from the house with Carroll.

On June 6, 1995, the Little Rock Police Department focused its investigation on a search of Calloway's neighborhood in an effort to locate a suspect named "Tracy," and Calloway surrendered herself to police officers that same day. Calloway gave a full statement indicating that she was with the young men at the time of the murders but stating that she was not aware of an intention to commit the killings.

At trial, the prosecutor's theory of the case against Calloway was one of accomplice liability. Calloway's defense was that she did not know what Noel and Carroll intended to do at the Hussian house and that she did not assist them in any way in the commission of the murders. The prosecutor presented testimony from Curtis Cochran, who was driving the vehicle that day. Cochran testified that everyone in the car knew where they were going and what Noel intended to do because Noel announced it in the car. According to Cochran, Noel gave Calloway a .45 caliber handgun while they were in the car, and she still had it when they went to the Hussian house.

Jack Thomas, a neighbor of the victim, also testified for the State and stated that he saw Calloway run from the Hussian house and that it appeared as though she was carrying a gun. Kyle Jones testified that he arrived at the Hussian residence with his fiancee, Marcel Young, and saw three people standing in the carport: Noel, Cochran, and Calloway. The threesome asked Marcel and Kyle if Yashica Young was home, and Kyle said that he would check. Kyle and Marcel entered the house, and Kyle went to the back of the home to tell Marcel's mother, Mary Hussian, that they were home. He heard someone burst in through the front of the house and heard Marcel scream. Kyle and Mary Hussian ran toward the front of the house and were intercepted by Carroll, who was carrying a shotgun. They retreated to the bedroom. Kyle went into the bathroom and closed the door. Mary Hussian hid behind the bed and dialed 911. Kyle testified that he heard three shots come from the front room and that he heard the shotgun blast in the bedroom just before he escaped through the window. Kyle eventually came back to the house and told police officers what he had seen.

Mary Hussian told the same story to the jury as Kyle did. She testified that when she hid behind the bed to call 911, Carroll yelled for her to come out from behind the bed. She pleaded with him not to kill her or her children. She eventually rushed Carroll, and they fought for control of the shotgun. The shotgun discharged in the struggle, and the shot went through the roof. Mary Hussian gained control of the gun and chased Carroll back through the house, where she saw her three murdered children lying on the floor. Carroll left through the front door. Mary Hussian saw three people in the house, but could only identify Carroll and Noel and not Calloway.

The State also contended at trial that Calloway's original statement to the Little Rock police officers and her trial testimony were in conflict. She first told police officers that she was in the car and that Cochran and she picked up Carroll and Noel, but at trial she testified that the threesome picked her up to give her a ride home. She also testified at trial that she did not see any guns in the car until the group was about to go into the Hussian house. However, it was established at trial that two weapons were used at the murder scene — a .45 caliber pistol and a shotgun. Calloway admitted that Carroll was in the back seat of the two-door car with her but maintained that she did not see the shotgun.

The jury convicted Calloway of the four charges and subsequently sentenced her as stated above.

Calloway's first assignment of error is that the trial court used a model jury instruction, AMCI 2d 401, instead of the amended AMCI 2d 401 proffered by her. AMCI 2d 401, which was given to the jury, reads as follows:

> In this case, the State does not contend that Tracy Calloway acted alone in the commission of the offenses of Capital Murder and Criminal Attempt to Commit Capital Murder. A person is criminally responsible for the conduct of another person when she is an accomplice in the commission of an offense.
>
> An accomplice is one who directly participates in the commission of an offense or when causing a particular result is an element of an offense, acting with respect to that result with the

kind of culpability sufficient for the commission of that offense, she:

> Solicits, advises, encourages, or coerces the other person to engage in that conduct causing the result; or aids, agrees to aid, or attempts to aid the other person in planning of the conduct causing the result.[1]

Calloway sought to add the following language relating to "mere presence":

> Mere presence, acquiescence, silence or knowledge that a crime is being committed, in the absence of a legal duty to act, is not sufficient to make one an accomplice.

The language was refused, and defense counsel proffered the amended instruction for the record.

In reviewing the trial court's decision to use a model jury instruction over a non-model instruction, this court has held that the trial court should not use a non-model instruction unless there is a finding that the model instruction does not accurately reflect the law. *See Williams v. State*, 329 Ark. 8, 946 S.W.2d 678 (1997); *Hill v. State*, 318 Ark. 408, 887 S.W.2d 275 (1994); *Moore v. State*, 317 Ark. 630, 882 S.W.2d 667 (1994). In support of her contention that the model instruction should include a "mere presence" component, Calloway cites several cases which have held that mere presence is not enough to establish that an individual was an accomplice. *See Vickers v. State*, 313 Ark 64, 852 S.W.2d 787 (1993); *Ford v. State*, 296 Ark. 8, 753 S.W.2d 258 (1988); *Spears v. State*, 280 Ark. 577, 660 S.W.2d 913 (1983).

This court has twice specifically rejected the argument that AMCI 2d 401 should be altered to reflect the notion that mere presence is not enough to establish accomplice liability. *See Williams*, 329 Ark. at 21, 946 S.W.2d at 688; *Webb v. State*, 326 Ark. 878, 935 S.W.2d 250 (1996). Our reasoning for these holdings is sound. In order to prove that a person is an accomplice under AMCI 2d 401, one must prove that the defendant was

[1] AMCI 2d 401 was given as modified at the request of defense counsel to include language from Ark. Code Ann. § 5-2-403(b) (Repl. 1993), relating to assistance in causing a particular result.

engaged in activity which aided in the commission of the crime and, thus, was not merely present. If the State proves that a person was present when a crime was committed but does not further prove beyond a reasonable doubt that person in some way participated in the crime, the State has not met its burden. It would be redundant for the trial court to instruct the jury on what does *not* give rise to accomplice liability in addition to what does. *Moore*, 317 Ark. at 636, 882 S.W.2d at 671.

Calloway attempts to distinguish *Webb v. State, supra*, by contending that this court found that the facts in *Webb* did not support a "mere presence" instruction. However, this argument does not contend with the more recent decision in *Williams v. State, supra*, where this court specifically stated that *Webb* rejected the requirement of a "mere presence" jury instruction. We held in both *Williams* and *Webb* that AMCI 2d 401 accurately and completely reflects the law of accomplice liability. Thus, Calloway's argument on this point has already been settled by prior case law and is meritless.

Calloway's second point arises out of comments made by the prosecutor during closing argument. The prosecutor made the following statement:

> And another thing about these oaths. I take an oath. He's exactly right. I took an oath as a deputy prosecutor. So, when he stands up here and says that Curtis Cochran tailored his testimony to suit me, then he maligns me. Well, ladies and gentlemen, I took an oath. So, if you believe that what I did was told Curtis Cochran what to say —

Defense counsel objected to the prosecutor's argument and moved for a mistrial. The trial court denied the motion but did admonish the jury that "counsel are not allowed to inject their own personalities in the trial," and that the jury should not consider such comments or make them a part of their deliberations. Calloway now contends that the statement made by the prosecutor was so prejudicial that it could not be corrected by an admonition and that a declaration of a mistrial was warranted.

This court has held that a mistrial is such an extreme remedy that it should not be used unless there has been error "so

prejudicial that justice cannot be served by continuing the trial or when the fundamental fairness of the trial itself has been manifestly affected." *Puckett v. State*, 324 Ark. 81, 89, 918 S.W.2d 707, 711 (1996). A mistrial should only be declared when an admonition to the jury would be ineffective. *Id.* Moreover, the trial court is given broad discretion to control counsel in closing arguments, and this court will not disturb the trial court's decision absent a manifest abuse of discretion. *Lee v. State*, 326 Ark. 529, 932 S.W.2d 756 (1996). We said in *Lee*: "[R]emarks that require a reversal are rare and require an appeal to the jurors' passions." 326 Ark. at 532, 932 S.W.2d at 758.

In this case, the trial court made a specific finding that defense counsel had "invited" the prosecutor's rebuttal by questioning the integrity of the prosecutor in closing argument. Defense counsel repeatedly made reference to the fact that Curtis Cochran had changed his story only after the prosecutor talked to him. The prosecutor's rebuttal sought to correct any inference that she told Cochran to lie. This court has recognized that when one party uses improper closing remarks the other party may respond with what would ordinarily be improper remarks. *Id*; *Larimore v. State*, 317 Ark. 111, 977 S.W.2d 570 (1994); *McFadden v. State*, 290 Ark. 177, 717 S.W.2d 812 (1986). We have no doubt that the prosecutor should be allowed to counter any suggestion of suborning perjury.

Furthermore, the trial court immediately sustained defense counsel's objection to the prosecutor's injecting personalities into her argument and immediately admonished the jury to that effect, thereby curing any potential prejudice. Having observed the argument first hand, the trial court was in the best position to determine if there was prejudice, and we defer to its judgment. *Bullock v. State*, 317 Ark. 204, 876 S.W.2d 579 (1994). There was no abuse of discretion in this regard.

For her final point, Calloway contends that the trial court erred in not granting defense counsel's request for surrebuttal argument to correct misstatements made by the prosecutor. At the end of the prosecutor's rebuttal, the defense counsel moved the court to allow him a surrebuttal argument because the prose-

cutor had misrepresented Calloway's testimony in her rebuttal argument. Specifically, defense counsel claimed that the prosecutor had argued that Calloway contended that the two other State witnesses, Jack Thomas and Kyle Jones, were lying. In fact, Calloway never specifically stated that they were lying, but her testimony did contradict those witnesses on several points. The trial court ruled in favor of the State and said: "Counsel if I allowed that [surrebuttal argument], I'm afraid there would never be an end to this trial."

The trial court is given broad discretion to control counsel in closing arguments, and this court will not disturb the trial court's decision absent a manifest abuse of discretion. *Lee v. State, supra*; *Mills v. State*, 322 Ark. 647, 910 S.W.2d 682 (1995). In this case, there was no abuse of discretion. For one thing, defense counsel could have objected to any misstatements made by the prosecutor in her rebuttal argument.[2] For another, the prosecutor's arguments were logical inferences based on the testimony of the witnesses. It is logical to conclude that if a defendant testifies in a manner that completely contradicts a witness's testimony, there is an implication that the defendant is saying the witness is lying. This easily falls within the confines of permissible argument. There was no abuse of discretion in refusing to grant surrebuttal argument.

Affirmed.

[2] The court is aware that defense counsel did object to alleged factual misstatements during the prosecutor's initial closing argument, and the trial court raised the issue of whether that would be a comment on the evidence by the court.

Tommy CRAWFORD *v.* ARKANSAS DEPARTMENT OF HUMAN SERVICES

97-241 951 S.W.2d 310

Supreme Court of Arkansas
Opinion delivered October 9, 1997

Clark Law Firm, by: *Jim Clark*, for appellant.

Office of Chief Counsel, by: *Johnny E. Gross*, for appellee.

ROBERT L. BROWN, Justice. This case arises out of the court-ordered termination of the parental rights of appellant Tommy Crawford. The record contains almost three and a half years of matters before the chancery court, juvenile division, and other agencies following the original call to law enforcement officers caused by a domestic disturbance at Crawford's home in January of 1993. At that time, Crawford was living with his girlfriend, Mary Cross, who was still married to Bobby Cross. Also living in the house were four minor children. Two of the children, Tequilla Cross and Melissa Cross, were the natural children of Mary Cross and Bobby Cross. The other two children, Justin Crawford (now age 9) and James Crawford (now age 7), were the biological children of Mary Cross and Crawford. The parental rights of Bobby Cross, Mary Cross, and Tommy Crawford were terminated with respect to all four children. This appeal, however, concerns only the termination of the parental rights of Tommy Crawford with respect to James and Justin Crawford. We affirm the order of termination.

On January 30, 1993, the Benton County Sheriff's Office responded to a report of domestic violence at the home of Crawford and Mary Cross. The subsequent investigation resulted in two proceedings. The first was a criminal proceeding which resulted in a plea of guilty by Crawford to Violation of a Minor in the First Degree, a class C felony. The victim of this offense was Mary Cross's daughter, Tequilla Cross. Crawford was sentenced to ten years in prison with five years suspended.

The second proceeding was in chancery court, juvenile division, and concerned placement of the four children in the care of appellee Arkansas Department of Human Services (DHS) because of allegations of abuse and allegations that the children were dependent-neglected. On February 22, 1993, DHS filed a petition for emergency custody, following which the two daughters, Melissa and Tequilla Cross, were removed from the home of Mary Cross. The two boys, James and Justin, remained with their mother. At the adjudication hearing held on March 30, 1993, Tequilla Cross testified about the circumstances at the home before

she was removed from the home and placed in foster care. She testified that Mary Cross and Crawford, as well as their friends, drank alcohol daily and regularly smoked marijuana, all of which took place in front of the children.

After the initial disturbance and allegations of sexual abuse on January 30, 1993, Crawford did not reside with the children or Mary Cross. On May 16, 1993, a restraining order was issued enjoining Crawford from having any contact with the children or with Mary Cross. In September of 1993, DHS established a case plan, with the stated goal being reunification of the family. An adjudication order was entered on November 23, 1993, wherein the two boys, James and Justin, were found to be dependent-neglected, following a stipulation by counsel to the same effect made on May 13, 1993.

Following a hearing on December 7, 1993, Crawford was allowed visitation with his sons for one hour a week under supervision of DHS. He was ordered to pay child support in the amount of $32.00 per week and to pay half of the boys' medical bills. The chancery court later raised the amount of child support to $35.00 a week on August 11, 1994. Crawford participated sporadically in supervised visitation with his sons for almost a year while the boys were still living with Mary Cross. On April 1, 1994, Justin and James Crawford were ordered placed in foster care along with their half-sisters, Melissa and Tequila Cross.

According to DHS reports, Crawford stopped scheduling visits with his sons and had no contact with them from November of 1994 to April 28, 1995. In addition, he never paid the court-ordered child support. Crawford, in his own testimony, admitted that he was aware of the chancery court's order to pay child support, but he did not pay it. He said that he bought his boys clothes instead. The DHS reports reflect that Crawford and Mary Cross failed to make sufficient efforts to improve their condition and to establish a home for the children.

Crawford began serving his prison term in May of 1995 for the sexual abuse of Tequilla. He was in prison for over a year before the final hearing on termination of his parental rights, which was held on July 11 and 12, 1996. During that time, he

wrote a total of three letters to his children. He refused to attend counseling for sexual offenders while in prison and continued to deny molesting Tequilla in spite of his guilty plea. He claimed to have mistaken Tequilla for Mary Cross, while he was in a drunken state.

On August 16, 1996, an order terminating the parental rights of Mary Cross, Bobby Cross, and Tommy Crawford was issued by the chancery court. The court found that DHS had proven by clear and convincing evidence that the children had been residing outside the home for more than one year and that, despite meaningful efforts by DHS to rehabilitate the home and correct the conditions which caused removal, the conditions had not been remedied. The court further found that DHS had proven by clear and convincing evidence that Crawford had failed to provide significant material support to his sons or to maintain meaningful contact with them.

Crawford argues on appeal that there were insufficient efforts by DHS to rehabilitate him and that the evidence in this case was not clear and convincing. Our caselaw has established that termination of parental rights is an extreme remedy and in derogation of the natural rights of the parents. *Anderson v. Douglas*, 310 Ark. 633, 839 S.W.2d 196 (1992). Parental rights, however, will not be enforced to the detriment or destruction of the health and well being of the child. *Burdette v. Dietz,* 18 Ark. App. 107, 711 S.W.2d 178 (1986).

The relevant statute, Ark. Code Ann. § 9-27-341 (Supp. 1995), provides in part:

> (b) . . . An order forever terminating parental rights shall be based upon a finding by clear and convincing evidence:
> (1) That it is in the best interest of the juvenile;
> (2) Of one or more of the following grounds:
>
> (A) That a juvenile has been adjudicated by the court to be dependent-neglected and has continued out of the home for twelve (12) months, and, despite a meaningful effort by the Department of Human Services to rehabilitate the home and correct the conditions which caused removal, those conditions have not been remedied by the parent . . . .

> (B) The juvenile has lived outside the home of the parent for a period of twelve (12) months, and the parent has willfully failed to provide significant material support in accordance with the parent's means or to maintain meaningful contact with the juvenile. To find willful failure to maintain meaningful contact, it must be shown that the parent was not prevented from visiting or having contact with the juvenile by the juvenile's custodian or any other person, taking into consideration the distance of the juvenile's placement from the parent's home. Material support consists of either financial contributions or food, shelter, clothing, or other necessities where such contribution has been requested by the juvenile's custodian or ordered by a court of competent jurisdiction.

Ark. Code Ann. § 9-27-341(b)(2) (Supp. 1995).

As the statute states, the facts warranting termination of parental rights must be proved by clear and convincing evidence. In reviewing the trial court's evaluation of the evidence, this court will not reverse unless the court's finding of clear and convincing evidence is clearly erroneous. Ark. R. Civ. P. 52(a); *Anderson v. Douglas*, 310 Ark. 633, 637, 839 S.W.2d. 196, 198 (1992). Clear and convincing evidence is that degree of proof which will produce in the factfinder a firm conviction regarding the allegation sought to be established. *Anderson v. Douglas, supra*; *Cobbins v. State*, 306 Ark. 447, 816 S.W.2d 161 (1991). Furthermore, this court will defer to the trial court's evaluation of the credibility of the witnesses. Ark. R. Civ. P. 52(a); *Anderson v. Douglas, supra.*

We first note that § 9-27-341(b)(2)(A) does not speak in terms of efforts by DHS to rehabilitate individuals like Crawford but rather the home as a whole. Regardless of that distinction, there is a second ground for termination of parental rights under § 9-27-341(b)(2)(B). Rights may be terminated if the juvenile has lived outside the home of the parent for twelve months and the parent has willfully failed to provide significant material support to his children as ordered by the chancery court and to have meaningful contact with them. It is on this finding by the chancery court that we base our affirmance.

In November of 1993, Crawford was given the opportunity to have supervised visitation with his two sons on a weekly basis.

He visited with them for a time, but eventually quit contacting them altogether in November of 1994. This lack of contact continued at least until April 28, 1995 — the date of a DHS report on the matter. Crawford admitted lack of contact with his sons, and his explanation was that he wanted the children to get used to his not being around because he was going to prison. We give this reasoning little credence. In addition, Crawford was ordered to pay child support in the amount of $32.00 a week and then $35.00 a week. He failed to make any child-support payments. We agree with DHS that evidence abounded that Crawford had not paid support or had meaningful contact with his sons. Nor was the prognosis very good that this situation would change due to Crawford's incarceration.

Moreover, at the time of the final Review Hearing, Crawford was in prison for his crime against Tequilla Cross. Although imprisonment imposes an unusual impediment to a normal parental relationship, we have held that it is not conclusive on the termination issue. *Bush v. Dietz*, 284 Ark. 191, 680 S.W.2d 704 (1984); *Zgleszewski v. Zgleszewski & Horne*, 260 Ark. 629, 542 S.W.2d 765 (1976). In the instant case, nevertheless, imprisonment undoubtedly had a bearing on the trial court's decision for two reasons: the nature of the crime itself, which was violation of a minor; and the fact that Crawford was not going to be available to care for his sons during his term of imprisonment, which could be as long as four additional years. There is also the factor that throughout their time in foster care, the sons appear to have been improving in every respect. Their grades at school improved. The case worker noted that they spoke less violently and acted more behaved. Tequilla testified that she hoped that they all could return home one day, but only if Crawford would stay away. She said that she thought the boys were in danger when he was around. Later, she wrote a letter to the chancery court and stated that she believed it would be best for everyone if all of the children remained in foster care. In closing arguments, the guardian *ad litem* for the boys stated that she would not make a recommendation about terminating parental rights, but she wanted to relay what she observed from the children. She said that the two boys were calling their foster parents "mom" and "dad" and they liked

where they were. In recounting these circumstances, we are mindful of the policy expressed in § 9-27-341(a) relating to termination of parental rights:

> The intent of this section is to provide permanency in a juvenile's life in all instances where return of a juvenile to the family home is contrary to the juvenile's health, safety, or welfare, and it appears from the evidence that return to the family home cannot be accomplished in a reasonable period of time.

We conclude that the chancery court appropriately found clear and convincing evidence that the two sons lived apart from Crawford for twelve months and that he failed to provide monetary support for them or to make sufficient contact with them. We, therefore, affirm the termination of parental rights.

Affirmed.

Billy Edward WELCH *v.* STATE of Arkansas

CR 97-378 955 S.W.2d 181

Supreme Court of Arkansas
Opinion delivered October 9, 1997

Norman Mark Klappenbach, for appellant.

Winston Bryant, Att'y Gen., by: *C. Joseph Cordi, Jr.*, Asst. Att'y Gen., for appellee.

ROBERT L. BROWN, Justice. Appellant Billy Edward Welch was convicted of possession of a controlled substance with intent to deliver, felon in possession of a firearm, simultaneous possession of a controlled substance and a firearm, and possession of drug paraphernalia. He was sentenced as a habitual offender to two terms of life in prison for the possession-with-intent charge and the simultaneous possession charge, six years for being a felon in possession of a firearm, and ten years for the drug paraphernalia. All of Welch's convictions arise out of a traffic stop and the subsequent impoundment and search of his vehicle. On appeal, he raises the issues of sufficiency of the evidence, speedy trial, and suppression of the evidence seized from his vehicle. We affirm.

On the evening of July 28, 1995, the Dallas County Sheriff's Department conducted a safety inspection at the intersection of State Highways 8 and 9 in Dallas County. Deputy sheriffs stopped all vehicles and checked the drivers' licenses and other documentation relating to ownership of the vehicle and insurance. Welch came upon the deputies while driving his Chevrolet El Camino

with a friend. He was approached by Deputy Bill Still, an Auxiliary Deputy Sheriff for Dallas County.

Deputy Still later testified that Welch was unable to provide a legible driver's license, proof of insurance, or proof of ownership of the vehicle. Deputy Still reported this situation to his supervisor on the scene, Deputy Sheriff Kenneth Seale. The deputies then checked Welch's license plate and found that it was registered to another vehicle. Both deputies also testified at the suppression hearing that the initial computer report on Welch indicated that there was a warrant out for his arrest for failure to appear in court in a different county.

Welch was asked if he had any weapons, drugs, or alcohol in his vehicle. According to the deputies, he initially denied having any drugs or weapons. Later, however, he surrendered a nine millimeter handgun from behind the seat of his El Camino. The deputies then asked if they could search the vehicle, whereupon Welch became angry and refused to allow them to do a search and insisted that he be allowed to go home. Welch was then arrested for the traffic violations, and his car was impounded.

Before impounding the vehicle, the deputies took an inventory of its contents. At trial, the law enforcement officers, including Auxiliary Deputy Still, Deputy Seale, and Arkansas Game and Fish Wildlife Officer Mike Knoedl, testified about their involvement in the search. Officer Knoedl testified that he occasionally assisted the Dallas County Sheriff's Department in investigations. On this occasion, Deputy Seale asked Officer Knoedl to assist in the search of Welch's vehicle because the El Camino was extremely cluttered. Deputies Still and Seale testified that other law enforcement officers brought them items from the car, and they recorded on a log sheet everything that was found in the vehicle and where it was found. Both of the deputies testified that the purpose of the search was to keep Welch from later claiming that something was missing from his vehicle. Deputy Still also stated that he was searching the vehicle to determine if there were more guns.

While conducting the inventory search, the law enforcement officers found several syringes, a bag containing more than thirty-

three grams of methamphetamine, a set of scales, and several spoons. Most of these items were found in an ammunition box that was located in the bed of the El Camino. The officers also found Welch's proof of insurance and proof of ownership of the vehicle in the ammunition box with the drugs. Prior to trial, Welch moved to have all of the items found in the search suppressed. The motion was denied, and Welch was tried by jury, convicted, and sentenced as set out above.

I. Sufficiency of the Evidence

We first consider Welch's argument regarding sufficiency of the evidence because the double jeopardy clause precludes a second trial when a judgment of conviction is reversed for insufficiency of the evidence. *King v. State*, 323 Ark. 671, 916 S.W.2d 732 (1996); *Jones v. State*, 323 Ark. 655, 916 S.W.2d 736 (1996).

After the State rested its case, the following exchange took place:

> COUNSEL FOR DEFENSE: Your Honor, the State has rested and at this point the defense would move for a directed verdict.
>
> THE COURT: Is that all you've got to say?
>
> COUNSEL FOR DEFENSE: Yes, sir, that's all I'm saying. (The court then gave the State a chance to comment after which the following took place.)
>
> THE COURT: The motion for directed verdict is denied.
>
> COUNSEL FOR DEFENSE: Your Honor, then the defense would now rest and we renew our motion for a directed verdict and I would like to say that the defense is resting without calling the defendant, or a witness, after discussing that with my client and he is in agreement, is that right, Mr. Welch?

The court then denied the renewed motion. At no time did defense counsel state any grounds for his motion, which violates Rule 33.1 of the Arkansas Rules of Criminal Procedure. *See also Dixon v. State*, 327 Ark. 105, 937 S.W.2d 642 (1997); *Smallwood v. State*, 326 Ark. 813, 935 S.W.2d 530 (1996). Thus, the trial

judge had no opportunity to rule on specific grounds with respect to any of the charges. We hold that Welch is procedurally barred from raising this issue on appeal.

II. Suppression of the Evidence

[redacted] Welch's next point concerns the items seized by the Dallas County Sheriff's Department while conducting a warrantless search prior to impoundment of his vehicle. When reviewing the denial of a suppression motion, this court makes an independent examination of the evidence based on the totality of the circumstances, and we will not reverse the trial judge's decision unless it is clearly against the preponderance of the evidence. *Brunson v. State*, 327 Ark. 567, 940 S.W.2d 440 (1997), *reh'g denied*, 327 Ark. 576-A, 940 S.W.2d 440 (1997).

[redacted] We initially examine the general law relating to inventory searches. Inventory or administrative searches are excepted from the requirement of probable cause and a search warrant. *Florida v. Wells*, 495, U.S. 1 (1990). The purpose of an inventory search is to protect the property, the police, and the public. *Id.* The rationale is that police officers can better account for the property if they have an accurate record of what is contained in a vehicle when it is impounded. Moreover, the police and the public are protected by ensuring that the vehicle does not contain explosives or other harmful items. As part of an inventory search, the police are permitted not only to search the vehicle, but also the containers within the vehicle. *Id. Colorado v. Bertine*, 479 U.S. 367 (1987); *Snell v. State*, 290 Ark. 503, 721 S.W.2d. 628 (1986), *cert. denied*, 484 U.S. 872 (1987).

[redacted] In order for a search of a properly detained vehicle to fall within the inventory search exception to the search warrant requirement, there must be standard operating procedures established by the law enforcement agency conducting the search. *Florida v. Wells, supra*; *Colorado v. Bertine, supra; Snell v. State, supra.* The procedures must be followed and the inventory search must not be conducted solely for investigative purposes. *Id.* There is no requirement that the procedures for the inventory search be in writing. *United States v. Lowe*, 9 F.3d 43 (8th Cir. 1993). *See also*

United States v. Skillern, 947 F.2d 1268 (5th Cir. 1991), *cert. denied*, 503 U.S. 949 (1992); *Snell v. State, supra.*

Absent a showing that the true intent of the police officers was to conduct an evidentiary search, the testimony of police officers that they always take inventory of impounded vehicles and that they always search containers is sufficient. *Id.* The fact that police officers have some idea or expectation of what they might find does not invalidate the purpose of the search. Indeed, the police are not required to weigh the individual's privacy interest against the probability of finding hazardous materials before opening a container in the vehicle. *Colorado v. Bertine*, 479 U.S. at 374.

a. Standard Procedures

Turning to the case at hand, Welch argues that the Dallas County Sheriff's Department did not follow normal procedures for an inventory search because the Department did not have written procedures and the deputy sheriffs could not be specific as to what the procedures were. In *Snell v. State, supra*, this court relied on the *testimony* of law enforcement officers to prove the inventory search, which included opening a container, was standard procedure. Accordingly, we turn to the testimony of the law enforcement officers to determine whether standard operating procedures were in place. Deputy Sheriff Seale testified that he always searches vehicles that are impounded:

> Q. — as far as the Dallas County Sheriff's Department is concerned what does inventory mean?
>
> A. Well, it's part of our policy, as far as I know, that in case, you know, if we impound a vehicle we got everything listed and documented then the subject can't come back later on and say that such-and-such is missing —
>
> . . . .
>
> Q. Okay. Do you — Mr. Seale, have you participated in other inventory searches?
>
> A. I have.

> Q. Yes, sir. Is this the — the way y'all did this any different than your normal procedure?
>
> A. No.
>
> . . . .
>
> Q. Now, what were you looking for when you were searching the vehicle?
>
> A. Weren't looking for any certain thing, we was just documenting each and every item that was in the vehicle before we impounded it.

In addition, Game and Fish Officer Knoedl testified at trial:

> Q. And is that your standard procedure to open a box like that?
>
> A. Yes, sir.
>
> Q. Who told you to do that, Mike?
>
> A. Well, basically I work under the same procedure that the Game and Fish follows, which we have a written policy that says, "All containers locked, or unlocked, will be searched," you know, "or inventoried when a vehicle is stored."
>
> Q. Okay. Does the Dallas County Sheriff's Office have a written policy like that?
>
> A. Sir, I couldn't say for sure. I know that there is supposed to be a verbal policy. I know from being here seven years and working with the Dallas County Sheriff's Department, that that's normal operating procedure that is done.

[redacted] The trial court cited the Eighth Circuit's decision in *United States v. Lowe, supra,* for the proposition that standard procedures do not have to be in writing and made the following findings in its order:

> The Courts have ruled that an inventory search must be based upon standardized procedures to prevent rummaging. The officers testified at the hearing that upon impounding the vehicle it would be taken to the Sheriff's Office so that a written inventory of the contents of the vehicle could be made in accordance

> with their policy. They acknowledged that they had not seen a written policy but do this all the time.
>
> The Courts have not required that for inventory searches to be valid they must be based on written standardized procedures or written standard police policy. These procedures may be written, but established unwritten procedures are also sufficient. The officers in this case were following what they had been trained to do when the vehicle was impounded after a valid arrest, perform an inventory for the protection of the owner, the police and the public.

These findings are a proper statement of the law and the facts. While we have no doubt that written procedures are preferable to oral procedures, neither our caselaw nor federal caselaw requires that the standard policy be in writing for the inventory search to pass constitutional muster. The essential points appear to be that the practice be uniform and that no discretion be left to the police officers to decide the boundaries of the inventory search. *See Colorado v. Bertine, supra.*

Welch makes a specific argument that doing an inventory of the ammunition box was clearly violative of the Fourth Amendment. We disagree. Though Game and Fish Officer Mike Knoedl was not a member of the Sheriff's Department, he testified that he knew the department's procedures on opening containers, having worked in conjunction with the Department for seven years. Deputy Kenneth Seale further testified that the inventory search, which would include search of the ammunition box, was according to normal procedure. Thus, there was evidence of a standard policy, unlike the case of *Kirk v. State*, 38 Ark. App. 159, 832 S.W.2d 271 (1992), where the Court of Appeals concluded there was no evidence of a policy regarding closed containers.

Certainly, the circumstances surrounding the search were suspicious with no proof of ownership of the vehicle, a warrant outstanding for Welch's arrest, and a weapon in the vehicle. We are further persuaded by the Supreme Court's reasoning in *Colorado v. Bertine, supra*:

> Even if less intrusive means existed of protecting some particular types of property, it would be unreasonable to expect police

> officers in the everyday course of business to make fine and subtle distinctions in deciding which containers or items may be searched and which must be sealed as a unit.

Bertine, 479 U.S. at 375, *quoting Illinois v. Lafayette*, 462 U.S. 640, 648 (1983). There was no abuse of discretion by the trial court in refusing to suppress this evidence.

b. Pretextual Search

Other than the testimony of Deputy Still that he was also looking for guns, there was no evidence that the search was anything other than an inventory search. Deputy Still and Deputy Seale both testified that they were doing an inventory search. The United States Supreme Court has observed that the fact that a police officer is also aware that he might come upon pertinent evidence in the course of an inventory search is not fatal to that search. *Colorado v. Bertine, supra.*

To suppress an inventory search, a defendant must show that the police officers were conducting the inventory search in bad faith for the sole purpose of collecting evidence. *Id. See also South Dakota v. Opperman*, 428 U.S. 364 (1976)(plurality opinion). Here, the trial court did not find that there was an ulterior motive on the part of the Dallas County Sheriff's Department. We decline to superimpose our view of the testimony over that of the trial court's when the law enforcement officers are following standard procedure and in the absence of proof that the sole motivation for the search was to collect evidence. *See Ryan v. State*, 303 Ark. 595, 798 S.W.2d 679 (1990).

III. Speedy Trial

Welch next claims that the trial court erred because it did not dismiss the charges against him after the time for speedy trial had expired. The State answers that Welch waived his right to a speedy trial because he failed to raise the issue in the trial court.

Welch was arrested on July 28, 1995. The defense requested and was granted a motion for a continuance on August 19, 1996. The attorney requesting the continuance explained that he would

not be ready for trial on that day because Welch failed to attend any of their scheduled meetings and he had not met with the defendant until August 13, 1996. The continuance was granted and time was charged to the defendant. The defense later made a motion to suppress and a hearing was held on November 25, 1996. At the end of the hearing, the court, the prosecutor, and defense counsel attempted to set a trial date, and the following exchange took place:

> THE COURT: Is there really a speedy trial problem? If I remember correctly I think Mr. Welch walked out of this courtroom and left and we were trying to resolve this matter and he was gone a good long time, was he not?
>
> PROSECUTOR: Yes, sir. I would ask, so as to avoid any further problem, I'd ask that we go ahead and try this case this year, depending, of course, on what the Court rules. If the Court rules —
>
> THE COURT: Well, I'm not going to do anything until I rule on this [suppression] motion —
>
> PROSECUTOR: Yes, sir.
>
> THE COURT: — and if you get me that in a week then I will set it and right now I told you I would set it preferably on the 12, that day's open —
>
> PROSECUTOR: Yes, sir.
>
> THE COURT: — do either of you have any problem with the 12th?
>
> DEFENSE COUNSEL: No, sir, that'd just give me time to drive back from St. Louis and rest a day before I try a jury trial.

This is the only time that speedy trial was discussed at the trial court level before the current appeal.

In criminal cases, even constitutional issues must be presented to the trial court to preserve them for appeal. *Henry v. Eberhard*, 309 Ark. 336, 832 S.W.2d 467 (1992). A defendant's failure to move for a dismissal of charges for a lack of speedy trial constitutes a waiver of his rights under the rules. *Summers v. State,* 292 Ark. 237, 729 S.W.2d 147 (1987). The defense had plenty of

opportunity to object to the trial date, but instead consented to it even after the trial court referred to a potential speedy-trial problem. The trial court is not required to make the motion for him. This issue has no merit.

IV. Cumulative Error

For his final point, Welch contends that all of the rulings against him, when considered together, constitute reversible error. In response, the State correctly points out that the cumulative-error argument was not raised to the trial court. This court has specifically held that not only must each of the negative rulings be objected to individually, a defendant must also raise the cumulative-error objection to the trial court and obtain a ruling in order to argue the point on appeal. *Witherspoon v. State*, 319 Ark. 313, 891 S.W.2d. 371 (1995). Because Welch did not raise the cumulative-error objection in the trial court, he is barred from raising it on appeal. *Id.*

The individual objections by Welch and the record on appeal have been reviewed for prejudicial error in accordance with Supreme Court Rule 4-3(h), and none has been found.

Affirmed.

Clarence Edward MIXON *v.* STATE of Arkansas

CR 97-452 954 S.W.2d 214

Supreme Court of Arkansas
Opinion delivered October 9, 1997

John F. Stroud III, for appellant.

Winston Bryant, Att'y Gen., by: *C. Joseph Cordi, Jr.,* Asst. Att'y Gen., for appellee.

ANNABELLE CLINTON IMBER, Justice. The appellant, Clarence Edward Mixon, was convicted by a jury of residential burglary, aggravated robbery, theft of property, and two counts of rape. As a habitual offender, Mixon was sentenced to consecutive terms of two life sentences plus 115 years' imprisonment. On appeal, Mixon argues that the trial court erred in allowing testi-

mony regarding two footprints that were found near the crime scene, and in ordering his sentences to run consecutively. Finding no merit to either argument, we affirm.

On October 9, 1995, at approximately 3:30 a.m., a man broke into the victim's home, raped her twice at knife point, and stole her jewelry. The victim was unable to see her attacker because a pillow case was placed over her head. She, however, was able to feel a scar on the perpetrator's forearm.

The next morning, around 9:00 a.m., the police discovered two footprints outside of the victim's home. The first footprint was located on a bench underneath a window to the victim's house. The second footprint was found on the ground approximately sixty-five to seventy feet from the victim's home at the intersection of Tenth and County Street. Officer Humphries testified that the patterns of the two footprints were similar, and the letters "L.A." were clearly visible in the print found at the street corner. Detective Tate testified that there was "no doubt" in her mind that an L.A. Gear tennis shoe made both footprints. Detective Tate also testified that she observed similar footprints leading to and away from the victim's home. The victim testified that she did not own any L.A. Gear tennis shoes, and no such footwear was found in her home.

Several days later, the police located the victim's stolen jewelry in several pawn shops, and the pawn tickets listed the depositor as the defendant, Clarence Mixon. When Mixon was arrested, he was wearing a pair of L.A. Gear tennis shoes with markings similar to those observed in the two footprints found at the crime scene. At the time of his arrest, the police also observed a scar on Mixon's forearm similar to that described by the victim. Furthermore, DNA testing indicated a 99.99% probability that Mixon raped the victim. Finally, the victim identified Mixon's voice as similar to the voice she heard on the night of the rape. Based on this evidence, the jury found Mixon guilty of residential burglary, aggravated robbery, theft of property, and two counts of rape.

I. Footprints

For his first argument on appeal, Mixon asserts that the trial court erred when it allowed the police officers to testify about the footprints that were found at the crime scene. Mixon argues that the trial court erred when it declined to exclude the evidence under Ark. R. Evid. 403, which states in relevant part that:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. . . .

We have repeatedly held that the balancing mandated by Rule 403 is a matter left to a trial court's sound discretion, and thus, we will not reverse the court's ruling absent a showing of manifest abuse. *Wallace v. State*, 326 Ark. 376, 931 S.W.2d 113 (1996); *Scott v. State*, 325 Ark. 267, 924 S.W.2d 248 (1996).

Mixon argues that the testimony was more prejudicial than probative because L.A. Gear is a popular brand of tennis shoe, and the prints were found in a heavily traveled area several hours after the assault occurred. Officer Humphries, however, testified that there was not much traffic in the area at six o'clock in the morning, and Detective Tate testified that she saw similar footprints leading to and away from the victim's home. Moreover, Detective Tate testified that there was "no doubt" in her mind that both footprints were made by L.A. Gear shoes. Finally, the footprints had similar patterns to the soles of the shoes Mixon was wearing at the time of his arrest. Based on these facts, we cannot say that the trial court abused its discretion when it declined to exclude the testimony under Rule 403.

II. Consecutive Sentences

At the conclusion of the trial, the jury sentenced Mixon to forty years for residential burglary, forty years for theft of property, seventy-five years for aggravated robbery, and two life sentences for the two counts of rape. The trial judge ordered all sentences, except for the sentence of forty years for theft of property, to be served consecutively. On appeal, Mixon argues that the trial court erred in running the sentences consecutively because the

court failed to use its discretion pursuant to Ark. Code Ann. § 5-4-403 (Repl. 1993).

We, however, cannot address the merits of this argument because Mixon failed to properly preserve the issue for appellate review. On several occasions, we have refused to address an appellant's challenge to the trial court's decision to run the sentences consecutively when the appellant failed to make an objection below. *See Hicks v. State*, 327 Ark. 652, 941 S.W.2d 387 (1997); *Brown v. State*, 326 Ark. 56, 931 S.W.2d 80 (1996). Because Mixon made no objection after the trial court announced its ruling that four of his five sentences would run consecutively, we must affirm the trial court's ruling.

III. Arkansas Supreme Court Rule 4-3(h)

In accordance with Ark. S. Ct. R. 4-3(h), the record has been reviewed for rulings decided adversely to Mixon but not argued on appeal, and no reversible errors were found.

UNION PACIFIC RAILROAD COMPANY and T.P. Spoon
v. Jonathan SHARP and Aristea Sharp

96-1096 952 S.W.2d 658

Supreme Court of Arkansas
Opinion delivered October 9, 1997
[Petitions for rehearing denied November 13, 1997.*]

* Both appellants and appellees filed petitions for rehearing.

William H. Sutton, Frederick S. Ursery , Scott H. Tucker, & Clifford W. Plunkett, for appellants.

Epley, Epley & France, Ltd., by: *Lewis E. Epley, Jr.* and *Tim S. Parker,* for appellees.

Arkansas Trial Lawyers Association, by: *Henry C. Kinslow,* amicus curiae.

Barrett & Deacon, by: *J.C. Deacon* and *D.P. Marshall, Jr.*, amicus curiae, for Association of American Railroads, on cross-appeal.

ANNABELLE CLINTON IMBER, Justice. This is a negligence action involving a collision at a railroad crossing in Marianna. The appellants, Union Pacific Railroad Company and T.P. Spoon ("the railroad"), appeal a jury verdict rendered against them. The appellees, Jonathan and Aristea Sharp ("Sharp"), cross-appeal the trial court's entry of partial summary judgment in favor of the railroad on the issue of whether the railroad placed adequate warning devices at the crossing. We reverse the jury verdict, and affirm the partial summary judgment.

On February 15, 1993, Jonathan Sharp was driving a van owned by his mother, Aristea Sharp, when he collided with a Union Pacific train at the Louisiana Street railroad crossing in

Marianna. The accident occurred in the afternoon, and the streets were wet from an earlier rain. Union Pacific's train was being pulled by two locomotives. The lead locomotive was operated by engineer T.P. Spoon who was on the right side of the train and brakeman Steve Tyler who was on the left side of the train where the impact occurred. The second locomotive was unoccupied. The only warning device at the railroad crossing was a single crossbuck[1] which was installed in the early 1980's pursuant to a safety program funded by the federal government.

Sharp filed a negligence action against the railroad alleging that it failed to place adequate warning devices at the crossing, failed to maintain the warning devices, failed to properly sound audible warnings, and failed to keep a proper lookout for vehicles entering the crossing.[2] Prior to trial, the court granted the railroad partial summary judgment on the issue of whether it placed adequate warning devices at the crossing because it found that the claim was preempted by federal law. The case proceeded to trial on Sharp's remaining negligence theories.

At trial, Sharp admitted that he was aware of the railroad crossing because he had passed over it four or five times the day of the accident. Sharp, however, claimed that he did not know that a train was entering the crossing at the time of the accident because his view was obstructed, and the train failed to sound its audible warning devices. Sharp further explained that he applied his brakes when he saw the train approximately sixty-two feet from the crossing, but that he was unable to stop before the front end of his van collided with the left side of the train. In contrast, the train operators testified that they sounded the whistle in a series of two long, one short, and one long blasts, and that they were unable to see Sharp's vehicle prior to impact.

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[1] A "cross-buck" is an x-shaped highway warning sign placed at a railroad crossing. *Webster's New International Dictionary* 541 (3d 1968).

[2] Sharp claimed that the railroad was negligent in several other respects which are not relevant to this appeal.

Direct Appeal

I. Sufficiency of the Evidence

For its first argument on appeal, the railroad asserts that the trial court erred when it denied its motion for a directed verdict on Sharp's negligence claim. Our standard of review of the denial of a motion for a directed verdict is whether the jury's verdict is supported by substantial evidence. *Ouachita Wilderness Institute, Inc. v. Mergen*, 329 Ark. 405, 947 S.W.2d 780 (1997); *Balentine v. Sparkman*, 327 Ark. 180, 937 S.W.2d 647 (1997). Substantial evidence is defined as "evidence of sufficient force and character to compel a conclusion one way or the other with reasonable certainty; it must force the mind to pass beyond suspicion or conjecture." *Esry v. Carden*, 328 Ark. 153, 942 S.W.2d 846 (1997). When determining the sufficiency of the evidence, we review the evidence and all reasonable inferences arising therefrom in the light most favorable to the party on whose behalf judgment was entered. *Id.* In such situations, the weight and value of testimony is a matter within the exclusive province of the jury. *Id.*

To establish a *prima facie* case of negligence, a plaintiff must show that damages were sustained, that the defendant breached the standard of care, and that the defendant's actions were the proximate cause of the damages. *See Ouachita Wilderness, supra*; *Southern Farm Bureau Casualty Ins. v. Allen*, 326 Ark. 1023, 934 S.W.2d 527 (1996). The parties do not contest that Sharp suffered damages as a result of the collision. Hence, the relevant inquiry on appeal is whether Sharp presented substantial evidence that the railroad breached the standard of care, and that this breach was the proximate cause of his damages.

A. Breach of the Standard of Care

At trial, Sharp argued that the railroad was negligent in failing to keep a proper lookout and failing to properly sound its audible warnings. Because the jury rendered a general verdict of negligence, it is impossible to determine whether the jury found that the railroad was negligent in one or both respects. Hence, we must affirm if there is sufficient evidence to support either theory of negligence.

Sharp's first theory of negligence was that the railroad failed to maintain a proper lookout under Ark. Code Ann. § 23-12-907(a)(1) (1987) which states that:

> It shall be the duty of all persons running trains in this state upon any railroad to keep a constant lookout for all persons, including licensees and trespassers, and property upon the track of any and all railroads.

During Sharp's case-in-chief, the train's engineer, T.P. Spoon, testified that he could not see Sharp's van, and that he did not know that the train had struck the van until the brakeman brought it to his attention. We find that from this testimony, a jury could have concluded that the railroad breached the standard of care by failing to keep a proper lookout for vehicles entering the Louisiana Street crossing. Because we find that Sharp presented substantial evidence that the railroad was negligent in failing to maintain a proper lookout, it is unnecessary to address whether he presented substantial evidence that the railroad was also negligent in failing to properly sound its audible warnings.

B. Proximate Causation

The railroad next argues that the trial court should have granted a directed verdict because there was insubstantial evidence that the railroad's negligence was the proximate cause of Sharp's injuries. We have previously defined proximate cause as "that which in a natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred." *Ouachita, supra*; *Craig v. Traylor*, 323 Ark. 363, 915 S.W.2d 257 (1996). Proximate causation is usually an issue for the jury to decide, and when there is evidence to establish a causal connection between the negligence of the defendant and the damage, it is proper for the case to go to the jury. *Ouachita, supra*; *Tyson Foods Inc. v. Adams*, 326 Ark. 300, 930 S.W.2d 374 (1996); *McGraw v. Weeks*, 326 Ark. 285, 930 S.W.2d 365 (1996). In other words, proximate causation becomes a question of law only if reasonable minds could not differ. *Ouachita, supra*; *Tyson, supra*.

As mentioned previously, Sharp presented evidence that the railroad might have been negligent in failing to keep a proper lookout. The jury could have concluded that if the railroad had kept a proper lookout, it could have either stopped prior to colliding with Sharp's van or sounded earlier warnings to notify Sharp of the impending danger. The railroad argues that Archie Burnham's testimony unequivocally established that the train could not have stopped when it was first able to see Sharp's vehicle. We, however, have previously explained that the jury is not bound to accept the opinion testimony of experts as conclusive. *Dixon Ticonderoga Co. v. Winburn Title Mfg. Co.*, 324 Ark. 266, 920 S.W.2d 829 (1996); *Burns v. State*, 323 Ark. 206, 913 S.W.2d 789 (1996); *Bowen v. State*, 322 Ark. 483, 911 S.W.2d 555 (1996), *cert. denied*, 116 S. Ct. 1861 (1996). Hence, we find that Sharp presented substantial evidence of a causal connection between his damages and the railroad's actions.

In reaching this conclusion, we are not unmindful of our prior decisions where we held that it was improper to give the lookout instruction where the evidence established that the train could not have stopped in time to avoid the collision. *Northland Ins. Co. v. Union Pacific R.R.*, 309 Ark. 287, 830 S.W.2d 850 (1992); *St. Louis Southwestern Ry. v. Evans*, 254 Ark. 762, 497 S.W.2d 692 (1973). These cases, however, are distinguishable from the case at hand in that the appellants in both *Northland* and *Evans* contested the court's decision to give a jury instruction on one particular theory of negligence. *Northland*, *supra*; *Evans*, *supra*. Although the railroad also objected to the lookout instruction in this case, it has failed to contest this ruling on appeal. Instead, the railroad has merely asked us to determine whether there was substantial evidence to support the jury's general verdict of negligence which, as previously mentioned, could have been based upon the jury's finding that the train was negligent in failing to sound audible warnings, in failing to keep a proper lookout, or both. In other words, we are asked only to determine if there was any showing of proximate cause, and not whether the plaintiff established proximate cause of a particular theory of negligence.

For these reasons, we find that Sharp presented substantial evidence that the railroad breached its standard of care, and

that this breach was the proximate cause of Sharp's injuries. Accordingly, we affirm the trial court's decision to submit the case to the jury for resolution.

II. The Sudden Emergency Instruction

For its next argument on appeal, the railroad asserts that the trial court erred when it gave the Sudden Emergency instruction which states:

> A person who is suddenly and unexpectedly confronted with danger to himself or others not caused by his own negligence is not required to use the same judgment that is required of him in calmer and more deliberate moments. He is required to use only the care that a reasonably careful person would use in the same situation.

AMI Civ. 3rd 614.

In *Wiles v. Webb*, 329 Ark. 108, 946 S.W.2d 685 (1997), we recently abolished the use of the Sudden Emergency instruction in all *future* cases because we found that the instruction was inherently confusing. The *Wiles* holding applies prospectively only, and thus is inapplicable to cases, such as this one, that were tried before the *Wiles* decision was handed down on June 16, 1997. In these "pre-*Wiles*" cases, we will apply the old rule that the Sudden Emergency instruction may not be given where there is any evidence that the party requesting the instruction was negligent in creating the emergency situation. *Thomson v. Littlefield*, 319 Ark. 648, 893 S.W.2d 788 (1995); *Druckenmiller v. Cluff*, 316 Ark. 517, 873 S.W.2d 526 (1994).

Sharp claims that this issue is not preserved for appeal because the railroad failed to make a proper objection to the instruction. It is well settled that no party may assign as error the giving or failure to give an instruction unless he objects thereto before or at the time the instruction is given, stating distinctly the matter to which he objects and the grounds of his objection. *Bridges v. State*, 327 Ark. 392, 938 S.W.2d 561 (1997); *Clowney v. Gill*, 326 Ark. 253, 929 S.W.2d 720 (1996). We find that the railroad complied with these requirements when it objected as follows:

SHARP: I have a 614 instruction on sudden emergency. It does appear that that was what occurred out there.

RAILROAD: Judge, the notes on 614 say one has to be free from negligence to be entitled to this instruction.

COURT: Just thinking on this — I don't know how the Judge can be put in the position of making that decision because that is a question of fact for the jury.

RAILROAD: Well the law as we will get to, and I think its 1804 is: A railroad grade crossing is a place of danger. And the witness himself testified that he knew there was a railroad crossing ahead, and he saw it when he turned the corner and also he had been across it four of five times that same day. He wasn't suddenly and unexpectedly confronted with the danger of a railroad crossing.

The railroad's initial objection was a verbatim recitation of the notes commenting on AMI 614. *See Williams v. Carr*, 263 Ark. 326, 565 S.W.2d 400 (1978). After the trial court expressed its understanding that only the jury can decide whether Sharp was free from negligence, the railroad enumerated evidence of Sharp's negligence, thereby apprising the trial court that the instruction should not be given because there was evidence that Sharp was negligent in creating the emergency situation. Only after considering the railroad's references to evidence of Sharp's negligence did the trial court overrule the objection. Hence, we find that the issue is properly preserved for appeal.

As to the merits, we agree with the railroad that the instruction should not have been given under the "pre-*Wiles*" rule because there was some evidence from which a jury could have concluded that Sharp was negligent in creating the emergency situation. For example, Sharp testified that he was aware of the crossing because he had passed over it several times that day. Additionally, Sharp admitted that he saw the train as it turned the corner to the intersection. Sharp also did not have a valid driver's license at the time of the accident. Finally, there was some evidence that Sharp may have been driving too fast for the wet road conditions.

Because there was some evidence that Sharp was negligent in causing the impending collision, we conclude that the

trial court erred when it gave the Sudden Emergency instruction. Accordingly, we reverse the trial court's ruling on this issue.

III. Closing Arguments

At the close of all evidence, the railroad moved for a directed verdict on the issue of whether it failed to sound audible warnings in a manner required by law. This is merely another theory of how the railroad was negligent in causing the collision. As we have previously ruled, there was sufficient evidence to support the jury's general verdict of negligence, and thus it is unnecessary for us to determine whether there was sufficient evidence of this particular theory of negligence. The railroad, however, raised this issue again during Sharp's closing argument.

At the conclusion of all evidence, the judge gave the jury the following instruction which is based upon Ark. Code Ann. § 23-12-410 (1987):

> A railroad is required to place on each locomotive a bell or whistle, and these shall be rung or whistled at a distance of at least a quarter mile from where the tracks cross any public street and shall be kept ringing or whistling until the locomotive has crossed the street.

AMI Civ. 3d § 1801. The judge also gave AMI Civ. 3d § 101 which informs the jury that opening statements, closing arguments, and statements made by the attorneys during the trial are not evidence.

During his closing argument, Sharp began to read AMI Civ. 3d § 1801 when the railroad objected stating that the statute does not say that each locomotive has to sound the warnings. At that point, Sharp had done nothing more than read the jury instruction, and thus we cannot say that he mischaracterized the law in any way. Sharp resumed his closing argument by reading the instruction again and then stating:

> It doesn't say they can pause one to three seconds in their whistling sequence. It says they shall be kept ringing and whistling. Mr. Spoon himself testified that he paused. Mr. Sain testified that there was pause in the blowing sequence. Mrs. Sain testified that there was pause in this blowing sequence. They

> were breaking the law coming down this track blowing that whistle like that. Mr. Spoon also testified that there were two engines on that train. He testified that only one had horns, whistles and bells working. They had one — at least one of the locomotives was out there without the proper equipment. They were breaking the law when they did that.

The railroad objected stating that Sharp had mischaracterized the law because the standard practice in the industry is to blow the whistle in a series of blasts, and that under federal law two engines together are defined as one locomotive. The railroad, however, did not ask for a mistrial or for a limiting instruction.

In *Jordan v. State*, 323 Ark. 628, 917 S.W.2d 164 (1996), we held that in order to preserve this issue for appeal, the attorney must ask for and be denied affirmative relief such as a mistrial or a limiting instruction. (citing *Littlepage v. State*, 314 Ark. 361, 863 S.W.2d 276 (1993)). In this case, the railroad did neither, nor did it ask the court to instruct the jury on the federal definition of locomotives or the method by which the train must sound its whistle. Hence, we find that the issue is not properly preserved for appeal.

For these reasons, we reverse and remand on the railroad's direct appeal.

Cross-Appeal

A. Failure to Place Adequate Warning Devices

On cross-appeal, Sharp argues that the trial court erred when it found that Sharp's claim that the railroad failed to place adequate warnings at the crossing was preempted by federal law. We find no error in the trial court's ruling, and accordingly we affirm the entry of summary judgment on this issue.

In 1970, Congress passed the Federal Railroad Safety Act which directed the Secretary of Transportation to study and develop solutions to safety problems created by railroad crossings. 45 U.S.C. §§ 421 to 447. Based on the Secretary's report and suggestions, Congress passed the Highway Safety Act of 1973. 23 U.S.C. § 130. This Act made federal funds available to states to

improve railroad crossings, in return for which the states were required to:

> conduct and systematically maintain a survey of all highways to identify those railroad crossings which may require separation, relocation, or protective devices, and establish and implement a schedule of projects for this purpose.

23 U.S.C. § 130(d). In 1975, the Federal Highway Administration (FHWA) promulgated regulations that determined the states's eligibility for the federal funds provided by the Highway Safety Act. Of particular importance to this case, is 23 C.F.R. § 646.214(b)(3) which states that automatic gates with flashing signals must be installed if one or more of certain listed conditions exist[3]. The regulation also provides that:

> For crossings where the requirements of § 646.214(b)(3) are not applicable, the type of warning device to be installed, whether the determination is made by a State regulatory agency, State highway agency, and/or the railroad, is subject to the approval of the FHWA.

23 C.F.R. § 646.214(b)(4).

Pursuant to the Highway Safety Act, the Arkansas State Highway and Transportation Department and Union Pacific's predecessor became involved in a state-wide project to upgrade railroad crossings throughout the state. The state plan included a determination that two crossbucks should be placed at all railroad crossings in the state, including the Louisiana Street crossing in Marianna. On January 4, 1980, the FHWA approved the state plan and subsequently entered into a contract to pay for 90% of

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[3] The conditions listed in 23 C.F.R. § 646.214(b)(3) include: 1) multiple main line railroad tracks; 2) multiple tracks at or in the vicinity of the crossing which may be occupied by a train or locomotive so as to obscure the movement of another train approaching the crossing; 3) high speed train operation combined with limited sight distance at either single or multiple crossings; 4) a combination of high speeds and moderately high volumes of highway and railroad traffic; 5) either a high volume of vehicular traffic, high number of train movements, substantial numbers of school buses or trucks carrying hazardous materials, unusually restricted sight distances, continuing accident occurrences, or any combination of these conditions; or 6) a diagnostic team recommends them.

the improvements. On March 3, 1981, the FHWA inspected and approved the completed improvements, and made final payment to the state on March 22, 1988.

The issue presented by this cross-appeal is whether federal funding of the improvements at the Louisiana crossing pursuant to the Highway Safety Act preempted Sharp's claim that the railroad was negligent in failing to install adequate warning devices. It is uncontested that according to 23 C.F.R. § 646.214(b) automatic gates and flashing lights are required only if one or more of the conditions listed in 646.214(b)(3) exist at a particular crossing. The ultimate issue in this case is what kind of federal participation triggers federal preemption under the Highway Safety Act.

Sharp argues that preemption occurs only when a diagnostic team has determined whether the 646.214(b)(3) conditions exist at a particular crossing. Because a diagnostic team did not evaluate the Louisiana Street crossing, Sharp contends that the federal government has not made a final determination in this respect, and thus it is proper to submit the issue to a jury for resolution.

In contrast, the railroad asserts that, by providing federal funds, FHWA determined that the State Highway Department's plan for the installation of crossbucks at the Louisiana Street crossing was adequate. Hence, the railroad argues that once federal funds have been spent to upgrade a railroad crossing, negligence claims such as Sharp's are preempted. We agree with the railroad's position, and accordingly we affirm the trial court's ruling.

The United State Supreme Court first addressed the preemptive effect of the Highway Safety Act and its regulations in *CSX Transportation Inc. v. Easterwood*, 507 U.S. 658 (1993). In *Easterwood*, the plaintiff claimed that the railroad was negligent in failing to place adequate warning devices at a railroad crossing where her husband was killed. *Id.* As in this case, the railroad argued that the claim was preempted by the federal act and supporting regulations. *Id.* The Supreme Court explained that negligence actions are preempted by the act because 23 C.F.R. §§ 646.214(b)(3) and (4) remove the railroad's decision-making authority to determine what type of warning devices are needed at a particular crossing. *Id.* The Court concluded that:

> for projects in which federal funds participate in the installation of warning devices, the Secretary has determined the devices to be installed and the means by which railroads are to participate in their selection. The Secretary's regulations therefore cover the subject matter of state law which, like the tort law on which respondent relies, seeks to impose an independent duty on a railroad to identify and/or repair dangerous crossings.

Id. Because federal funds were not expended to improve the railroad crossing in *Easterwood*, the Court found that the plaintiff's tort claim was not preempted.

After *Easterwood*, it was disputed whether preemption is triggered by the mere use of federal funds to improve a crossing or whether greater federal participation is required. In *Shots v. CSX Transportation, Inc.*, 38 F.3d 304 (7th Cir. 1994), the Seventh Circuit Court of Appeals refused to read *Easterwood* "literally," and held that the Secretary's mere funding of the installation of crossing devices did not necessarily imply federal approval of the state's determination of what warning devices were required at each crossing. *Id.* Instead, the Seventh Circuit suggested that preemption would occur only when there was greater federal participation such as the completion of an evaluation of the crossing in question by a diagnostic team.

The remaining federal circuit courts of appeal that have addressed this issue, have rejected the *Shots* holding, and have held that by providing funds the federal government has implicitly approved the states' improvement plans and their determinations of whether a particular crossing requires automatic gates and lights under 23 C.F.R. § 646.214(b)(3). *Armijo v. Atchison, Topeka, & Santa Fe Ry.*, 87 F.3d 1188 (10th Cir. 1996); *Michael v. Norfolk S. Ry.*, 74 F.3d 271 (11th Cir. 1996); *Hester v. CSX Transp., Inc.*, 61 F.3d 382 (5th Cir. 1995). As stated by the Fifth Circuit Court of Appeals in *Hester*, these courts find that:

> The fact that federal funds participated in the installation of the warning devices legally presupposes that the Secretary approved and authorized the expenditure, which in turn legally presupposes that the Secretary determined that the safety devices installed were adequate to their task.

Hester, supra.

Likewise, the Eighth Circuit Court of Appeals has consistently held that once warning devices paid for with federal funds are installed and operating, the railroad's common-law duty of care ceases, and it is entitled to the benefit of federal preemption. *Kiemele v. Soo Line R.R.*, 93 F.3d 472 (8th Cir. 1996); *Elrod v. Burlington Northern R.R.*, 68 F.3d 241 (8th Cir. 1995); *St. Louis Southwestern Ry. v. Malone Freight Lines, Inc.*, 39 F.3d 864 (8th Cir. 1994). *See also Dallari v. Southern Pac. R.R.*, 923 F. Supp. 1139 (E.D. Ark. 1996); *Cartwright v. Burlington N. R.R.*, 908 F. Supp. 662 (E.D. Ark. 1995).

In response, Sharp directs our attention to *Williams v. Burlington N. R.R.*, 849 F. Supp 682 (E.D. Ark. 1994), where the district court held that preemption does not occur unless federal funds are expended *and* a diagnostic team has determined what warning devices are adequate for the crossing in question. The *Williams* case, however, was decided before the Eighth Circuit first spoke on this issue in *Malone*, and thus we find it unpersuasive.

We agree with the Eighth Circuit that, "federal funding is the touchstone of preemption in this area because it indicates that the warning devices have been deemed adequate by federal regulators." *Elrod*; *supra*. We find that such a holding is consistent with Section 109 of the Highway Safety Act which declares that no funds shall be approved for expenditure by the FHWA unless "proper safety protective devices complying with safety standards determined by the Secretary at that time as being adequate shall be installed or be in operation at any highway and railroad crossing." 23 U.S.C. § 109(e). Moreover, 23 C.F.R. § 630.114(b) declares that the FHWA can authorize a project "only after applicable prerequisite requirements of Federal laws, and implementing regulations and directives have been satisfied."

Finally, we do not agree with Sharp's contention that the *Hester* and *Elrod* decisions are distinguishable because it was undisputed that the crossings did not contain the conditions listed in (b)(3). We find that such an analysis begs the question presented by this case. As we have previously explained, whether the conditions listed in (b)(3) exist at a particular crossing is for the FHWA,

not a jury, to decide. Once the FHWA has spoken on the issue by providing federal funds for a state improvement project, the determination of whether (b)(3) conditions exist has already been made, and it may not be revisited by the state courts.

For these reasons, we follow the Eighth Circuit's interpretation of *Easterwood* and hold that once warning devices paid for with federal funds are installed and operating, the railroad's common-law duty to determine what warning devices are adequate for a particular crossing ceases, and it is entitled to the benefit of federal preemption. In this case, the Arkansas State Highway Commission determined that in the interest of safety two crossbuck warning signs should be installed at every railroad crossing in Arkansas, including the Louisiana Street crossing in Marianna. When the FHWA paid for the installation of these crossbucks, it implicitly determined that such safety devices were adequate to their task pursuant to 23 C.F.R. §§ 109(e), 630.114(b), and 646.214(b). Accordingly, we affirm the trial court's ruling that Sharp's claim that the railroad failed to place adequate warning devices at the crossing is preempted by federal law.

The dissent argues that such a holding is contrary to public policy because federal preemption will "provide blanket immunity to the railroad when proof that conditions have changed over time was offered at trial." This argument, however, ignores the fact that the regulations promulgated by the FHWA have stripped the railroad of any decision-making authority to determine what type of warning devices are needed at a particular intersection, and placed such authority in the FHWA. *See Easterwood, supra.* As later acknowledged in the dissent, any failure to monitor the changing nature of an intersection thus must be attributable to a "break down" in the federal system.

Moreover, the dissent suggests that preemption is not absolute, and that at some undeterminable point preemption disappears and the railroad's authority to determine what type of warning devices are needed is mysteriously resurrected. We, however, do not agree that federal preemption can be a revolving door. Rather, we find that federal premption is absolute once fed-

eral funds have been expended to implement the installation of warning devices at a particular intersection.

B. Failure to Maintain Warning Devices

Finally, Sharp alleges that the trial court erred when it granted the railroad a directed verdict on his claim that the railroad was negligent in failing to maintain the crossbucks at the Louisiana Street crossing. Sharp is correct that the Highway Safety Act does not preempt claims that a railroad was negligent in failing to maintain warning devices at a crossing. *See, e.g., Michael v. Norfolk S. Ry.*, 74 F.3d 271 (11th Cir. 1996); *Kiemele v. Soo Line R.R.*, 93 F.3d 472 (8th Cir. 1996). As explained by the court in *Michael*, 23 C.F.R. § 646.214(b) "deals with the design and installation of new warning devices, not the maintenance of those devices." *Michael, supra.* Thus, while the Highway Safety Act preempts a claim that the railroad failed to install adequate warning devices, it does not preempt a claim that the railroad was negligent in failing to maintain the warning devices implicitly approved by the FHWA.

Moreover, we disagree with the dissent's assertion that there is "a very thin line" between these two types of claims. As previously explained, federal preemption strips the railroad of its decision-making authority as to what types of warning devices are needed at a particular intersection. Preemption, however, does not relieve the railroad of its separate and distinct duty to maintain the warning devices. We find the line between these two types of claims to be clear and distinct.

During oral argument, Sharp asserted that the trial court precluded him from presenting any evidence that the railroad was negligent in failing to maintain the crossbucks at the Louisiana Street crossing. The abstract, however, is devoid of any such ruling. Moreover, after the railroad moved for a directed verdict on this issue, Sharp proclaimed:

> It has been my assumption that [the claim that the railroad was negligent in failing to maintain the warning devices] was part of the preemption, your Honor, and that's the reason I didn't try to put on any proof.

We agree with Sharp's admission that he failed to present any proof that the railroad was negligent in this respect. Accordingly, we affirm the trial court's ruling.

For these reasons, we reverse and remand on the railroad's direct appeal, and affirm on Sharp's cross-appeal.

BROWN, J., concurring in part and dissenting in part.

ROBERT L. BROWN, Justice, concurring in part; dissenting in part. I agree with the majority opinion on direct appeal but dissent from the majority's conclusion on cross-appeal.

The issue on cross-appeal is whether federal funds used to pay for two crossbuck signs at a railroad crossing in Marianna in 1981 shields the railroad from all liability for what plaintiffs contend became an abnormally dangerous railroad crossing 12 years later. A subsidiary issue is whether this immunity exists for the railroad even when no survey of the crossing has been made by a diagnostic team during this 12-year period. I do not read the *dictum* in *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658 (1993), to provide blanket immunity to the railroad when proof that conditions have changed over time was offered at trial and when there has been no proof of monitoring by any government agency during the 12-year period. Otherwise, the federal government could pay for one crossbuck sign and protect the railroad from liability for decades. That defies common sense and is contrary to public policy.

The common law in Arkansas provides that where there is evidence to show that a railroad crossing is abnormally dangerous, that becomes a jury question. A jury must then decide whether the railroad breached its duty of ordinary care to give a warning reasonably sufficient to permit the traveling public to use the crossing with reasonable safety. *Northland Ins. Co. v. Union Pac. R.R. Co.*, 309 Ark. 287, 830 S.W.2d 850 (1992); *Missouri Pacific R.R. Co. v. Biddle*, 293 Ark. 142, 732 S.W.2d 473 (1987); A.M.I. CIVIL 3d 1805. In *Northland Ins. Co.*, we stated that AMI 1805, relating to the railroad's duty at abnormally dangerous crossings, should be given when there is proof tending to show the warning devices are inadequate.

The majority opinion hinges its conclusion on *CSX Transp. Inc. v. Easterwood, supra*, but, again, that case does not resolve the issue before this court. In *Easterwood*, the Court stated that when federal regulations relating to warning devices are applicable, state tort law is preempted. Those regulations read:

> (3)(i) *Adequate warning devices*, under § 646.214(b)(2) or on any project where Federal-aid funds participate in the installation of the devices are to include automatic gates with flashing light signals when one or more of the following conditions exist:
>
> (A) Multiple main line railroad tracks.
>
> (B) Multiple tracks at or in the vicinity of the crossing which may be occupied by a train or locomotive so as to obscure the movement of another train approaching the crossing.
>
> (C) High Speed train operation combined with limited sight distance at either single or multiple track crossings.
>
> (D) A combination of high speeds and moderately high volumes of highway and railroad traffic.
>
> (E) Either a high volume of vehicular traffic, high number of train movements, substantial numbers of schoolbuses or trucks carrying hazardous materials, unusually restricted sight distance, continuing accident occurrences, or any combination of these conditions.
>
> (F) A diagnostic team recommends them.
>
> (ii) In individual cases where a diagnostic team justifies that gates are not appropriate, FHWA may find that the above requirements are not applicable.
>
> (4) For crossings where the requirements of § 646.214(b)(3) are not applicable, the type of warning device to be installed, whether the determination is made by a State regulatory agency, State highway agency, and/or the railroad, is subject to the approval of FHWA.

23 CFR §§ 646.214(b)(3) and (4).

In *Easterwood*, the Court concluded that the regulations did not apply due to lack of federal participation in paying for the warning devices. Thus, preemption did not occur. The opinion, in addition, did not confront the critical issue in this case — does

preemption occur more than a decade later when there is proof that conditions have changed at the crossing and no diagnostic team has reevaluated the crossing? Without clear direction in *Easterwood* that preemption occurs even when proof is offered that compliance with federal regulations has not transpired, I am reluctant to convey blanket immunity on the railroad.

The other cases cited by the majority, while endorsing a principle of general preemption, also fail to come to grips with and discuss the precise issue raised in the case at hand. *See Kiemele v. Soo Line R.R.*, 93 F.3d 472 (8th Cir. 1996); *Aronijo v. Atchison, Topeka & Santa Fe Ry.*, 87 F.3d 1188 (10th Cir. 1996); *Michael v. Norfolk S. Ry.*, 74 F.3d 271 (11th Cir. 1996); *Elrod v. Burlington Northern R.R.*, 68 F.3d 241 (8th Cir. 1995); *Hester v. CSX Transp., Inc.*, 61 F.3d 382 (5th Cir. 1995); *St. Louis Southwestern Ry. v. Malone Freight Lines, Inc.*, 39 F.3d 864 (8th Cir. 1994); *Dallari v. S. Pac. R.R.*, 923 F. Supp. 1139 (E.D. Ark. 1996); *Cartwright v. Burlington N. R.R.*, 908 F. Supp. 662 (E.D. Ark. 1995). That issue is does preemption occur when the federal system has broken down and monitoring by diagnostic teams has failed to take place. To maintain the fiction under such circumstances that the initial federal funding of a crossbuck sign presupposes a finding by the Secretary of Transportation that the crossing is still safe seems particularly ludicrous.

Furthermore, in *Kiemele v. Soo Line R.R., supra*, the Eighth Circuit stated that there was a fact question relating to whether the crossbuck signs were "operating" or whether they had lost their reflectivity. If the crossbuck signs were not operating, the Eighth Circuit opined that the railroad was not entitled to federal preemption. It seems to me to be a very thin line indeed between failure of crossbuck signs to reflect properly and the inadequacy of passive crossbuck signs as a warning device altogether. Along the same line is the case of *Michael v. Norfolk S. Ry., supra*. There, the installed warning gate was arguably shorter than what federal regulations required. The Eleventh Circuit noted that this lapse, if proven, would void any claim for preemption. Both *Kiemele* and *Michael* stand for the proposition that federal preemption may not occur under the facts of individual cases.

Both the Seventh Circuit Court of Appeals and two decisions by the Federal District Court for the Eastern District of Arkansas have found that blanket federal preemption does not occur under *CSX Transp., Inc. v. Easterwood, supra. See Shots v. CSX Transp., Inc.*, 38 F.3d 304 (7th Cir. 1994); *Birmingham v. Union Pacific R.R. Co.*, No. PB-C-96-573 (E.D. Ark. June 18, 1997); *Williams v. Burlington Northern R.R. Co.*, 849 F. Supp. 682 (E.D. Ark. 1994). In *Shots*, the fiction that the Secretary of Transportation approved the warning devices at the crossing at issue is taken to task. Regulations b(3) and (4), according to the Seventh Circuit, merely set out criteria and not what was required at the particular crossing at issue. The two district court opinions (*Williams* and *Birmingham*) emphasize that there was inadequate proof that a diagnostic team had evaluated the pertinent crossings. This lapse in evaluation of the crossings raised a material issue of fact regarding whether preemption ever occurred which precluded summary judgment in both instances.

In the instant case, the Sharps presented proof of noncompliance with federal regulations which should at the very least raise a fact issue regarding the application of preemption of state common law and immunity for the railroad. That proof included not only the fact that one crossbuck sign on Sharp's side of the tracks was inadequate but also proof of the following b(3) conditions that would require a gate and flashing lights:

- multiple tracks
- high volume of vehicular traffic
- number of school buses
- no diagnostic team evaluation.

There was also proof that multiple accidents had occurred at this precise crossing. Surely, this proof of inadequacy was sufficient to thwart summary judgment.

There is, finally, the point that with such full-blown immunity, there is no incentive for Union Pacific to measure safety at railroad crossings. The majority opinion concludes that federal preemption is absolute even when federal safety regulations are not followed and that the railroads of this land have been "stripped" of

all decision-making authority concerning safety at railroad crossings. I cannot go that far because federal regulations and *CSX Transportation, Inc. v. Easterwood, supra*, do not contemplate that the railroad is out of the picture altogether or immune from liability when the federal system fails to operate. The Court made that clear in *Easterwood*:

> Indeed, §§ 646.214(b)(3) and (4) effectively set the terms under which railroads are to participate in the improvement of crossings. The former section envisions railroad involvement in the selection of warning devices through their participation in diagnostic teams which may recommend the use or nonuse of crossing gates. §§ 646-214(b)(3)(i)(F) and (3)(ii). Likewise, § 646.214(b)(4), which covers federally funded installations at crossings that do not feature multiple tracks, heavy traffic, or the like, explicitly notes that railroad participation in the initial determination of "the type of warning device to be installed" at particular crossings is subject to the Secretary's approval.
>
> . . . .
>
> The Secretary's regulations therefore cover the subject matter of the state law which, like the tort law on which respondent relies, seeks to impose an independent duty on a railroad to identify and/or repair dangerous crossings.

Easterwood, 507 U.S. at 670-71.

What is contended in the instant case is that the diagnostic team, with railroad participation, has failed to evaluate a dangerous crossing in Marianna, and proof was provided to support that contention. Far from my advocating a "revolving door" on preemption, when the federal apparatus has broken down, preemption simply does not occur. Otherwise, the public is protected neither by federal law nor common law tort. It is beyond dispute that the intention of the Secretary of Transportation in adopting the regulations was not to leave the traveling public vulnerable and without any mechanism to assure safety.

I respectfully dissent from the affirmance of summary judgment on cross-appeal.

David HUNTER *v.* STATE of Arkansas

CR 97-529 952 S.W.2d 145

Supreme Court of Arkansas
Opinion delivered October 9, 1997

Hatfield & Lassiter, by: *Jack T. Lassiter* and *Karen D. Miller*, for appellant.

Winston Bryant, Att'y Gen., by: *Kelly Terry*, Asst. Att'y Gen., for appellee.

RAY THORNTON, Justice. Appellant David Hunter appeals his convictions for the sale of unregistered securities, securities fraud, and theft of property, for which he has been sentenced to a total of forty-six years' imprisonment. On appeal, he contends: (1) that the trial court erred in denying his motion for a directed verdict because of insufficient evidence to sustain the charge of selling unregistered securities; (2) that it erred in denying his

motion for a directed verdict on the basis of the statute of limitations on the charge of securities fraud; and (3) that denial of these two motions violated his right to due process of law on the charge of theft of property. We find no merit in these arguments and affirm.

Appellant claimed that he invented or owned the rights to an invention of a patented device to prevent jackknifing of tractor-trailer trucks. The device was invented by O'Neal Sanders, who was granted a patent on October 17, 1978. Appellant met Mr. Sanders and persuaded him to install a working model of the invention on his horse trailer and truck. On October 21, 1980, a purported agreement was executed transferring Mr. Sanders's rights in the invention to appellant. The evidence compels the conclusion that Mr. Sanders did not sign this purported agreement that was eventually filed with the Patent and Trademark Office on August 13, 1987.

Appellant incorporated Drivers Ace, Inc., in November 1987. Prospective investors in Drivers Ace, Inc., were informed that the corporation held the patent rights to manufacture the device. Appellant continued to promote the invention, sometimes claiming that he was the inventor. On December 3, 1992, Drivers Ace entered into an agreement with Marvin Engineering Co., Inc., of Inglewood, California, granting Marvin the exclusive license to manufacture the device worldwide.

Peter Brocklesby witnessed this agreement on December 3. On January 21, 1993, Mr. Brocklesby and another investor, Norbert von Boode, transferred $250,000 to the Drivers Ace, Inc., account in the First National Bank of Sharp County. This sum was to pay for 125 shares of stock in Drivers Ace at $2,000 per share, and the stock was issued February 3, 1993. Before the certificate was issued and on the same day that the sum of $250,000 was deposited in the Drivers Ace account, appellant wired $180,000 from the Drivers Ace account to his personal account in the First Ozark National Bank in Flippin, Arkansas.

Appellant argues that this transaction cannot be the basis for prosecution for securities fraud and for theft, that the charge of securities fraud is barred by the statute of limitations, and that the

State did not prove the required elements of the crime of selling unregistered or nonexempt securities. We turn to our analysis of each of these arguments.

Appellant's first two points for reversal involve his motions for directed verdicts, which we treat as challenges to the sufficiency of the evidence. *Williams v. State*, 329 Ark. 8, 946 S.W.2d 678 (1997). We consider challenges to the sufficiency of the evidence before we address other allegations of trial error. *Harris v. State*, 284 Ark. 247, 681 S.W.2d 334 (1984). The test for determining the sufficiency of the evidence is whether there is substantial evidence to support the verdict. *Id.* Evidence is substantial if it is forceful enough to compel a conclusion one way or the other beyond speculation and conjecture. *Id.* We review the evidence in the light most favorable to the party opposing the motion and consider only the evidence that supports the verdict. *Id.*

At trial, appellant's counsel made motions for directed verdicts on two charges, the sale of unregistered securities and securities fraud. Appellant moved for directed verdicts after the State's case-in-chief and properly renewed his motions, which the trial court denied. We examine each motion separately below.

Sale of Unregistered Nonexempt Securities:

With respect to the charge of selling unregistered nonexempt securities, appellant argues that the State failed to meet its burden of proof with respect to the charge. This argument lacks merit.

The statute delineating the offense provides as follows:

> It is unlawful for any person to offer or sell any security in this state unless:
>
> (1) It is registered under this chapter; or
>
> (2) The security or transaction is exempted under § § 23-42-503 or 23-42-504.

Ark. Code Ann. § 23-42-501 (Repl. 1994). As appellant correctly states, the burden of proof is on the State to show that a sale of, or an offer to sell, an unregistered security took place. However, once the State has met that burden, the burden shifts to the

seller to show that the security was either exempt from registration or was registered. *Schultz v. Rector-Phillips-Morse, Inc.*, 261 Ark. 769, 552 S.W.2d 4 (1977); *McMullan v. Molnaird*, 24 Ark. App. 126, 749 S.W.2d 352 (1988).

Under Ark. Code Ann. § 23-42-504 (Supp. 1995), certain transactions are exempt from § § 23-42-501 and 23-42-502. Specifically, under subsection (a)(9)(A), stock offers to twenty-five people or less are exempted. However, Ark. Code Ann. § 23-42-506 (Repl. 1994) provides: "In any proceding under this chapter, the burden of proving an exemption or exception from an exemption is upon the person claiming it." The statute requires that a proof of exemption be filed with the commissioner to prove that the transaction was exempt. Ark. Code Ann. § 23-42-503(d)(1) (Supp. 1995). Appellant made no such showing at trial.

The State clearly proved that the sale of 125 shares of Drivers Ace stock to Mr. Brocklesby and Mr. von Boode, which was dated February 3, 1993, was a sale of securities. The State proved that the stock was not registered. The burden under Arkansas law then shifted to appellant to prove that the securities were exempt from registration. Appellant failed to meet this burden. There was sufficient evidence to sustain a conviction, and we affirm the trial court's decision on this point.

Fraud in Connection with Offer, Sale, or Purchase of Securities:

For his second point of appeal, appellant urges error in denying his motion for directed verdict based on the securities-fraud charge. In trial, counsel stated the following:

> Mr. Adams: Comes now the defendant, Mr. Hunter, and moves that the Court direct a verdict of acquittal on the charges as follows: On the charge of securities fraud, the allegations set forth in the Information and the allegation of the State was that there was the use of a forged document to defraud persons to purchase shares of stock in Drivers Ace. That document is dated more than five years before the filing of this Information. There has been no testimony that the document was shown to anybody within five years of the filing of this Information. In fact, the only person who made any reference to it in his testimony said that his last contact with David Hunter was prior to the year

> 1990. The Statute of Limitations has clearly run on that allegation and should be dismissed.

The State countered at trial with the argument that the act used for purposes of tolling the statute may be the last act in a chain of conduct, and that the act in this case began with showing Mr. Brocklesby and Mr. Parker the license and ended with the sale to Messrs. Brocklesby and von Boode in 1993. The State contended that the last act in the chain occurred in 1993 and that this act tolled the statute.

On appeal, appellant attempts to argue that the State failed to produce sufficient evidence that "the defendant made a statement that [he] and Drivers Ace, Inc., had an agreement with the owner of a patent on an anti-jackknifing device for large tractor trailer rigs permitting Drivers Ace, Inc., to manufacture and market the device and that the statement was not true."

Our law is well established that in order to preserve the challenge for our review, the movant must apprise the trial court of the specific basis on which the motion is made. *Stewart v. State*, 320 Ark. 75, 894 S.W.2d 930 (1995). Parties may not change their argument on appeal and are limited to the scope and nature of their arguments made below. *Id.* Proof of the specific element of the alleged crime must be identified in the motion for directed verdict in order to preserve the argument for appeal. *Miller v. State*, 328 Ark. 121, 942 S.W.2d 825 (1997).

As the trial language quoted above illustrates, the only portion of appellant's argument on this point that is preserved for our review is the argument that the State failed to show that the fraud occurred within the preceding five-year period, as required under the statute of limitations. His argument regarding the sufficiency of the evidence was not made before the trial court and is therefore not preserved for our review.

The issue is whether the act alleged in violation of Ark. Code Ann. § 23-42-507 (Repl. 1994), was beyond the statute of limitations found in Ark. Code Ann. § 23-42-105 (Repl. 1994). The statute of limitations for this felony offense is five years, and it "does not begin to run until after the commission of the last overt

act in the furtherance of a scheme or course of conduct." Ark. Code Ann. § 23-42-105(a).

Arkansas Code Annotated § 23-42-507 provides as follows:

> It is unlawful for any person, in connection with the offer, sale, or purchase of any security, directly or indirectly:
>
> (1) To employ any device, scheme, or artifice to defraud;
>
> (2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; or
>
> (3) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

The affidavit for warrant of arrest for appellant alleges that appellant's violation of the statute involved a breach of subsection (2), making an untrue statement of material fact in connection with the offer, sale, or purchase of any security. The warrant stated that appellant made such a statement many times in connection with the sales and offers of stock in Drivers Ace, Inc. The affidavit claimed that the untrue statement was that appellant and Drivers Ace had an agreement with the inventor to manufacture and market the anti-jackknifing device. The fraud that appellant allegedly perpetrated was telling potential investors that the company had a license to use another's patent to manufacture a device that would constitute the sole business of the company.

The evidence clearly shows that appellant's acts in selling security in a company that makes and manufactures an invention that he claimed to have the right to manufacture and sell constituted fraud or deceit upon many persons within the five-year period preceding January 29, 1996. The abstract and record are replete with examples of appellant's false statements or misrepresentations connected with the ongoing sale of this stock that culminated in the February 1993 exchange.

Reading the statute and viewing the evidence in the light most favorable to the State, we conclude that the evidence of appellant's actions in offering stock in a company that he founded

on a fraudulent premise constituted the last overt act in the furtherance of a scheme or course of conduct as required under statute. The course of conduct culminated in the sale of the stock on February 3, 1993, and commenced the running of the five-year statute of limitations. We affirm the trial court's decision on this point.

Theft of Property:

As his last point of appeal, appellant argues that consideration of the charge of theft of property along with the two securities charges, which he argues should have been dismissed on his motions for directed verdicts, constituted a denial of his due process rights. Before the trial court, appellant argued that the State could not use the 1993 stock sale for both the purpose of tolling the statute of limitations for violations of § 23-42-507 and as a basis for liability under § 5-36-103 (Supp. 1995), the theft of property charge.

On appeal, appellant asserts merely that submitting these two securities charges to the jury with the theft charge denied him a fair trial in violation of his due process rights. Appellant clearly did not raise this issue before the trial court, and he cannot raise it for the first time on appeal. Arguments, even constitutional ones, that are not raised before the trial court are barred on appeal. *Dulaney v. State*, 327 Ark. 30, 937 S.W.2d 162 (1997).

Affirmed.

Larry Don LOVELL, Sr., and Lynn A. Lovell, et al. *v.* Gerald BROCK, Tim Thomas, and Alfred Lee Brock

96-1374 952 S.W.2d 161

Supreme Court of Arkansas
Opinion delivered October 9, 1997

[redacted]

Compton, Prewett, Thomas & Hickey, P.A., by: *Floyd M. Thomas, Jr.*, , for appellant.

Barrett & Deacon, by: *David W. Calhoon* and *D.P. Marshall, Jr.*, for appellees'.

RAY THORNTON, Justice. On November 29, 1986, Larry Don Lovell, Jr., died as a result of a gunshot wound sustained while deer hunting. His parents, appellants, brought this action against Herbert Bartlett and a number of other individuals engaged in deer hunting in the area, contending that although Mr. Bartlett fired the shot that killed their son, vicarious liability should be imputed to other hunters who were staying at the Bartlett house. Appellants took a voluntary nonsuit against all the other hunters except for appellees, Gerald Brock, Tim Thomas, and Alfred Lee Brock.

The trial court found that Mr. Bartlett was solely responsible for the accident that caused Larry Jr.'s death, and entered a substantial judgment in favor of appellants against Mr. Bartlett. No appeal was taken from this judgment. In the trial court's order holding Mr. Bartlett solely responsible, the court found that there was no basis to impose vicarious liability on appellees and granted their motions for summary judgment. In their argument for reversal, appellants contend that appellees were members of an "association" or "club," imposing vicarious liability on appellees, or alternatively that they were involved in a joint venture or enterprise and should be held liable for Larry Jr.'s death. We have determined that the trial court's finding was not erroneous and affirm.

Several groups of hunters were seeking to kill deer on land owned by the Georgia Pacific company in Drew County on Thanksgiving weekend in 1986. The land was open to the public, and no hunting group had leased the land, or organized a club or association with officers and bylaws. Several persons from Marked Tree, including Larry Don Lovell, Sr., and his son were camped on Tommy Brashears' property near Ladelle. Nearby, ten or twelve other people from Marked Tree were camped.

In the same area, Mr. Bartlett owned a cabin and allowed several persons to use the cabin during deer season. These hunters paid Mr. Bartlett $100.00 per season to stay at the cabin. They did not meet and adopt any rules, did not own any property together, and did not lease any hunting rights. Among those who sometimes stayed at the cabin were appellees, Gerald Brock, Alfred Brock, and Tim Thomas, although Gerald Brock was not in Drew County on the day of the tragic accident.

On the day of the accident, a local hunter, Monroe Cottington, and his brother-in-law, Royce Wesson, were also nearby in the woods hunting deer. Although the season for using dogs was over, Mr. Cottington was running his dogs, and he gave an unsworn statement that Alfred Brock had asked him to do so. Under oath, Mr. Brock denied making that request. Tim Thomas had killed a deer by himself that morning, and he kept it for his own use. Hunters from at least three camps were in the area where Larry Jr. was fatally wounded.

The young victim, properly outfitted in an orange coat and cap, had been left at a pine top beside the road, while his father and another hunter looked for other stands. Mr. Brock was more than three-quarters of a mile away. Mr. Bartlett was driving along the road near the boy and had picked up Mr. Thomas, who was walking through the woods. Hearing dogs, Mr. Bartlett stopped the truck, and both he and Mr. Thomas loaded their guns as they were getting out of the truck. Almost immediately, a deer appeared on the left side of the road seventy or eighty yards ahead. Larry Jr.'s pine top was on the right side of the road about halfway between Mr. Bartlett and the deer. Larry Jr. fired at the deer, and almost simultaneously, Mr. Bartlett fired his rifle. The projectile

from Mr. Bartlett's rifle struck Larry Jr. in the back and emerged from his abdomen. He died that evening during surgery in Pine Bluff. Mr. Thomas did not fire his shotgun and did not see Larry Jr. in time to warn Mr. Bartlett. However, the young man was in plain view.

The trial court found "that the proximate cause of this terrible accident was the negligence of the Defendant, Herbert Bartlett, only, and that the negligence of Herbert Bartlett is not imputed to the Defendants, Gerald Brock, Alfred Lee Brock, or Tim Thomas, or either of them." The trial court also found "[t]hat there is no genuine issue as to any material fact that gives rise to joint or vicarious liability as to the Defendants, Gerald Brock, Alfred Lee Brock, or Tim Thomas, and the Defendants are entitled to a Judgment as a matter of law." Based on these findings, the trial court granted summary judgment to appellees.

This appeal raises a single point for reversal. Appellants argue that the court erred in granting summary judgment because appellees were vicariously liable either due to their involvement in a joint enterprise or because they were members of an "association" or "club."

Summary judgment should only be granted where there exists no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Porter v. Harshfield*, 329 Ark. 130, 948 S.W.2d 83 (1997) (citing Ark. R. Civ. P. 56). The evidence is viewed in the light most favorable to the party opposing the judgment, and we resolve all inferences and doubts against the moving party. *Id.* If the party moving for summary judgment makes a prima facie showing that no issues of fact exist, and the nonmoving party fails to present proof that such issues do exist, then we must affirm the trial court's grant of a summary judgment. *Id.* Our review of an order granting summary judgment is limited to the pleading, affidavits, and other supporting documents that the parties file in support of their arguments. *Id.* These well established principles guide our analysis of the issues in this case.

Joint Enterprise or Venture:

First, we address appellants' argument that the trial court erred in granting summary judgment to appellees because a joint enterprise existed, imposing vicarious liability upon appellees. To find that a joint enterprise existed, Arkansas law requires only a showing of: (1) a common object and purpose of the undertaking; and (2) an equal right to direct and govern the movements and conduct of each other in respect to the common object and purpose of the undertaking. *RLI Insurance Co. v. Coe*, 306 Ark. 337, 813 S.W.2d 783 (1991). We have stated that the doctrine of joint enterprise is a very complex doctrine and have noted that it has generally "fallen into disrepute." *Neal v. J.B. Hunt Transp., Inc.*, 305 Ark. 97, 101, 805 S.W.2d 643, 645 (1991) (citing W. Page Keeton, *et al.*, PROSSER AND KEETON ON THE LAW OF TORTS, § 72, at 521 (5th ed. 1984)). In *Neal*, we said that "[w]hile we are not enamored of the joint enterprise doctrine, it is a part of the common law of this State." *Id.* at 101, 805 S.W.2d at 645. We determined that the proper query for joint enterprise is whether there is enough evidence to show "an equal right to direct and govern the movements and conduct of each other in respect to the common object and purpose of the undertaking." *Id.* at 101, 805 S.W.2d at 645.

Appellants argue that appellees formed a joint enterprise by engaging in the one hunt that resulted in Larry Jr.'s death. The evidence shows that the group lodging in Mr. Bartlett's house may have had a common object and purpose in renting space in the house while hunting deer. However, there is no evidence to prove that any of the hunters had an equal right to direct and govern the movements and conduct of the group, or each other, with respect to the common object and purpose of the undertaking.

Because the essential elements for a joint enterprise have not been proven, we conclude that the trial court did not err in finding that Mr. Bartlett and the other hunters were not involved in a joint enterprise.

Associations and Clubs:

Appellants also argue that the trial court erred in finding no legal basis for the vicarious liability of the hunters because they

were members of a hunting club or association. The necessary predicate for reaching the question whether there is a legal basis for the application of vicarious liability to members of an association is a determination that an association or club was formed at all under the circumstances of this case.

[redacted] We have defined an "association" as "a body of persons acting together, without a charter, but upon the methods and forms used by corporations, for the prosecution of some common enterprise." *Weaver v. First Nat'l Bank of Memphis, Trustee*, 216 Ark. 199, 207, 224 S.W.2d 813, 817 (1949). At issue in *Weaver* was whether the Menasha Outing Club, an unincorporated association formed as a hunting and fishing recreational club, was authorized to sell property belonging to its members without the appellant's consent. It was uncontested that some sort of organization had been formed, and the Club operated under its own bylaws. *Id.* The court determined that it was appropriate to look to the Club's bylaws and supporting documents because such evidence "was competent to prove anything that the parties said or did in the formation of the association in order to determine what the nature of the association was . . . ." *Id.* at 207, 224 S.W.2d at 817 (quoting *Harris v. Ashdown Potato Curing Ass'n*, 171 Ark. 399, 284 S.W. 755 (1926)). We noted that the Club was organized for the pleasure of its members rather than for profit, with no attempt to incorporate. *Id.*

While the issue in *Weaver* is different, the language on associations is instructive. Here, there were no such bylaws or efforts to incorporate or create any formal organization. The group staying at Mr. Bartlett's house had no membership requirements or elected officers. It was shown that Mr. Bartlett was the sole party with authority over the operation of the camp. The property was owned by Mr. Bartlett, and the hunters abided by his terms without any written or other formalized agreement. The other hunters possessed no ownership rights in the property. Each one was paying $100 a season for the privilege of sleeping and eating at the house, although no joint or communal arrangements had been made. There was no promise of future years' hunts at a fixed amount, and no promise of a particular place in which to hunt. The hunters understood that Mr. Bartlett did not tolerate

drinking alcoholic beverages on the property, although again this was not a formal rule. Unlike the language quoted above on the definition of an association, the hunters did not appear to act upon the methods or forms used by corporations, or upon any formalized methods or forms at all. Neither did they have any apparent right of control or voting rights. Therefore, unlike *Weaver*, there was no showing of an intent, express or implied, to create a club or association.

In our decision in *Harris v. Ashdown Potato Curing Ass'n, supra,* we stated that "the mere purchase of space in the curing-house by one who was not otherwise interested in the business would not constitute a membership in the association . . . ." *Harris*, 171 Ark. at 411, 284 S.W. at 760. *Harris* is analogous to the case before the court because the depositions and statements indicate that the hunters thought that they were basically purchasing the right to occupy and eat in Mr. Bartlett's house. There is no indication that they thought they were purchasing a membership in an association that would entitle them to have future rights or interests in the property. There is evidence that the hunters shared meals and that they followed the practice of dividing the kill with the owner of the dogs, as well as sometimes sharing their kill with other hunters. There was no genuine issue of material fact contrary to the showing that these practices were based upon the decisions of each individual hunter.

Both appellants and appellees agree that this court has not imposed vicarious liability on members of an unincorporated association for the negligence of one member of the group solely on the basis of membership in the group. Appellants cite us to two cases that arose out of federal court in support of their argument that Arkansas law favors holding members of an association or club vicariously liable for the tortious conduct of its members. In *United Mine Workers v. Coronado Co.*, 259 U.S. 344 (1922), the Supreme Court determined that the individual members of a local labor union could be held liable for damages resulting from the violent acts of a few of the members. The union operated under a constitution; and it had an express joint purpose, elected representatives, and an organization of principal officers. *Id.* The Court stated that associations cannot be sued in the organization's

name, but liability may be had against each individual member. *Id.* The Court then carved out a special category of such organizations in the labor field and concluded that such organizations may be sued in federal court for their tortious acts; however, this decision rests upon the existence of an association. *Id.*

Next, appellants cite us to *Ketcher v. Sheet Metal Workers' Int'l Ass'n*, 115 F.Supp. 802 (E.D. Ark. 1953). This case also involved an unincorporated international labor union. The *Ketcher* court restated the principle that an unincorporated association may be liable for the tortious acts of its agents, although the association cannot be sued as an entity. *Id.* These are recognized principles of law and would be applicable to the case at bar only if we determine that an association existed with respect to these hunters.

Unlike *United Mine Workers* and *Ketcher*, this case does not involve an associated or incorporated group. Rather, in this case, the members had only the rights to occupy Mr. Bartlett's house and take meals there. They had no written "constitution" or agreement, and the only commonality of purpose was to eat and sleep in a place near hunting woods. Unlike *United Mine Workers* and *Ketcher*, the evidence in this case gives us no indication that a club or association, incorporated or unincorporated, was formed.

Viewing the evidence in the light most favorable to the party opposing the motion, we conclude that there is no genuine question of material fact as to the nonexistence of an association or club. The evidence shows that such an entity was neither intended nor created. We affirm the trial court's finding that appellees were not vicariously liable for the tortious act of Mr. Bartlett on this basis.

Even if an issue of material fact remained as to the formation of an association or the existence of a joint enterprise, it would still not be necessary to return this matter for a jury determination of that question. This court has most frequently applied the principles of vicarious liability in the context where it has found a master-servant or agency relationship, *see St. Joseph's Regional Health Ctr. v. Munos*, 326 Ark. 605, 934 S.W.2d 192 (1996); or in automobile cases, *see Reed v. McGibboney*, 243 Ark. 789, 422 S.W.2d 115 (1967) (holding that there was sufficient evidence "of

community of interest and of an equal right to share in the control and operation of the vehicle to warrant the submission to the jury of [the defendant's] vicarious liability upon either the theory of joint enterprise, or the theory of agency, or both").

Prosser states that the basis of a finding of imputed vicarious liability is still negligence, although the law has effectively broadened the action by imposing the negligence on an innocent defendant. PROSSER AND KEETON ON THE LAW OF TORTS, *supra* § 69, at 499. To prove a cause of action based on negligence, the plaintiff must not only prove both that he sustained damages and that the defendant was negligent, but also that the defendant's negligence was the proximate cause of the damages. *Ouachita Wilderness Inst. v. Mergen*, 329 Ark. 405, 947 S.W.2d 780 (1997).

In *Craig v. Traylor*, 323 Ark. 363, 915 S.W.2d 257 (1996), the court stated that proximate cause must be determined before fault may be assessed and that proximate cause is typically a question for the jury. *Id.*; *see also Ouachita Wilderness Inst.*, 329 Ark. at 414, 947 S.W.2d at 785. The only time that proximate cause may become a question of law is when "reasonable minds could not differ." *Id.* at 370, 915 S.W.2d at 260. The court defined "proximate cause" as "that which in a natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred." *Id.* at 370, 915 S.W.2d at 260 (quoting *Williams v. Mozark Fire Extinguisher Co.*, 318 Ark. 792, 888 S.W.2d 303 (1994)).

The Supreme Court of Alabama has considered this issue in *Hall v. Booth*, 423 So.2d 184 (Ala. 1982). In *Hall*, the only issue on appeal was whether the members of an unincorporated association were vicariously liable for the negligent shooting of a thirteen-year-old boy during a deer hunt. *Id.* at 185. The trial court had granted summary judgment with respect to all members of the club, except the member who accidentally shot and killed the boy. *Id.* The court determined that while the acts of the other hunters who were conducting the hunt may have been negligent, the appellant had the burden of proving that the appellees' negligence was the proximate, or direct and immediate, cause of the

injury. *Id.* The court concluded that it would not extend the liability of the member who fired the fatal shot to the other members because the appellant had failed to meet his burden of proving the element of proximate causation, and it affirmed the summary judgment. *Id.*

In this case, the trial court found that the proximate cause of the accident was the negligence of Mr. Bartlett *only*, and that his negligence was not imputed to appellees. Viewing the facts in the light most favorable to appellants, even if appellees negligently participated in the illegal act of running dogs to harvest a deer, Mr. Bartlett's negligent act was the immediate and direct cause of Larry Jr.'s death. The trial court correctly found that Mr. Bartlett's act was the proximate cause because it broke any causal chain that would be necessary to broaden his liability to appellees.

We conclude that there is no genuine issue of material fact and that the trial court did not err in finding that the liability of Herbert Bartlett did not extend to appellees.

Affirmed.

Senaca Maurice BOGAN *v.* STATE of Arkansas

CR 97-842 951 S.W.2d 314

Supreme Court of Arkansas
Opinion delivered October 9, 1997

Jame P. Massie, for appellant.

No response.

PER CURIAM. Senaca Maurice Bogan, by his attorney, has filed a motion for reconsideration and affidavit in compliance with this court's *Per Curiam* order dated September 11, 1997.

In the motion for reconsideration, Bogan's attorney, James P. Massie, accepts full responsibility for failing to timely file the record.

We find that such an error, admittedly made by the attorney for a criminal defendant, is good cause to grant the motion. *See In Re: Belated Appeals in Criminal Cases*, 265 Ark. 964 (1979) (per curiam).

The motion is, therefore, granted. A copy of this opinion will be forwarded to the Committee on Professional conduct.

Larry Darnell INGRAM *v.* STATE of Arkansas

CR 97-1114 951 S.W.2d 314

Supreme Court of Arkansas
Opinion delivered October 9, 1997

D. Kirk Joyce, for appellant.

No response.

PER CURIAM. The appellant, Larry Darnell Ingram, has filed a motion for belated appeal. His attorney, D. Kirk Joyce, a deputy public defender, states that appellant's case has been delayed due to recent turnover of attorneys at the Washington County Public Defender's Office. He explains further that he was assigned appellant's case after Kent McLemore, another deputy, resigned from the office. According to Mr. Joyce, while the notice of appeal and designation of record was timely filed in appellant's case, the court reporter did not receive notice to begin transcribing the record. No extensions were sought, and the deadline for filing the record was August 21, 1997. The record was tendered for filing on September 11, 1997.

Because counsel does not admit fault for failing to file the record in a timely manner, we must deny the motion. If the attorney will concede by affidavit that it was his fault that the record was not timely filed, or if other good cause is shown, then the motion will be treated as one for rule on the clerk and will be granted. *Harkness v. State*, 264 Ark. 561, 572 S.W.2d 835 (1978). The attorney is given thirty days from issuance of this per curiam order to respond.

Motion denied.

Robin K. SCHLESIER *v.* STATE of Arkansas

CR 97-399 953 S.W.2d 575

Supreme Court of Arkansas
Opinion delivered October 9, 1997

Wayne A. Gruber, for appellant.

No response.

PER CURIAM. Appellant Robin K. Schlesier, by his attorney, Wayne A. Gruber, has filed a motion for remand to the trial court.

On May 27, 1997, appellant filed a Petition for Writ of Certiorari to complete the record. By *Per Curiam* Order dated June 16, 1997, appellant's Petition for Writ of Certiorari was granted. The Writ of Certiorari was issued to the Monroe County Circuit Clerk and to the Court Reporter, Nila J. Keels, returnable on July 16, 1997.

On July 16, 1997, appellant filed a motion for extension of time and for further instruction. By *Per Curiam* Order dated September 11, 1997, appellant's motion for extension of time to file the record of testimony was granted and Nila J. Keels, court reporter, was cited to appear before this court on September 25, 1997, to show cause why she should not be held in contempt of

this court for her failure to comply in a timely manner with the command of the Writ of Certiorari issued on June 16, 1997.

Nila J. Keels appeared on September 25, 1997, entered a plea of not guilty, and requested a hearing. By *Per Curiam* Order dated October 9, 1997, this court appointed the Honorable Steele Hays as a master to conduct a hearing, make his findings of fact, and file them with the court. A decision regarding whether Nila J. Keels should be held in contempt will not be made by this court until the master files his findings of fact with the court.

As a result of appellant's inability to obtain a record of testimony from the court reporter, appellant seeks to remand this matter to the Monroe County Circuit Court to allow counsel to prepare a statement of the evidence or proceedings and to allow the trial court to settle the record, pursuant to Ark. R. App. P.—Crim. 4 and Ark. R. App. P.—Civ. 6(d) & (e). In support of his motion, appellant submits the unsworn affidavit of Nila J. Keels, in which she avers that the record of testimony in appellant's case on appeal has been lost since December, 1996, and that she has been unable to locate the record as of the date of the affidavit, March 21, 1997.

We find that the court reporter's inability to submit the record of testimony is good cause to grant Appellant's motion for remand to the trial court, pursuant to Ark. R. App. P.—Crim. 4 and Ark. R. App. P.—Civ. 6(d) & (e).

The motion is, therefore, granted.

Robin K. SCHLESIER *v.* STATE of Arkansas

CR 97-399 951 S.W.2d 563

Supreme Court of Arkansas
Opinion delivered October 9, 1997

PER CURIAM. On September 11, 1997, we issued an order for Nila J. Keels, court reporter, to appear before this court at 9:00 a.m., Thursday, September 25, 1997, to show cause why she should not be held in contempt of court for failure to comply in a timely manner with the command of the Writ of Certiorari issued on June 16, 1997.

Nila J. Keels appeared on September 25, 1997. At that time, she entered a plea of not guilty and requested a hearing. Therefore, we appoint the Honorable Steele Hays as a master to conduct the hearing. After the hearing, we direct the master to make findings of fact and file them with the court. Upon receiving the master's findings, we will decide whether Nila J. Keels should be held in contempt.

Darren SMITH and USA Truck, Inc. *v.* Dorien GALAZ

97-281 953 S.W.2d 576

Supreme Court of Arkansas
Opinion delivered October 16, 1997

[redacted]

Wright, Lindsey & Jennings, by: *James M. Moody, Jr.* and *Troy A. Price*, for appellants.

Gary Eubanks & Associates, by: *Willaim Gary Holt*, for appellee.

W.H. "DUB" ARNOLD, Chief Justice. Appellee Dorien Galaz was injured when her parked tractor-trailer was struck by another tractor-trailer owned by appellant USA Truck, Inc., and driven by appellant Darren Smith. The accident occurred in the parking lot of a North Little Rock truck stop on July 27, 1994. Galaz sued USA Truck and Smith for negligence, and a jury returned a $300,000.00 verdict in Galaz's favor. After the trial court entered judgment in the amount of the verdict, USA Truck and Smith filed a motion for new trial on the ground of excessive damages. The trial court denied the motion, from which USA Truck and Smith now appeal, raising two issues: (1) that the jury award is excessive and (2) that the trial court erred in admitting hearsay testimony at trial. Because we conclude that neither argument has merit, we affirm the trial court's judgment.

1. Excessive jury award

Smith first alleges that the jury award of $300,000.00 was so excessive as to shock the appellate court's conscience. We have stated that the standard of review we utilize in deciding whether a jury award is excessive is whether the verdict is so great

as to shock the conscience of this court or demonstrate passion or prejudice on the part of the trier of fact. *Houston v. Knoedl*, 329 Ark. 91, 947 S.W.2d 745 (1997); *Collins v. Hinton*, 327 Ark. 159, 937 S.W.2d 164 (1997). In doing so, we review the proof and all reasonable inferences most favorably to the appellee. *Id.* In determining whether the amount of damages is so great as to shock the conscience, we consider such elements as past and future medical expenses, permanent injury, loss of earning capacity, scars resulting in disfigurement, and pain, suffering, and mental anguish. *Builder's Transp., Inc. V. Wilson*, 323 Ark. 327, 914 S.W.2d 742 (1996). Our determination of whether a jury verdict is so excessive as to shock the conscience is made on a case-by-case basis. *Id.* We have said that the jury has much discretion in awarding damages in personal injury cases. *Id.*

In the present case, Galaz was standing in the cab of her tractor-trailer when Smith, who was speeding to make a left turn to back into a parking space, clipped the left front fender of her trailer with his rig. According to Galaz, upon impact, her neck snapped, then she fell back and hit the wall of the sleeper bunk in her rig. She did not go to the doctor immediately because she thought the pain would eventually go away. On August 29, 1994, approximately one month after the accident, Galaz, feeling pain in her left shoulder and experiencing numbness in her left arm, went to see Dr. Carl McKenney, a neurologist. After ordering a CT test, Dr. McKenney recommended that Galaz undergo physical therapy and an EMG nerve conduction. He also prescribed Darvocet, a pain medication, and suggested that she see Dr. Richard Hamer, a neurologist, and Dr. Samuel Finn, a neurosurgeon, for further treatment.

At trial, Galaz offered the deposition testimony of Dr. Hamer, who testified that Galaz had osteoarthritis, a degenerative condition common among truck drivers, a small posterior central disc herniation, and a ruptured disc, a new injury. According to Dr. Hamer, there was no question that the osteoarthritis existed prior to the accident. However, according to Dr. Hamer, with this chronic condition, any added force could rupture the disc — "it [was] like an accident waiting to happen." It was Dr. Hamer's testimony that "the thing that really brought [Galaz] to the doctor

was the ruptured disc." Regarding permanent impairment, he testified that Galaz would have a continuous pain requiring Advil, Tylenol, or similar medications, and would have difficulty using her neck.

Dr. James Bland, a neurosurgeon, saw Galaz on November 28, 1994, on February 17, 1995, April 20, 1995, June 8, 1995, and July 20, 1995. During each of these visits, Galaz complained of pain on the left side of her neck and numbness in her left arm. According to Dr. Bland, Galaz's symptoms were common among those persons suffering from aggravated degenerative disc disease.

The accident in question resulted in $3,334.79 in property damages to the tractor-trailer Galaz was driving. In addition to these damages, Galaz presented evidence that she incurred $7,409.74 in medical expenses. Her weekly average income as a truck driver prior to the accident was $455.54. Galaz returned to work in November 1995, taking a job as a server at Shoney's. In April 1996, she began working at International House of Pancakes. She assumed full duties as a server with the exception of heavy lifting. She worked between thirty-six and forty hours per week at $2.13 per hour plus tips, which amounted to an extra $400 to $600.00 per month.

When reviewing the facts at bar, it is clear that Galaz was simply an "eggshell plaintiff," or one who was susceptible to enhanced injury by virtue of an existing condition, which, in this case, was osteoarthritis. See *Avery v. Ward*, 326 Ark. 829, 933 S.W.2d 810 (1996). Matters of causation and credibility are questions of fact for the jury to decide. *Id.* Galaz produced evidence that the accident caused her to suffer a ruptured disc. Dr. Hamer testified that Galaz would suffer some permanent loss of normal function in that she would have continuous pain requiring medications such as Advil or Tylenol, and that she would have difficulty using her neck.

Galaz also presented proof of mental anguish as a result of the accident. It was her testimony that she was not happy with her position as a waitress, for she would rather be out on the road as a truck driver where she could enjoy traveling and seeing the country. The accident had an emotional impact on her; she felt as

though she had been stripped of her livelihood. She could no longer ride horses, whereas she had been very active in horse shows and horseback riding prior to the accident.

When considering this evidence, we conclude that the proof supported the conclusion that Galaz suffered a permanent injury that will cause her pain and discomfort and that has changed her life in that she can no longer pursue either her chosen career as a truck driver or her preferred social activities such as horseback riding. We cannot say that the verdict of $300,000.00 is so great as to shock the conscience of this court or to demonstrate passion or prejudice on the part of the jury.

2. Hearsay objection

At trial, Galaz offered the deposition testimony of Joe Neal Hilman, a manager of the pancake restaurant where Galaz worked after the accident. Smith objected to the following portion of the deposition being shown to the jury:

> QUESTION: Did you observe [Galaz] having any problems or limitations from the injuries that she attributed to the accident?
>
> ANSWER: Observations, no sir. But she explained to me that she had limitations in her capacity as a server, because there is a requirement to take the bus tub from the table and some lifting over — between 15 and 25 pounds. And she explained to me about the accident. And I told her she didn't have to do it if that was the situation, and that I would take care of it.

On appeal, Smith claims that the trial court erred in admitting this testimony because it was hearsay, and, under A.R.E. Rule 802, the jury could have taken it as proof of Galaz's limitations in her new job. Smith further claims that the error was not harmless because this evidence "from a seemingly disinterested third party seems likely to have influenced the assessment of damages." According to Smith, it is "impossible to say that the jury did not credit [Galaz's] employer on the matter of whether [her] injury prevented her from having a future as a capable and efficient server."

Galaz argued at trial that the portion of Hilman's deposition testimony at issue was admissible as an exception to the

hearsay rule. Particularly, she argued that the testimony was admissible under A.R.E. Rule 803 (3) as a then-existing physical condition. On appeal, we will not reverse the trial court on a ruling on the admission of evidence absent an abuse of discretion. *Warhurst v. White*, 310 Ark. 546, 837 S.W.2d 857 (1992). The evidentiary rule at issue, A.R.E. Rule 803 (3), provides as follows:

> Then existing mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition, such as intent, plan, motive, design, mental feeling, pain, and bodily health, but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

In the present case, Galaz offered the testimony of Hilman to prove the truth of the matter asserted — that she had physical limitations in her new job after the accident. It is significant that the declarant, Galaz, was present and testified in front of the jury. In fact, she also testified that she could not do any heavy lifting at the pancake restaurant because of the accident. Under these circumstances, we cannot say that Smith and USA truck were prejudiced by the admission of the portion of Hilman's deposition testimony at issue. Nor can we say that the trial court abused its discretion in admitting this evidence under A.R.E. Rule 803 (3) as evidence of a then-existing physical condition.

We affirm the judgment of the trial court.

Andrew AKINS *v.* STATE of Arkansas

CR 96-352 955 S.W.2d 483

Supreme Court of Arkansas
Opinion delivered October 16, 1997

Tarver & Byrne, by: *Russell J. Byrne*, for appellant.

Winston Bryant, Att'y Gen., by: *Brad Newman*, Asst. Att'y Gen., for appellee.

DAVID NEWBERN, Justice. Andrew Akins was convicted of rape, Ark. Code Ann. § 5-14-103 (Repl. 1993), and aggravated robbery, Ark. Code Ann. § 5-12-103 (Repl. 1993), and given sixty- and forty-year consecutive imprisonment sentences respectively. Mr. Akins argues the evidence was insufficient to support the conviction. We disagree with his argument on that point. We decline to review his argument that he was denied his right to a speedy trial because we have no indication that the Trial Court ruled on such a motion. The State concedes that reversal and remand is required because Mr. Akins was denied his constitutional right to represent himself. In addition, we address Mr. Akins's argument that the Trial Court abused his discretion in admitting evidence that Mr. Akins had committed an earlier crime. As the case is to be remanded, and thus a new record of trial compiled, we need not address the argument that the record

in this case was insufficient to permit Mr. Akins to mount a proper appeal.

George and Ralita Franklin, residents of Lake Village, went with Tommy and Ledell Bolton to Dave's Food Mart where the Franklins cashed a tax-refund check. When Mr. Franklin left home later that evening, he saw Mr. Bolden talking with Andrew Akins, who lived on the same street as the Franklins. Mr. Bolden was aware that Mr. Franklin would be working in Wynne that evening. When Mr. Franklin left to go to work, he took most of the cash from the check with him.

Still later that evening, Ms. Franklin and a child were watching television in the Franklins' bedroom. When someone knocked on the front door, the child opened the door because she thought that it was her brother. After seeing who was at the door, the child began crying and ran into the bedroom. Thereafter, a man, dressed in black and wearing a mask, entered the bedroom. The only lighting in the bedroom came from the television. The man pointed his shotgun at Ms. Franklin and demanded the money he had seen at Dave's Food Mart. Ms. Franklin told him that she did not have that money, and she gave him twenty-eight dollars. He insisted that she had more money and lifted the gun up as if he were going to hit her with it.

The man then pointed his gun at Ms. Franklin and told her to go into the front room. He then demanded that she disrobe. The room was dark. When he raised his gun up as if he were going to hit her with it, she complied. While he was standing behind Ms. Franklin, he made her turn around and hug him. Then, he made her bend over a living room chair, and he placed his penis in her vagina. After he ejaculated, he told her to go to the bathroom to urinate. The light was not on in the bathroom. After she urinated, he told her to wipe herself with a tissue. She did so, and she put the tissue in a bucket in the bathroom. The man grabbed her hand and told her that if she went to the police, he would kill her and the child.

He then told her to turn off the kitchen lights so that he could, without being seen, exit the house through the back door. She testified that they were in the kitchen for about twenty-five

minutes. While the lights were on in the kitchen, Ms. Franklin focused on his eyes. Once the kitchen lights were turned off, the man left the house. During the course of the incident, the man called Ms. Franklin "bitch" several times.

After the man left, Ms. Franklin ran to the house next door, and she was brought to the police department and to a hospital emergency room where a standard rape-kit examination was performed. She told the police that the man who entered her home could have been Jarvis Akins because the eyes that she saw looked like Jarvis Akins's eyes. Andrew Akins and Jarvis Akins are brothers. She was informed that Jarvis Akins was in jail. She told Mr. Franklin that she did not know who the perpetrator was but that he had "funny looking eyes." The next day, she viewed photographs at the request of the police. She covered the faces of the individuals, except for the eyes, in the three pictures, and she identified Andrew Akins.

At the trial, Stephanie Watts testified that Andrew Akins raped her on November 21, 1990. Ms. Watts testified that during the course of the incident, Mr. Akins called her "all sorts of bitches," made her hug him, and told her that if she told the police about the incident, he would harm her. Ms. Watts further testified that Mr. Akins did not wear a mask during the incident, and that he ripped her clothes off and raped her while she was lying down. Ms. Watts stated that Mr. Akins also hit her, choked her, and poked her in the eyes.

There was testimony that Mr. Akins escaped from custody on two occasions. There was also testimony that Mr. Akins has many relatives in the area, and some have light, hazel eyes as does Mr. Akins.

A small paper bag containing paper towels and the rape kit, which included underwear worn by Ms. Franklin on the night she was raped, was submitted to the Arkansas Crime Laboratory to be tested for the presence of semen and blood. Semen was identified on the various swabs from the rape kit, the underwear, and the paper towels.

John Quill, an FBI supervisory special agent, testified that he analyzed DNA samples from vaginal swabs and the underwear of Ms. Franklin as well as blood samples taken directly from Mr. Akins, and he concluded that the DNA profiles matched Mr. Akins's DNA. He also analyzed DNA samples from the vaginal swabs of Stephanie Watts and concluded that the DNA profiles matched Mr. Akins's DNA. Mr. Quill testified that the chance of an unrelated individual having a DNA profile like Mr. Akins is less than one in seven hundred million in the Caucasian, black, and Hispanic population. He also testified that "unrelated" means those individuals other than a father, a brother, or a cousin so that if there is another accused from the family, the probability numbers would be different. He stated that he can distinguish the DNA profiles of brothers if he has a known standard for comparison. No such standard was offered as evidence at the trial.

1. Sufficiency of the evidence

The first issue on appeal is whether the Trial Court erred in denying Mr. Akins's motion for directed verdict. "A motion for directed verdict is a challenge to the sufficiency of the evidence." *Carter v. State*, 324 Ark. 395, 921 S.W.2d 924, (1996). In considering whether a conviction is supported by sufficient evidence, the Court need only consider the evidence that supports the guilty verdict, and the Court views the evidence in the light most favorable to the State and affirms if there is substantial evidence to support the verdict. *Martin v. State*, 328 Ark. 420, 944 S.W.2d 512, (1997); *Hicks v. State*, 327 Ark. 652, 941 S.W.2d 387 (1997). "Substantial evidence is that which is forceful enough to compel reasonable minds to reach a conclusion one way or the other" and permits the trier of fact to "reach a conclusion without having to resort to speculation or conjecture." *McGehee v. State*, 328 Ark. 404, 943 S.W.2d 585 (1997).

The original record, portions of which were lost, does not include a motion for directed verdict by counsel for Mr. Akins at the close of the State's case. The Trial Court held a reconstruction hearing pursuant to an order from this Court to complete the record, and concluded that defense counsel made the motion for directed verdict as required by Ark. R. Crim. P. 33.1. The

ground stated was lack of substantial evidence identifying Mr. Akins as the perpetrator of the offense against Ms. Franklin.

There was substantial evidence to support the jury's verdict. Ms. Franklin identified Mr. Akins from a photographic line-up, and most important, his DNA profile matched that contained in the rape kit. The jury also could have taken into consideration the opportunity Mr. Akins had to learn of the cash that he thought was in Ms. Franklin's possession, especially in view of the fact that the perpetrator mentioned, in the course of committing the offenses, having seen the money at Dave's Food Mart.

2. Speedy trial

The second issue is whether the Trial Court erred in not dismissing this matter based on a violation of Ark. R. Crim. P. 28. The record does not include a motion to dismiss based on the denial of a speedy trial. The record-reconstruction effort leaves some doubt as to whether such a motion was made. It is clear, however, that neither the original record nor the record of the reconstruction hearing shows that any ruling on such a motion occurred. To preserve arguments for appeal, even constitutional ones, the appellant must obtain a ruling. *Newman v. State*, 327 Ark. 339, 939 S.W.2d 811 (1997); *Danzie v. State*, 326 Ark. 34, 930 S.W.2d 310 (1996).

At the reconstruction hearing, the attorneys and the Trial Court spoke of various motions and trial events, including testimony, that were not transcribed. Defense counsel had the opportunity to review the record and note that no ruling on such a motion was included. However, no reference to a ruling was made in the reconstruction proceeding. We decline to dismiss this case in view of the lack of evidence that the Trial Court ruled on a speedy trial motion.

3. Prior criminal conduct

Stephanie Watts testified that she was raped by Mr. Akins some three months prior to the rape of Ms. Franklin. The Trial Court gave a limiting instruction that "such evidence of another similar event committed under similar circumstances is admitted

solely for the purpose of establishing identity of the Defendant." *See* Ark. R. Evid. 404(b).

The record does not indicate that there was an objection to Ms. Watts's testimony, so we do not reverse on the point in this instance. As a retrial is likely, however, we will address the issue to point out that, had a proper objection been made, the evidence should have been excluded.

Ordinarily, the Trial Court has wide discretion in admitting evidence of other crimes or wrongs, and its decision will not be reversed absent an abuse of discretion. *Haynes v. State*, 309 Ark. 583, 832 S.W.2d 479 (1992). We have, however, zealously guarded the rights of accused persons to have the State's evidence strictly confined to the issues surrounding the offense charged to insure that no one is convicted because he has committed offenses other than that for which he is on trial or because he is of bad character and addicted to crime. *Tarkington v. State*, 250 Ark. 972, 469 S.W.2d 93 (1971). Yet the mere fact that evidence shows the defendant guilty of another crime does not prevent its admissibility when otherwise competent on the issue on trial. *Id.*

The similarities of the two rapes were not sufficient to support a finding that Ms. Watts's testimony was admissible pursuant to Ark. R. Evid. 404(b) which provides that evidence of other crimes, wrongs, or acts may be admissible to establish proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *See Rogers v. State*, 257 Ark. 144, 515 S.W.2d 79 (1974) (stating evidence of a defendant's commission of a similar offense is admissible as tending to show identity of the perpetrator when the similarity of the means or manner employed in committing the crimes logically operates to set the offenses apart from other crimes of the same general variety and tends to suggest that the perpetrator of one was the perpetrator of the other).

The rapes occurred months apart. Ms. Franklin's assailant wore a mask, Ms. Watts's assailant did not. Ms. Franklin's assailant made her take off her own clothes while Ms. Watts's assailant ripped her clothes off of her. Ms. Franklin's assailant raped her from behind while she bent over a chair while Ms. Watts's assailant

raped her while she was lying down. Ms. Franklin's assailant did not strike her while Ms. Watts's assailant hit her, choked her, and poked her in the eyes.

The only similarities between the two rapes were that both Ms. Franklin and Ms. Watts reported that the assailant called them a "bitch" and made them hug him. Whatever probative value the rape of Ms. Watts had was substantially outweighed by the danger of prejudice. Ark. R. Evid. 403.

The State argues that evidence of Ms. Watts's rape was necessary in order for expert testimony on the DNA analysis to be presented because the DNA expert had to testify as to how he obtained the DNA samples of Mr. Akins. There was no such necessity. The expert had DNA samples from Mr. Akins and from Ms. Franklin. The ones from Ms. Watts were superfluous.

5. Self-representation

The remaining issue is whether the Trial Court erred in denying Mr. Akins's right to represent himself. The State concedes reversible error on this point. At the August 18, 1995 pretrial hearing, Mr. Akins requested that he be allowed to represent himself and stated that he would not be ready for trial on the August 22 trial date. Apparently, communications between Mr. Akins and defense counsel had broken down. Defense counsel stated that he was only able to get "limited responses" from Mr. Akins, and Mr. Akins stated that defense counsel would not listen to him. The Trial Court explained that Mr. Akins "need[ed] somebody with experience in the law," and that he was not convinced that Mr. Akins had demonstrated sufficient intelligence to represent himself. The Trial Court also stated that if Mr. Akins had asked "three years ago" to represent himself, he might have been allowed to do so, but there would be no continuance to allow the defendant to become familiar with the case. Defense counsel argued that Mr. Akins was familiar with the case, and that Mr. Akins had filed a motion to sever, which was similar to the motion defense counsel later filed, as well as a writ of mandamus to effect his release pursuant to Rule 28.3.

At the close of the hearing, the Trial Court stated that, if Mr. Akins reviewed his file during the four days prior to trial, the Trial Court would reconsider. There was some confusion as to whether the Trial Court would allow Mr. Akins to represent himself if he read the file and was prepared for the August 22 trial date.

On the morning of the trial, Mr. Akins stated that he still wanted to represent himself and that he had asked to do so on previous occasions but that he was not prepared to go to trial that day. As to Mr. Akins's argument that he attempted to speak with the Trial Court about representing himself prior to August 18, the Trial Court could not recall the incident and stated that he would have to agree with Mr. Akins. Mr. Akins also referred to letters that he had written to the Trial Court in which he had requested that he be allowed to represent himself. Mr. Akins's request to represent himself on August 18, 1995, was the first such request in the record. Mr. Akins stated that he had not read the file because he thought that the Trial Court had already decided that he would not be allowed to represent himself. Defense counsel pointed out the "crux" of the case — Ralita Franklin's statement and the testimony that the DNA statistics applied solely to non-related people — in an apparent attempt to persuade the Trial Court that Mr. Akins had the ability to represent himself. The Trial Court held that Mr. Akins could not represent himself because he was not prepared to go to trial and because of the complexity of the case due to the DNA evidence.

The Trial Court also held that "[w]ithout granting you [Mr. Akins] a continuance to represent yourself, you are not intelligently and knowingly, in my opinion, making the decision to represent yourself. And for that reason, I'm going to deny your motion." The Trial Court ultimately agreed with the prosecutor that it did not have a problem with Mr. Akins representing himself, but with him representing himself on August 22 due to his lack of preparation.

[redacted] "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." *Oliver v. State*, 323 Ark. 743, 918 S.W.2d 690 (1996). "To establish a voluntary and intelligent waiver, the trial judge must explain to the accused that he is entitled as a matter of law to an attorney and question him to see if he can afford to hire counsel. The judge must also explain the desirability of having the assistance of an attorney during the trial and the drawbacks of not having an attorney." *Gibson v. State*, 298 Ark. 43, 764 S.W.2d 617 (1989). "The right to counsel is a personal right which the accused may knowingly waive either at the pretrial stage or at trial." *Leak v. Graves*, 261 Ark. 619, 550 S.W.2d 179 (1977) (finding that in view of the appellant's age, education, and recent experience in court, represented by counsel, appellant knowingly and intelligently chose to waive his right to counsel); *see Barnes v. State*, 258 Ark. 565, 528 S.W.2d 370 (1975) (holding that appellant's assertion of his right to represent himself was timely because it was made before the trial commenced).

In *Fritz v. Spalding*, 682 F.2d 782 (9th Cir. 1982), the United States Court of Appeals for the Ninth Circuit, considering the appellant's assertion of his right to represent himself accompanied by a motion for continuance, stated that, when a defendant's pretrial motion to proceed *pro se* is accompanied by a request for a continuance, the motion may be denied only upon "an affirmative showing" that the purpose of the pro se motion was to gain delay. The Court further stated that the court "must examine the events preceding the motion to determine whether they were consistent with a good faith assertion of the right and whether the defendant could reasonably be expected to have made the motion at an earlier time."

The Trial Court refused to allow Mr. Akins to represent himself because he was not prepared to go to trial on August 22, 1995. Based on our holdings in the *Leak* case and the *Barnes* case, we hold that the Trial Court erred in denying Mr. Akins's request to represent himself at trial because the request was made four days before trial and again on the morning of the trial before the trial began. If the Trial Court had granted Mr. Akins's request to represent himself on August 18 or if the Trial Court had been clearer about its intention to reconsider Mr. Akins's request after

he reviewed his file, then Mr. Akins would have had an opportunity to be prepared for trial, and a motion for continuance might not have been necessary. Additionally, Mr. Akins does not seem to assert his right as a delaying tactic, but rather due to frustration with defense counsel.

As to whether Mr. Akins could have reasonably been expected to raise the motion at an earlier time, we note his undisputed assertion of attempts to assert his right prior to August 18 as well as the confusion regarding the Trial Court's statement that it would reconsider the request on August 22. In these circumstances we do not gainsay the State's concession that reversible error occurred.

Reversed and remanded.

Chrisshannon BROWN *v.* STATE of Arkansas

CR 97-376 952 S.W.2d 673

Supreme Court of Arkansas
Opinion delivered October 16, 1997

William R. Simpson, Jr., Public Defender, by: *Kent C. Krause*, Deputy Public Defender, for petitioner.

Winston Bryant, Att'y Gen., by: *Kelly Terry*, Asst. Att'y Gen., for respondent.

TOM GLAZE, Justice. Chrisshannon Brown petitions this court for a writ of prohibition against the Pulaski County Circuit Court, First Division, asserting that the court mistakenly denied her motion to dismiss for speedy-trial reasons. The circuit court denied Brown's motion, finding the trial delay was attributable to Brown's unavailability, which is excludable under Rule 28.3(e) of the Arkansas Rules of Criminal Procedure.[1]

The facts relevant to Brown's argument begin with her arrest on November 30, 1995, at a home located at 2606 South Arch Street, Little Rock. Brown's arrest resulted in her being charged with several drug crimes. When taken to the police department, Officer Subhash Wagh asked Brown where she lived, and Brown gave the South Arch Street address. In confirmation, Wagh read aloud the same address when he mirandized her. However, when signing the Miranda form, she listed a different address — 3006 Bermuda, Little Rock. Later, on November 30, Brown was released on $5,000.00 bond, and the bond papers reflected her address to be 2606 South Arch Street.

On May 29, 1996, the State filed its felony information against Brown, and set out Brown's address as 2606 South Arch Street. On June 29, 1996, the court mailed a notice to Brown at the South Arch Street address, directing her to appear for plea and

[1] Provision (e) provides as follows: The period of delay resulting from the absence or unavailability of the defendant. A defendant shall be considered absent whenever his whereabouts are unknown. A defendant shall also be considered unavailable whenever his whereabouts are known but his presence for the trial cannot be obtained or he resists being returned to the state for trial.

arraignment in circuit court on July 17, 1996. The letter was not returned to the court. When Brown failed to appear, as notified, on July 17, the court issued a warrant for her arrest. However, sometime after July 17, someone contacted the court's case coordinator, and as a result, the case coordinator placed Brown's plea and arraignment hearing back on the docket for July 31, 1996. No other notice was given to Brown, nevertheless she appeared on July 31. At that hearing, the court scheduled a jury trial for September 19, 1996.

When the September 19 trial date arrived, Brown's counsel informed the court that a conflict of interest had arisen between Brown and her co-defendant. Upon agreeing to sever Brown's and her co-defendant's cases, the court set separate dates for each. At that time, the court noted without objection that, for speedy-trial purposes, Brown's actions had tolled the thirteen-day period from July 17 to July 30. The court then set a new trial date for December 5, 1996.

Prior to the December 5 trial, Brown moved for dismissal on speedy-trial grounds, stating that the speedy-trial rule, Ark. R. Crim. P. 28, required that she be brought to trial within twelve months from the time of her arrest or be absolutely discharged. Because her December 5 trial date was six days past the twelve-month speedy-trial period, she asked that her case be dismissed. The court, however, excluded the thirteen-day period in July as it had previously ruled, and it denied Brown's motion. Brown then filed her petition for writ of prohibition in this court, and makes the same argument she made in circuit court, claiming the thirteen-day period should not have been excluded.

Prohibition is an extraordinary writ and is never raised to prohibit a trial court from erroneously exercising its jurisdiction, only where it is proposing to act in excess of its jurisdiction. *Rhodes v. Capehart*, 313 Ark. 16, 852 S.W.2d 118 (1993). The court has held Rule 28 is jurisdictional inasmuch as it requires a defendant to be brought to trial within twelve months or be absolutely discharged. *Id.* Even so, the court will not grant a writ of prohibition unless it is clearly warranted, and will only issue such a writ in a case where there are no disputed facts. *Ellison v. Lang-*

ston, 290 Ark. 238, 718 S.W.2d 446 (1986). Here, whether a writ should issue in this case rests upon a fact determination. Consequently, we dismiss Brown's petition with prejudice. We explain our decision more fully below.

Because Brown showed that her trial was scheduled to begin six days after the speedy-trial period had expired, the State conceded that it had the burden of showing any delay must have been the result of Brown's conduct. *See State v. McCann*, 313 Ark. 286, 853 S.W.2d 886 (1993). In addition, the State had the duty to show it had made a diligent, good-faith effort to bring the accused, Brown, to trial. *Chandler v. State*, 284 Ark. 560, 683 S.W.2d 928 (1985).

Undertaking its legal burdens, the State showed at the hearing on Brown's motion before the circuit court that, on June 29, 1996, the trial court's case coordinator had sent its notice addressed to Brown at 2606 South Arch Street, notifying her to appear at a plea and arraignment hearing on July 17, 1996. As the testimony developed at the hearing on Brown's dismissal motion, the circuit judge became quickly convinced that the State had exercised due diligence in its effort to bring Brown to trial. In this respect, the judge concluded that the State and the court's case coordinator had reasonably used the South Arch Street address to notify Brown of her July 17 hearing, since that address had been submitted by Brown, as it appeared on the felony information, her bond papers, and in the circuit clerk's office.

While Brown claims she had never received a notice of the initial July 17 hearing, the trial court, after considering her testimony and counsel's argument, simply did not believe her. For example, the trial court expressed its doubts concerning Brown's story when the trial judge expounded that he thought it strange that, after the court had issued a bench warrant for Brown's arrest for missing the July 17 hearing, someone later called on her behalf seeking another hearing. The trial court obviously concluded that Brown was not being completely forthright in contending she was unaware of the scheduled hearing. *See Allen v. State*, 327 Ark. 350, 939 S.W.2d 270 (1997) (holding that the appellate court does

not attempt to weigh the evidence or pass on the credibility of witnesses; that duty is left to the trier of fact).

Also, bearing on the issue of Brown's unavailability, she conceded to the trial court that she had moved on numerous occasions, and the proof showed that besides the Arch Street address, she had acquired others — 3006 Bermuda, 1005 Adams, 1020 Adams, and 804 Conner Avenue. The trial judge disagreed with Brown's suggestion that the State or the court must take the initiative to keep up with every move Brown made. And while Brown argues her addresses were known by and available from her probation officer, Sharon Beverly, Beverly's testimony was less than clear. In fact, nothing to which Beverly testified indicated where Brown lived when the court's July 17 hearing notice was mailed to her.[2]

In conclusion, whether Brown was available and whether the State exercised due diligence in this speedy-trial matter concerned fact questions to be decided by the trial court. Because disputed facts are integral to deciding this case, we decline to issue any writ of prohibition.

[2] Beverly did testify that Brown lived at 1020 Adams Street on June 14, 1996.

Kathy R. EOFF *v.* Lisa WARDEN

97-221 953 S.W.2d 880

Supreme Court of Arkansas
Opinion delivered October 16, 1997
[Petition for rehearing denied November 13, 1997.]

Huckabay, Munson, Rowlett & Tilley, P.A., by: *John E. Moore* and *Julia L. Busfield*, for appellant.

Hodges & Hodges, by: *David Hodges* and *Lona McCastlain*, for appellee.

TOM GLAZE, Justice. Lisa Warden brought this lawsuit against Kathy R. Eoff after sustaining injuries from falling in the parking lot on property of an apartment complex owned by Kathy. Prior to her fall, Lisa had been at her friend's, Cecilia Mitchell's, apartment in the complex to help Cecilia with her clothes dryer, but when the two of them could not fix it, Lisa's husband was called and he performed the repairs. Afterwards, Cecilia was confronted with the dilemma of needing to pick up her son from football practice and staying at her apartment to receive a telephone call. In order to help Cecilia, Lisa volunteered that she and her husband would pick up Cecilia's son so Cecilia could stay and not miss her call. The Wardens opted to drive Cecilia's car so Cecilia's son would easily recognize it. It was night when the Wardens walked to Cecilia's car, and the car was parked in one of two spaces which she had been designated as a tenant. Twelve foot long concrete barriers had been placed to separate parking spaces, and Lisa tripped over one of the barriers on the driver's side of Cecilia's car. She sustained a broken arm, and later required surgery.

In Lisa's complaint against Kathy Eoff, Lisa alleged she was a business invitee at the time she fell on Kathy's parking lot. She further asserted Kathy's failures to maintain the premises, to adequately light the parking lot and to place concrete barriers properly were the proximate causes of Lisa's injuries. At trial, the jury agreed, 10 to 2, rendering a verdict in Lisa's favor in the sum of $30,000.00.

On appeal, Kathy Eoff argues one point for reversal. She relies on *Stalter v. Akers*, 303 Ark. 603, 798 S.W.2d 428 (1990), in support of her contention that the trial court erred in failing to direct a verdict in Kathy's favor because Lisa had failed to establish

that Kathy had any legal duty to make repairs or remove defects on leased property. We must agree, and therefore reverse and dismiss.

In *Akers*, Patsi Stalter leased or rented a house to Jason and Laura Howard. Sandy Akers was the Howards' neighbor and frequent visitor. On the day in question, the Howards invited Akers to their house, and at the end of their visit, Akers went down the steps from the Howards' porch and fell when she reached the bottom step. The bottom step had been broken and a concrete block had been placed in its stead as a temporary substitute. Akers sued the Howards and Stalter for injuries resulting from her fall. She obtained a default judgment against the Howards, the tenants, and a jury verdict of $16,000.00 against Stalter, the landlord. The *Akers* court reversed the jury verdict, and in so holding stated as follows:

> We believe the injured third party (Akers) must establish a landlord's contractual duty to repair a defect in the premises before he (or she) may recover for an injury suffered upon leased property over which the landlord has relinquished possession and control to a tenant.

Stalter, 303 Ark. at 607.

In the present case, the trial judge was persuaded that *Akers* was distinguishable, because there, the landlord (Stalter) had relinquished control over the leased house, but here, the landlord, Kathy Eoff, had retained possession and control of the parking lot of her apartment complex. In reaching this decision, the trial judge mentioned no evidence that showed such a distinction existed, nor did the judge cite any legal authority in support of his decision.

In fact, the case law bearing on the landlord-liability issue before the trial judge runs counter to his ruling. For example, this court has long adhered to the general rule that a landlord is under no legal obligation to a tenant for injuries sustained in common areas, absent a statute or an agreement. *See Kilbury v. McConnell*, 246 Ark. 528, 438 S.W.2d 692 (1969); *see also Glasgow v. Century Property Fund XIX*, 299 Ark. 221, 772 S.W.2d 312 (1989); *Joseph v. Riffel*, 186 Ark. 418, 53 S.W.2d 987 (1932); *Haizlip v. Rosenberg*, 63 Ark. 430, 39 S.W. 60 (1897). Moreover,

in *Propst v. McNeill*, 326 Ark. 623, 932 S.W.2d 766 (1996), the court stated that no Arkansas law had been shown where a landlord's retention-of-control exception had ever been recognized, thus, the *Propst* court held that only an express agreement or assumption of duty by conduct can remove a landlord from the general rule of nonliability. Here, because Lisa Warden failed to show that Kathy Eoff had in any way agreed or undertook a duty to maintain or repair her premises, the trial judge erred in denying Eoff's motion for directed verdict.

In conclusion, we address Lisa's argument that Kathy failed to properly renew her motion for directed verdict at the end of all the evidence, but instead waited until after the instructions had been argued. Lisa's argument is in error. Suffice it to say, Kathy's counsel moved for directed verdict after Lisa's case-in-chief, and in doing so, counsel specifically cited the applicable case law bearing on landlord liability and pointed out that Lisa had failed to show Kathy had agreed or undertook any duty to maintain or repair the parking lot. At the end of all the evidence, defense counsel renewed his earlier motions, thus generally renewing the directed-verdict motion Kathy made at the end of Lisa's case-in-chief.[1] This court has held that a defendant is not required to restate his or her grounds for directed verdict where he had already made a specific motion at the close of the plaintiff's case. *See Aronson v. Harriman*, 321 Ark. 359, 901 S.W.2d 832 (1995).

For the reasons above, we reverse and dismiss.

NEWBERN and CORBIN, JJ., dissent.

DAVID NEWBERN, Justice, dissenting. The issue in this appeal is whether the landlord is immunized against an action by a person, other than the landlord's tenant, for negligence in creating or maintaining a "common" area which has not been placed in the exclusive control of the tenant. The majority opinion concludes that the landlord may not be liable to the guest of a tenant who alleges that the landlord was negligent in creating barriers in a

[1] Defense also unnecessarily renewed his directed-verdict motion during a discussion in chambers regarding which jury instructions should be proffered.

parking lot and then negligently failing to light the parking lot properly. The majority's holding is based on a case holding that a landlord may not be held liable to her tenant for an injury occurring to a third party on "leased property over which the landlord has relinquished possession and control to a tenant." *Stalter v. Akers,* 303 Ark. 603, 607, 798 S.W.2d 428, 430 (1990). The property in question in the *Stalter* case was a porch on a house the control of which had clearly been relinquished to the tenant.

As the majority opinion states, we have tenaciously clung to the rule that a landlord's duty to a tenant is solely contractual, and thus we have held that a landlord is not liable for negligence in failure properly to maintain rental property resulting in injury to the tenant. We have questioned that view, however.

In *Propst v. McNeill,* 326 Ark. 623, 932 S.W.2d 766 (1996), a case in which a tenant alleged property damage due to his landlord's failure to maintain an airplane hangar properly, we pointed out our longstanding rule and said, "Because of the policy considerations and possible impact that would ensue in enlarging a landlord's liability, there is merit in the argument that such matters might be dealt with better in the legislative arena." Later in the same paragraph, however, we wrote that we would "not foreclose" review of the "caveat lessee" rule in a proper case. *See also Bartley v. Sweetser,* 319 Ark. 117, 122, 890 S.W.2d 250, 252 (1994), (Newbern, J., concurring.) Here we are provided an opportunity to limit a rule with respect to which we have express doubts. Other courts have so limited the application of the rule.

> It is well-established that the landlord's traditional tort immunity is not available when injuries to tenants or to others result from dangerous conditions on portions of the property that are within the control of the landlord. In this situation, the position of the landlord is essentially that of a possessor of land who invites or permits others to use the property, and who thereby owes to such users a duty of reasonable contemplated use. The landlord is therefore under an affirmative obligation to exercise reasonable care to inspect portions of the land located there. The obligation extends not only to the tenant, but also to the tenant's family members, employees, invitees, and guests, and to others who are rightfully on the land.

5 THOMPSON ON REAL PROPERTY, THOMAS EDITION 205 (David A. Thomas ed. 1994). See *Lakeview Assocs., Ltd. V. Maes* (1995 Colo.) (landlord owed duty to tenant with respect to safety of parking lot whether or not tenant used lot to park an automobile; *see also Hankard v. Beal*, 543 A.2d 1376 (Me. 1988) (trial court improperly granted landlord's motion for summary judgment as to landlord's liability when a third party fell and was injured in parking lot). "Implicit in these decisions is the notion that since no individual tenant controls the common area, control remains with the landlord." ROBERT S. SCHOSHINSKI, AMERICAN LAW OF LANDLORD AND TENANT 190 (1980 and Supp. 1997).

If a landlord may not be held responsible for negligence in creating or maintaining an ill-lighted apartment-house parking lot which is alleged to be a trap for the unwary, is the tenant responsible? If not the tenant, then is the alleged negligence simply a wrong without a remedy? There is no need to reach such a result.

In the case now before us, the majority applies the old landlord-tenant rule and the "exclusive possession" aspect of it in a case where it need not apply. Again, we are not dealing with a landlord and a tenant but with a property owner and a person who is not a tenant. Not only does the majority apply a rule that we have questioned; it extends the rule to a situation to which it has not previously been applied.

I respectfully dissent.

CORBIN, J., joins in this dissenting opinion.

Gerald BARBER et al. *v.* Mike WATSON

97-77 953 S.W.2d 579

Supreme Court of Arkansas
Opinion delivered October 16, 1997

Mixon & McCauley, P.A., by: *Donn Mixon*, for appellants.

Mooney Law Firm, by: *Charles M. Mooney, Sr.*, for appellee.

DONALD L. CORBIN, Justice. Appellants, some seventy residents of two subdivisions in Jonesboro, appeal the judgment of the Craighead County Chancery Court, Western District, denying their request for an injunction to prevent Appellee Mike Watson from constructing multi-family dwellings in one of the subdivisions. Appellants raise three points on appeal, which require us to construe a deed and bills of assurance; hence, our jurisdiction is pursuant to Ark. Sup. Ct. R. 1-2(a)(16). We find no error and affirm.

We can discern the following information from the abstract provided. Appellants are owners and residents of thirty-six and one-half lots in Meadow Lark Acres Subdivision ("Meadow Lark") and twelve lots in Meadow Lark Acres Extended Subdivision ("Meadow Lark Extended"), which are contiguous subdivisions comprised of fifty-two lots and twenty lots, respectively. Appellee is the owner of Lots 1, 2, 3, and 4 of Block H in Meadow Lark Extended. Meadow Lark was established and a bill of assurance was executed on November 15, 1967. Meadow Lark Extended was established and a bill of assurance was executed on November 18, 1968. The original bill of assurance for Meadow

Lark Extended prohibited the construction of any building other than single-family dwellings except on certain lots, including the four lots owned by Appellee. On those excepted lots, the bill of assurance provided that apartments may be constructed with the approval of the developers. An amended bill of assurance for Meadow Lark Extended was executed on August 18, 1995, prohibiting any construction of apartment buildings in Meadow Lark Extended. The amended bill of assurance was signed by owners of lots in both subdivisions.

Appellants filed this suit seeking an injunction from the chancery court prohibiting Appellee's planned construction of two additional apartment units on an already existing fourplex situated on one of his lots in Meadow Lark Extended. Appellants claimed that the area was not equipped to handle the increased traffic, that Appellee's plan violated all the bills of assurance, and that the use of the land for apartments would materially and substantially lessen the use and enjoyment of Appellants' property, thus constituting a nuisance.

Appellee filed a motion to dismiss the complaint on the grounds that some of the plaintiffs lacked standing to bring the action because they did not live in or own property in Meadow Lark Extended, and that pursuant to ARCP Rule 12(b)(6), the complaint failed to state facts upon which relief could be granted. A hearing was conducted on the matter on July 9, 1996. A letter order was subsequently entered by the chancellor granting Appellee's motion to dismiss. On the issue of standing, the chancellor agreed with Appellee that those plaintiffs who lived in or owned property in Meadow Lark had no standing to challenge any proposed construction in Meadow Lark Extended. The chancellor did find, however, that the amended bill of assurance had been signed by a majority of the lot owners of Meadow Lark Extended. Notwithstanding that finding, the chancellor concluded that the amended bill of assurance was not valid because it had not been timely executed in accordance with the procedure set out in the original bill of assurance. Appellants now assert that the chancellor's findings and conclusions were erroneous. We disagree.

We try chancery cases *de novo* on the record, but we do not reverse a finding of fact by the chancellor unless it is clearly erroneous. *Holaday v. Fraker*, 323 Ark. 522, 920 S.W.2d 4 (1996). In order to demonstrate that the chancellor's ruling was erroneous, Appellants must show that the trial court abused its discretion by making a judgment call that was arbitrary or groundless. *Id.*

For the first point for reversal, Appellants assert that the trial court erred in finding that the amended bill of assurance was not timely executed. In order for us to determine whether the chancellor correctly interpreted the provisions of the original bill of assurance, we must consider the language of the document. The pertinent provisions, as abstracted, read:

> We, W.R. Kitterman and Esther Lea Kitterman, his wife, Alton D. Holmes and Maralyn Holmes, his wife, and B. Frank Hyneman and Marzee Ann Hyneman, his wife, are the owners of the property that we plat and designate as Meadow Lark Acres Extended Subdivision to Craighead County, Arkansas. No lots shall be used except for residential purposes and no building shall be erected other than a single-family dwelling except that a duplex dwelling may be permitted under certain restrictions and apartment buildings shall be permitted on Lots 1, 2, 3, and 4 of Block H of the subdivision, and certain other lots, with the approval of the developers herein. The covenants and the restrictions of the Bill of Assurance shall be binding for a period of 25 years from the date of recording, after which time the covenants and restrictions shall be automatically extended for successive periods of ten years unless an instrument signed by a majority of the owners has been recorded agreeing to change or to terminate the covenants and restrictions.

The twenty-five-year period provided in the original bill of assurance would have expired in November 1993. The amended bill of assurance was not executed until August 18, 1995. The chancellor concluded that because Appellants had not executed the amended bill of assurance prior to the time the original bill of assurance had expired, the provisions of the original bill of assurance were automatically extended for an additional ten years. The chancellor determined that the proper way to amend or terminate the original bill of assurance was for a majority of the owners to agree and then file the agreement of record to take effect at the

time the original bill of assurance expired. Because the amended bill of assurance was not timely filed, the chancellor reasoned, the original bill of assurance, which allowed apartments on certain lots with the developers' approval, was still in effect at the time Appellants filed their complaint. We conclude the chancellor's interpretation was correct.

Courts do not favor restrictions upon the use of land; if such restrictions exist, they must be clearly apparent. *Holaday*, 323 Ark. 522, 920 S.W.2d 4; *McGuire v. Bell*, 297 Ark. 282, 761 S.W.2d 904 (1988). The general rule governing the interpretation, application, and enforcement of restrictive covenants is the intention of the parties as shown by the covenant. *Holaday*, 323 Ark. 522, 920 S.W.2d 4. Where, however, the language of the restrictive covenant is clear and unambiguous, the parties will be confined to the meaning of the language employed, so long as the meaning does not defeat the plain and obvious purpose of the restriction. *Id.* (citing *Hays v. Watson*, 250 Ark. 589, 466 S.W.2d 272 (1971)). Where no general plan of development exists, restrictive covenants contained in a bill of assurance are not enforceable. *McGuire*, 297 Ark. 282, 761 S.W.2d 904. Appellants do not challenge that a general plan of development existed in the subdivisions.

In *White v. Lewis*, 253 Ark. 476, 487 S.W.2d 615 (1972), this court was asked to interpret the amendment procedures set out in a bill of assurance very similar to the one in the present case. There, the bill of assurance provided in part:

> These covenants are to run with the land and shall be binding on all parties and all persons claiming under them for a period of twenty-five years from the date these covenants are recorded, after which said covenants shall be automatically extended for successive periods of 10 years unless an instrument signed by a majority of the owners of the lots has been recorded, agreeing to change said covenants in whole or in part.

Id. at 478, 487 S.W.2d at 616. The appellants had filed an agreement to alter part of the bill of assurance, but the twenty-five-year period had not yet expired. The appellants argued that the language contained in the original bill of assurance pertaining to

amendments or alterations of the bill was uncertain. This court disagreed, holding:

> When the recited provisions of the bill of assurance are read *in toto* we think the restriction and the provisions for waiver are unambiguous. In simple terms it is provided that the covenants shall be binding for a period of twenty-five years from date of recordation, *after which* they are automatically extended for successive periods of ten years, unless an instrument signed by a majority of the property owners is filed agreeing to a change in whole or in part.

Id. at 478, 487 S.W.2d at 616.

Here, we conclude that the language in the original bill of assurance for the Meadow Lark Extended subdivision was likewise clear and unambiguous. We conclude further that giving the language of the document its plain meaning does not defeat the plain and obvious purpose of the restrictions. Accordingly, we agree with the chancellor's determination that Appellants should have had the agreement, signed by a majority of the owners, filed of record before the expiration of the twenty-five-year period, reflecting that the amendment was to take effect as of the day of the original bill's expiration. That was not done in this case; hence, the amended bill of assurance was not valid.

For the second point for reversal, Appellants argue that the trial court erred in refusing to find that Appellee's proposed plan to add two units onto an already existing fourplex located on Lot 2 was prohibited by the original bill of assurance for Meadow Lark Extended. Appellants contend that although the bill of assurance provided that apartments are permitted on Lot 2, they are only permitted with the approval of all of the developers. Appellants contend that Appellee only secured the approval of Esther Lea Kitterman, signing on behalf of herself and her husband W.R. Kitterman, and failed to obtain the approval of the other developers. We do not reach the merits of this argument because it is not clear from the abstract that Appellants made this particular argument below or that the trial court ruled on the issue in its order.

Where the abstract does not reflect that the argument, or any similar argument, was made in the trial court, we will not

reach the merits of the argument on appeal. *Betts v. Betts*, 326 Ark. 544, 932 S.W.2d 336 (1996); *Douthitt v. Douthitt*, 326 Ark. 372, 930 S.W.2d 371 (1996). Nor will we turn to the record to decide such an issue. *Reeves v. Hinkle*, 326 Ark. 724, 934 S.W.2d 216 (1996). "It is critical that this court not be placed in a position of considering an issue for the first time on appeal." *Id.* at 727-28, 934 S.W.2d at 218. Here, the abstract reflects only that Appellants asserted in their amended complaint that "Mr. Watson's proposed construction violates all the Bills of Assurance[.]" There is no further indication in the abstract that Appellants made anything other than this vague assertion that Appellee's proposed plans violated the original bill of assurance. The abstract does not contain any argument by counsel on this point, nor does it demonstrate that the issue was addressed by the chancellor either during the hearing or in the order.

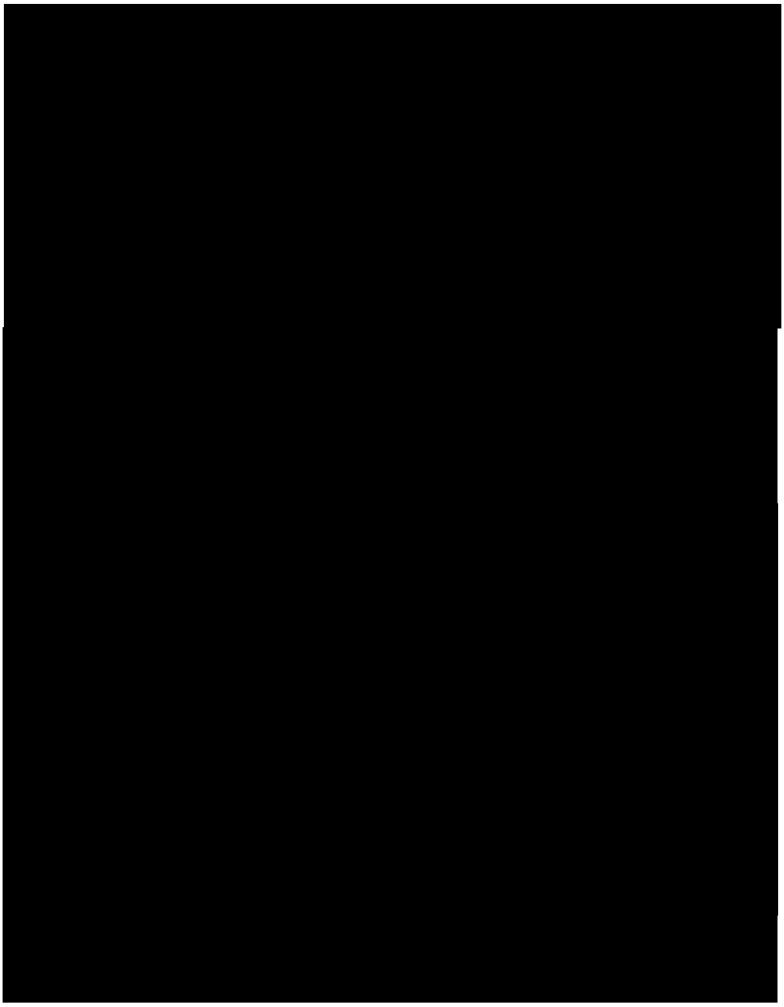
For the final point for reversal, Appellants argue that the chancellor erred in refusing to admit into evidence a plat of the Meadow Lark subdivision. As with the previous point, we do not reach the merits of this argument because Appellants have failed to abstract the specific arguments made by them in support of the exhibit's admission. The abstract only reveals that Appellants offered the exhibit, that Appellee objected to its relevance, and that the trial court sustained the objection. Without the benefit of knowing Appellants' reasons for offering the exhibit, it is practically impossible for us to determine whether the trial court abused its discretion in denying its admission. Even though our review of this appeal is *de novo*, it is nonetheless limited to the record as abstracted. *See Clardy v. Williams*, 319 Ark. 275, 890 S.W.2d 276 (1995). Where the abstract fails to show the specific arguments made regarding the proffered evidence, we will not consider the argument on appeal. *See Newton v. Chambliss*, 316 Ark. 334, 871 S.W.2d 587 (1994).

Affirmed.

Zeronical RICE *v.* STATE of Arkansas

97-295 954 S.W.2d 216

Supreme Court of Arkansas
Opinion delivered October 16, 1997



William R. Simpson, Jr., Public Defender, by: *C. Renae Ford*, Deputy Public Defender, for appellant.

Winston Bryant, Att'y Gen., by: *Vada Berger*, Asst. Att'y Gen., for appellee.

ROBERT L. BROWN, Justice. Appellant Zeronical Rice appeals the denial of his motion to transfer the criminal charges of aggravated robbery and theft to juvenile court. We affirm the trial court's finding on the aggravated robbery charge but dismiss the theft charge for lack of jurisdiction in the circuit court.

At the juvenile-transfer hearing, the prosecutor presented the testimony of Officer Jeffrey Norman of the Little Rock Police Department. Officer Norman testified that on September 5, 1995, Rice asked his brother, Tyrone Rice, to invite his friend, Steven Morris, to come over to his house. Morris used his 1994 Honda Elite moped as transportation. When Morris arrived, Rice pointed a sawed-off twelve-gauge shotgun at Morris and ordered him to give him the keys to his moped. Morris dropped the keys on the floor. Rice picked up the keys and set his shotgun down briefly to gather some clothes before he left. While his back was turned, Morris grabbed the shotgun and ran toward the front door, dropping the shotgun as he escaped through the door. Morris contacted the Little Rock Police Department from a neighbor's house and informed them about what had happened. He then watched Rice leave on his moped. When Rice was arrested on September 11, 1995, he confessed to Officer Norman that he had taken Morris's moped at gun point. At the time, he was fifteen with a date of birth of September 11, 1979. Morris's moped was never recovered.

Other testimony presented by the prosecutor at the juvenile-transfer hearing revealed that Rice had been implicated in two other offenses after his arrest for the aggravated robbery involving Morris. Officer Paul Childress of the Benton Police Department testified that he investigated an incident involving Rice, which occurred on December 8, 1995. According to the police officer, Rice and another person went to a residence in Benton and accused Greg James of being an informant for a drug task force. Rice beat James severely with a bottle, a television set, and his fists. James was treated at the hospital for his injuries.

Officer Childress further stated that there was another felony bench warrant for Rice stemming from an incident that occurred on December 23, 1995. According to Officer Childress, Rice and another person approached Jonathan Caple as he was leaving a bar in Benton and questioned him about an incident involving Rice and Caple's brother. While they were talking, Rice took a semi-automatic handgun, put a round in the chamber, and pointed the gun at Caple's head. Rice told Caple to drop all of his money. Caple escaped by retreating back into the bar.

The only testimony presented by Rice at the juvenile-transfer hearing was that of a teacher, Sylvia Carter, from whom Rice was receiving instruction in an effort to obtain his GED. Ms. Carter testified that Rice was cooperative and polite. She explained that Rice was doing well in his classes except for math which frustrated him.

Following the hearing, the motion to transfer was denied.

For his points on appeal, Rice contends that the trial court should have granted the motion to transfer to juvenile court because there was a high likelihood of rehabilitation and the State presented no countervailing proof regarding his potential for rehabilitation. Arkansas Code Ann. § 9-27-318 (Supp. 1995), provides the criteria for a motion to transfer to juvenile court:

> (e) In making the decision to retain jurisdiction or to transfer the case, the court shall consider the following factors:
>
> (1) The seriousness of the offense, and whether violence was employed by the juvenile in the commission of the offense;

(2) Whether the offense is part of a repetitive pattern of adjudicated offenses which would lead to the determination that the juvenile is beyond rehabilitation under existing rehabilitation programs, as evidenced by past efforts to treat and rehabilitate the juvenile and the response to such efforts; and

(3) The prior history, character traits, mental maturity, and any other factor which reflects upon the juvenile's prospects for rehabilitation.

(f) Upon a finding by clear and convincing evidence that a juvenile should be tried as an adult, the court shall enter an order to that effect.

We dispense with Rice's rehabilitation argument by focusing on his age. At this writing, he is eighteen, and his potential for rehabilitation within the juvenile system is nil. State law and our cases have made it clear that the initial commitment to the State Division of Youth Services cannot commence after the eighteenth birthday of the youth. Ark. Code Ann. § 9-28-208(d) (Supp. 1995); *Jensen v. State*, 328 Ark. 349, 944 S.W.2d 820 (1997); *Hansen v. State*, 323 Ark. 407, 914 S.W.2d 737 (1996). Moreover, we said in *Jensen v. State, supra*, that although § 9-28-208(d) extends the commitment time beyond eighteen in certain circumstances, it presupposes that the youth has already been committed to the State Division of Youth Services prior to reaching eighteen. *See also Hansen v. State, supra.*

Rice is beyond the age when he can be rehabilitated in the juvenile justice system. Furthermore, he confessed to a crime, aggravated robbery, that is clearly serious and clearly involves the use of violence. The evidence that Rice should be tried as an adult on this charge was clear and convincing.

Though Rice did not raise the issue, we conclude that the circuit court does not have jurisdiction over the theft charge. State law provides that if a juvenile is fourteen or fifteen at the time the delinquent act occurs, the prosecuting attorney may charge him with certain enumerated crimes, including aggravated robbery. Ark. Code Ann. § 9-27-318(b)(2) (Supp. 1995). Theft is not a listed charge. As we stated in *Banks v. State*, 306 Ark. 273, 813 S.W.2d 257 (1991), theft and aggravated robbery may both be

charged because they are separate crimes, having separate elements, even though they may have been committed at the same time. *See also Butler v. State*, 324 Ark. 476, 922 S.W.2d 685 (1996). However, we held in *Banks* that dismissal of the theft charge was appropriate due to lack of jurisdiction over the defendant who was fourteen at the time the acts were committed. The same holds true in the instant case. The circuit court has no jurisdiction to try Rice for a theft charge, even under § 9-27-318 as subsequently amended after *Banks v. State, supra*, was decided, when the alleged act was committed while Rice was fifteen. The prosecutor could have filed the theft charge in juvenile court and then moved to transfer it to circuit court as a charge arising out of the same course of conduct as the aggravated robbery. Ark. Code Ann. § 9-27-318(c) (Supp. 1995); *Butler v. State, supra*. This was not done. We dismiss the theft charge for lack of jurisdiction.

Affirmed as modified.

The MEGA LIFE and HEALTH INSURANCE COMPANY, Charles Hall, and Jim Dawson *v.* Michael D. JACOLA and Pamela R. Jacola, Individually and as Parents and Natural Guardians of Kristen M. Jacola, a Minor

96-1343 954 S.W.2d 898

Supreme Court of Arkansas
Opinion delivered October 16, 1997

Mitchell, Williams, Selig, Gates & Woodyard, P.L.L.C., by: *R.T. Beard III* and *Mark N. Halbert*, for appellants.

Lovell & Nalley, by: *John Doyle Nalley*, for appellees.

ANNABELLE CLINTON IMBER, Justice. This is an interlocutory appeal from an order certifying a class action. *See* Ark. Sup. Ct. R. 1-2(a)(11); Ark. R. App. P.—Civ. 2(a)(9). We affirm the trial court's order.

On September 1, 1994, the appellees, Michael and Pamela Jacola, purchased a group health insurance policy from the appellants, Mega Life & Health Insurance Company ("Mega"), for themselves and their two dependents. The group policy was issued through the Alliance for Affordable Health Care ("Alliance") which served as group master policyholder. Soon thereafter, the Jacolas' minor daughter received outpatient medical treatment, and Mega refused to pay the medical bills.

On May 17, 1995, the Jacolas filed a tort action against Mega and the two agents who sold them the policy alleging numerous individual theories for recovery including negligence, fraud, misrepresentation, and false advertising. In their complaint, the Jacolas also requested class certification so that they could represent

approximately 400 other Arkansans who had purchased identical health insurance policies from Mega.

In their motion for class certification, the Jacolas alleged that Alliance was a sham organization thereby making the Mega health insurance policies individual, instead of group, policies. Additionally, the Jacolas asserted on behalf of the proposed class that the policies they purchased from Mega were void in two respects. First, the Jacolas asserted that the policies were void because Mega failed to comply with Ark. Code Ann. § 23-98-107(a) (Repl. 1992), which requires issuers of minimum basic benefit policies to obtain from their prospective insureds a written statement acknowledging the limited nature of the coverage provided. The Jacolas also claimed that the policies were void because Mega failed to comply with Insurance Commission Rule 18 which requires a stamped notification on the first page of an individual health insurance policy that does not cover outpatient services. On behalf of the class, the Jacolas asked the court to declare the policies void, force Mega to withdraw use of the policy in Arkansas, grant compensatory damages in the amount of the premiums collected from the insured for the past five years, and award punitive damages.

The trial court conducted two hearings on the Jacolas' certification motion. On August 8, 1996, the trial court granted the Jacolas' motion for certification pursuant to Ark. R. Civ. P. 23. In its order, the court found that the Jacolas had satisfied the Rule 23(a) requirements of numerosity, commonality, typicality, and adequacy. The trial court, however, did not make specific findings regarding the existence of the Rule 23(b) requirements of predominance or superiority.

■■ On appeal, Mega asserts that the trial court's order of certification is erroneous because the Jacolas failed to satisfy each of the six requirements listed in Rule 23(a) & (b). According to Ark. R. Civ. P. 23, a trial court may certify a class only if the following conditions are met:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical

> of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Ark. R. Civ. P. 23(a). Additionally, the court must find that questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. Ark. R. Civ. P. 23(b). A trial court has broad discretion in determining whether these elements have been satisfied, and we will not reverse absent an abuse of that discretion. *Direct Gen. Ins. Co. v. Lane*, 328 Ark. 476, 944 S.W.2d 528 (1997); *Farm Bureau Mutual Ins. Co. v. Farm Bureau Policy Holders & Members*, 323 Ark. 706, 918 S.W.2d 129 (1996); *Cheqnet Sys., Inc. v. Montgomery*, 322 Ark. 742, 911 S.W.2d 956 (1995).

Citing *Farm Bureau Mutual Ins. Co. v. Farm Bureau Policy Holders & Members*, 323 Ark. 706, 918 S.W.2d 129 (1996), Mega asserts that a trial court is not allowed to look beyond the pleadings to determine whether the requirements of Rule 23 have been satisfied. We, however, rendered no such ruling in *Farm Bureau*. Rather, we clearly enunciated that neither the trial court nor the appellate court may delve into the merits of the underlying claim when determining whether the requirements of Rule 23 have been satisfied. *Id.* Although a trial court may not consider whether the plaintiffs have a cause of action or if they will ultimately prevail on the merits, the court may hold a hearing to determine whether the requirements of Rule 23 have been satisfied. In fact, two such hearings were held in this case and both sides were allowed to present testimony and introduce documentary evidence. Thus, we conclude that Mega's interpretation of *Farm Bureau* is erroneous.

I. Failure to Make Findings

First, Mega asserts that we must reverse the certification order because the trial court failed to make specific findings regarding the existence of the Rule 23(b) requirements of predominance and superiority. This issue is governed by Ark. R. Civ. P. 52(a) which states that "findings of fact and conclusions of law are

unnecessary on decisions of motions under these Rules," but that the court shall enter such specific findings and conclusions upon the request of a party. It does not appear from the abstract that Mega ever requested that the court make such specific findings in regard to the predominance and superiority requirements of Rule 23(b).

Moreover, Rule 52(b) states that upon a motion of a party made no later than ten days after the entry of judgment, the court may amend its findings of fact or make additional findings. Thus, Mega had ten days after the order of certification was entered to ask the trial court to make additional findings regarding the Rule 23(b) elements. Mega, however, failed to make such a request. Because Mega failed to request specific findings in regard to the Rule 23(b) elements either prior to or after the entry of the order of certification, we hold that it has waived this issue on appeal. *See Smith v. Quality Ford, Inc.*, 324 Ark. 272, 920 S.W.2d 497 (1996); *Brown v. Seeco, Inc.*, 316 Ark. 336, 871 S.W.2d 580 (1994).

Implicit in the trial court's order granting class certification is the court's ultimate conclusion that all six elements of class certification have been satisfied. Thus, on appeal we hold that Mega has waived only its right under Ark. R. Civ. P. 52 to have the trial court *enter specific findings in its order* regarding the satisfaction of each of the six elements of class certification. Mega has not, however, waived its right to contest the trial court's *ultimate conclusion* that all six elements have been satisfied as required by Ark. R. Civ. P. 23. We agree with the dissent that there must be evidence in the record to support the trial court's ultimate conclusion that all six elements of class certification, including the predominance and superiority requirements of Rule 23(b), have been satisfied. We, however, disagree with the dissent's assertion that we must reverse a certification order that does not make specific findings regarding the Rule 23(b) requirements when the complaining party failed to request specific findings under Rule 52. Accordingly, we find no merit to Mega's first argument on appeal.

We also must respond to the dissent's contention that the certification order must be reversed because the trial court failed to conduct a "rigorous analysis" of the Rule 23(b) requirements of predominance and superiority. In support of this argument, the dissent cites *Arthur v. Zearley*, 320 Ark. 273, 895 S.W.2d 928 (1995). The *Arthur* opinion, however, is devoid of any language requiring the trial court to conduct a "rigorous analysis." In fact, we are unable to find any Arkansas case requiring the trial court to conduct a rigorous analysis, or for that matter, any case that describes exactly what such an analysis entails. Instead, we have consistently held that we will reverse a trial court's certification order *only* when the court has abused its discretion. *Direct Gen. Ins. Co. v. Lane*, 328 Ark. 476, 944 S.W.2d 528 (1997); *Farm Bureau Mutual Ins. Co. v. Farm Bureau Policy Holders*, 323 Ark. 706, 918 S.W.2d 129 (1996). In making this determination, we have consistently reviewed the evidence in the record to determine whether it supports the trial court's ultimate conclusion regarding certification. *See, e.g., Direct Gen., supra; Arthur, supra;* We have not, as argued by the dissent, previously required the court to enter into the record a detailed explanation of why it concluded that certification was proper, and we refuse to impose such a requirement upon the trial court at this time.

II. Requirements of Rule 23

Next, Mega claims that the order of certification must be reversed because the Jacolas failed to satisfy each of the six requirements of Rule 23. We disagree with this assertion, and accordingly we affirm the trial court's order of certification.

A. Numerosity

The first requirement of class certification is "that the class is so numerous that joinder of all members is impractical." Ark. R. Civ. P. 23(a)(1). In *Cheqnet Systems, Inc. v. Montgomery*, 322 Ark. 742, 911 S.W.2d 956 (1995), we held that:

> the exact size of the proposed class and the identity of the class members need not be established for the court to certify a class,

> and the numerosity requirement may be supported by common sense.

We have not adopted a bright-line rule to determine how many class members are required to satisfy the numerosity requirement. *See, e.g. Summons v. Missouri Pac. R.R.*, 306 Ark. 116, 813 S.W.2d 240 (1991) (approving a class of several thousand claimants); *International Union of Elec., Radio, & Mach. Workers v. Hudson*, 295 Ark. 107, 747 S.W.2d 81 (1988) (declaring that "at least several hundred" class members were sufficient); *Cooper Communities, Inc. v. Sarver*, 288 Ark. 6, 701 S.W.2d 364 (1986) (holding that 184 potential class members were enough); *City of North Little Rock v. Vogelgesang*, 273 Ark. 390, 619 S.W.2d 652 (1981) (rejecting a class of only seventeen potential plaintiffs).

In this case, the trial court found that the numerosity requirement had been satisfied because the Jacolas provided evidence that there were over 400 Arkansans who had purchased identical policies from Mega. Mega attempts to defeat the trial court's finding by declaring that only fourteen of these policyholders purchased their policies from the same agents as the Jacolas, and that only one of these fourteen policyholders (other than the Jacolas) has been denied benefits. This argument, however, ignores the Jacolas' underlying claim on behalf of the class that the policies are void irrespective of any representations made by a particular agent. Further, Mega's argument addresses the merits of the underlying claim. We have continuously held that whether the plaintiffs have stated a cause of action or will ultimately prevail on the merits is immaterial to our determination of whether the trial court erred when it found that the class should be certified under Rule 23. *Direct Gen., supra*; *Farm Bureau, supra*; *First Nat'l Bank v. Mercantile Bank*, 304 Ark. 196, 801 S.W.2d 38 (1990). Thus, we conclude that the trial court did not abuse its discretion when it found that the numerosity requirement had been satisfied.

B. Commonality

The second requirement of Rule 23 is that there are "questions of law or fact common to the class." Ark. R. Civ. P. 23(a)(2). In this case, the questions common to all members of

the class are: 1) whether Alliance is a true group master policyholder; 2) whether the policies issued by Mega are group or individual health insurance polices; 3) whether the policies are void because Mega failed to obtain written acknowledgements from their insureds that the policies were minimum basic benefits policies as required by Ark. Code Ann. § 23-98-107(a) (Repl. 1992); and 4) whether the policies are void because Mega failed to comply with Insurance Commission Rule 18 which requires a stamped notification on the first page of an individual health insurance policy that does not cover outpatient services.

If these issues are resolved in favor of the class, the individual members will have suffered a common injury of paying premiums for a void insurance policy. Thus, the class members may be entitled to rescission of the policies and a refund of the premiums paid, or coverage for outpatient services. Thus, we conclude that the trial court did not abuse its discretion when it found that the commonality requirement had been satisfied.

C. Predominance

The next logical issue is whether the "common claims predominate over any questions affecting only the individual members" as required by Rule 23(b). As previously discussed, there are several issues common to the class members. However, there are also several individual issues such as whether misrepresentations were made by the agents selling the policies, whether the insureds relied upon these misrepresentations, and the extent of each individual's damages. Thus, the greater issue presented by this case is whether these common issues predominate over the individual issues such that certification is proper.

In *International Union of Electrical, Radio & Machine Workers v. Hudson*, 295 Ark. 107, 747 S.W.2d 81 (1988), we held that the predominance element could be satisfied if the preliminary, common issues were resolved before the individual issues. In *Hudson*, non-union workers sued the union for lost wages and personal and property damages that they suffered when they attempted to cross the picketline. *Id.* The case presented one common issue of whether the union could be held liable for the actions of its mem-

bers, and several individual issues regarding the extent of damages. *Id.* In *Hudson*, we explained that:

> By limiting the issue to be tried in a representative fashion to the one that is common to all, the trial court can achieve real efficiency. The common question here is whether the unions can be held liable for the actions of their members during the strike. If that question is answered in the negative, then the case is over except for the claims against the named individual defendants which could not be certified as a class action. If the question is answered affirmatively, then the trial court will surely have "splintered" cases to try with respect to the damages asserted by each member of each of the subclasses, but efficiency will still be achieved, as none of the plaintiffs would have to prove the unions' basic liability.

Id. We also found that this bifurcated process was consistent with Rule 23(d) which allows the trial court to enter orders necessary for the appropriate management of the class action. *Id.*

Since *Hudson*, we have approved this bifurcated approach to the predominance element by allowing the trial courts to divide the case into two phases: 1) certification for resolution of the preliminary, common issues; and 2) decertification for resolution of the individual issues. For example, in *Security Benefit Life Ins. Co. v. Graham*, 306 Ark. 39, 810 S.W.2d 943 (1991), we allowed the court to certify a class action contesting the validity of an annuity policy despite the fact that there were individual issues regarding the law in thirty-nine states where the policies were issued because we found that "resolution of the common questions of law or fact would enhance efficiency for all parties, even if individual claims remained to be adjudicated."

Likewise, in *Summons v. Missouri Pacific Railroad*, 306 Ark. 116, 813 S.W.2d 240 (1991), we affirmed a class action of plaintiffs who claimed they suffered a variety of damages when the defendant's train overturned and released volatile and toxic chemicals into the area. The common issues were the existence of strict liability, and whether the railroad was negligent, while the individual issues were proximate causation and the extent of damages suffered by each class member. *Id.* As in *Hudson* and *Security Benefit*, we held that the case should proceed as a class action for reso-

lution of the preliminary, common issues. We also admonished that predominance may not be determined by comparing the mere number of individual versus common claims. *Id.*

However, in *Arthur v. Zearley*, 320 Ark. 273, 895 S.W.2d 928 (1995), we found that the bifurcated approach did not adequately resolve the predominance problem. In *Arthur*, the proposed class was a group of patients who had an experimental product called "Orthoblock" surgically implanted into their spines. *Id.* The common issue in *Arthur* was whether Orthoblock was a defective product, and there were numerous individual issues regarding informed consent, proximate causation, and damages. *Id.* The preliminary issue in *Arthur*, was what the patient knew prior to receiving the implantation. *Id.* If the patient was fully aware of the risks of the experimental treatment, then all subsequent issues would be rendered moot. *Id.* The preliminary issue, therefore, was an individual issue instead of a common issue as in *Hudson*, *Security Benefit*, and *Summons*, thus rendering the bifurcated approach utilized by those cases impractical.

We find that this case is like *Hudson*, *Security Benefit*, and *Summons*, in that the preliminary issues for resolution are issues that are common to all class members. For instance, the court must first determine whether the Alliance is a true group master policyholder, and whether the policy Mega issued was a group or individual policy. If the court finds that Mega issued a true group policy, then the notice requirements under Ark. Code Ann. § 23-98-107(a) and Insurance Commission Rule 18 will be rendered moot. Because we hold that the common issues presented by this case must be resolved prior to addressing the individual issues as in *Hudson* and its progeny, we conclude that the Jacolas have satisfied the predominance requirement.

D. Superiority

The next element of Rule 23, is that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Ark. R. Civ. P. 23(b). We find that by first addressing the issues common to all members of the class, the court can achieve real efficiency. *See Lemarco, Inc. v. Wood*,

305 Ark. 1, 804 S.W.2d 724 (1991); *Hudson, supra.* Moreover, certifying this case as a class action is fair to both sides. By bifurcating the proceeding, Mega will be able to pursue its individual defenses, such as the defense that the Jacolas did not read their policy until after they filed this action, during the second phase of the trial. *Hudson, supra.* We also find that class certification is also fair to the plaintiffs because it is more economical to pursue the action as a class instead of individually. *Summons, supra; Lemarco, supra.* Thus, we also conclude that the superiority requirement has been satisfied.

E. Typicality

The next requirement is that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Ark. R. Civ. P. 23(a)(3). In *Direct General Insurance Co. v. Lane*, 328 Ark. 476, 944 S.W.2d 528 (1997), we recently explained that the typicality requirement is satisfied if the representative's claim arises from the same wrong allegedly committed against the members of the class. We have also adopted the following explanation of the typicality requirement taken from Newberg's treatise on class actions:

> Typicality determines whether a sufficient relationship exists between the injury to the named plaintiff and the conduct affecting the class, so that the court may properly attribute a collective nature to the challenged conduct. In other words, when such a relationship is shown, a plaintiff's injury arises from or is directly related to a wrong to a class, and that wrong includes the wrong to the plaintiff. Thus, a plaintiff's claim is typical if it arises *from the same event or practice or course of conduct* that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory. When it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually met *irrespective of varying fact patterns which underlie individual claims.*

Id., (citing HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS, § 3.13, at pp. 166-67 (2d ed. 1985)) (emphasis added). Thus, when analyzing this factor, we focus upon the defendant's

conduct and not the injuries or damages suffered by the plaintiffs. *Direct Gen.*, *supra*; *Cheqnet*, *supra*; *Summons*, *supra*.

In this case, the common issues are whether Alliance is a true group master policyholder, whether Mega issued group or individual policies, and whether Mega complied with the statutory and regulatory notice requirements. Each of these claims arise from Mega's common course of selling an alleged group policy through Alliance. Because each of these common claims arose from the same wrong allegedly committed by Mega, we find no abuse in the trial court's determination that the Jacolas' claim is typical of the claims presented in the class action.

F. Adequacy

The last element is whether the Jacolas "will fairly and adequately protect the interests of the class." Ark. R. Civ. P. 23(a)(4). We have previously explained that the three elements of this requirement are that:

> (1) the representative counsel must be qualified, experienced and generally able to conduct the litigation; (2) that there be no evidence of collusion or conflicting interest between the representative and the class; and (3) the representative must display some minimal level of interest in the action, familiarity with the practices challenged, and ability to assist in decision making as to the conduct of the litigation.

Direct Gen., *supra*; *First Nat'l*, *supra*.

In their complaint and request for certification, the Jacolas stated that their attorney, John Doyle Nalley, would fairly and competently represent the class. Absent a showing to the contrary, we may presume that the representative's attorney will vigorously and competently pursue the litigation. HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS, §§ 3.24, 3.42 (3d. ed. 1992). Additionally, there is no evidence that the Jacolas have a conflict of interest with the class members. Thus, we hold that the first and second elements of the adequacy requirement have been established.

Finally, in order to establish adequacy, the representative must show some minimal interest in the case. We have held that this element of adequacy is satisfied if the representative displays a minimal level of interest in the action, a familiarity with the challenged practices, and the ability to assist in litigation decisions. *Direct Gen., supra*; *Cheqnet, supra*; *Union Nat'l Bank v. Barnhart*, 308 Ark. 190, 823 S.W.2d 878 (1992). During the hearing, Mike Jacola testified that he had read the complaint and understood the allegations against Mega. Jacola further testified that he had stayed in touch with his lawyer since the lawsuit was filed, that he understood his duties as class representative, and that he was willing to comply with those duties. Therefore, we conclude that the trial court did not err when it held that the Jacolas had fulfilled the adequacy requirement.

In response, Mega asserts that the Jacolas are inadequate representatives because their claim will ultimately fail due to the fact that they did not read their policy. This argument, however, ignores the Jacolas' underlying claim on behalf of the class that the policies are void. Furthermore, Mega's argument addresses the merits of the underlying case, and thus we will not consider it when determining whether the requirements of Rule 23 have been satisfied. *Direct Gen., supra*; *Farm Bureau, supra*; *First Nat'l, supra*. Thus, we also find no error in the trial court's determination that the adequacy requirement had been satisfied.

For these reasons, we conclude that the trial court did not abuse its discretion when it held that class certication was proper under Rule 23. Accordingly, we affirm.

Affirmed.

THORNTON, J., dissents

RAY THORNTON, Justice, dissenting. In order to obtain certification by the trial court for a class action, the Jacola family as plaintiffs have the burden of showing that the requirements for class certification have been met. The Jacolas have not met that burden in this case. I do not find that either the trial court's order or the record reflects the type of rigorous analysis that I believe is required under Rule 23 to determine the reasons why the com-

mon questions predominate over the individual questions and why a class action is superior to other methods of trying the issues. *Arthur v. Zearley*, 320 Ark. 273, 895 S.W.2d 928 (1995); *see also Valentino v. Carter-Wallace, Inc.*, 97 F.2d 1227 (9th Cir. 1996).

Rule 23 of the Arkansas Rules of Civil Procedure provides for class certification when:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Ark. R. Civ. P. 23(a). Additionally, the rule provides that a class action may be maintained if the court

> finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Ark. R. Civ. P. 23(b).

In the case before us, the trial court did not make the determination required by the rule as to predominance, or as to the superiority of a class action for a fair and efficient adjudication of the controversy. It seems to me that it is necessary that this matter be remanded to the trial court for consideration of these two criteria.

Predominance

We have held that it is not necessary that the questions of law and fact be identical, but that it is enough to show that a common question of law or fact *predominates* over other questions affecting individual members. *Arkansas Louisiana Gas Co. v. Morris*, 294 Ark. 496, 744 S.W.2d 709 (1988); *see also Security Benefit Life Ins. Co. v. Graham*, 306 Ark. 39, 810 S.W.2d 943 (1991) and *International Union of Elec., Radio & Mach. Workers v. Hudson*, 295 Ark. 107, 747 S.W.2d 709 (1988) (emphasizing the requirement that the questions of law or fact be *predominant* in order to meet the criteria of this rule). With regard to Rule 23 motions, we have

specifically stated that we will follow the federal rules in class actions. *Farm Bureau Mut. Ins. v. Farm Bureau Policy Holders*, 323 Ark. 706, 918 S.W.2d 129 (1996). The Supreme Court, in interpreting Rule 23, has said that a class action "may only be certified if the trial court is satisfied *after a rigorous analysis*, that the prerequisites of Rule 23 have been satisfied." *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 161 (1982) (emphasis supplied); *see also Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996). In the recent case of *Anchem Products, Inc. v. Windsor*, 117 S. Ct. 2231 (1997), the Supreme Court affirmed a reversal by the Third Circuit Court of Appeals of a district court's class certification, based in part upon a failure to show predominance as required by Rule 23. The Supreme Court stated:

> We address first the requirement of Rule 23(b)(3) that "[common] questions of law or fact . . . predominate over any questions affecting only individual members." The District Court concluded that predominance was satisfied based on two factors: class members' shared experience of asbestos exposure and their common "interest in receiving prompt and fair compensation for their claims, while minimizing the risks and transaction costs inherent in the asbestos litigation process as it occurs presently in the tort system."
>
> . . .
>
> The predominance requirement stated in Rule 23(b)(3), we hold, is not met by the factors on which the District Court relied. The benefits asbestos-exposed persons might gain from the establishment of a grand-scale compensation scheme is a matter fit for legislative consideration, *see supra*, at 2237-2238, but it is not pertinent to the predominance inquiry. *That inquiry trains on the legal or factual questions that qualify each class member's case as a genuine controversy, questions that preexist any settlement.*
>
> . . .
>
> *The Rule 23(b)3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation. See* 7A Wright, Miller, & Kane 518-159.

Id. at 2249 (footnotes omitted) (emphasis supplied).

At issue in this case is the plaintiffs' reliance upon representations by Mega. The fact that each individual's reliance on Mega's representations, as well as the uniformity of the representations, will be questioned, further underscores the importance of rigorously analyzing whether the common issues predominate. As pointed out by the Fifth Circuit in *Simon v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 482 F.2d 880 (5th. Cir. 1973):

> If there is any material variation in the representations made or in the degrees of reliance thereupon, a fraud case may be unsuited for treatment in a class action. Thus, courts usually hold that an action based substantially, as here, on oral rather than written misrepresentations cannot be maintained as a class action. *Similarly, if the writings contain material variations, emanate from several sources, or do not actually reach [certain class members], they are no more valid a basis for a class action than dissimilar oral representations.*

Id. (citations omitted) (emphasis supplied). In *Arthur v. Zearley*, 320 Ark. 273, 895 S.W.2d 928 (1995), when reversing a class certification of a medical malpractice case that involved a question of informed consent, we found that the issues regarding what was said to each patient, the emotional condition of the patient, and each patient's understanding would make the individual questions predominant. Quoting *Brown v. Regents of University of California*, 151 Cal. App. 3d. 982, 198 Cal. Rptr. 916 (3d Dist. 1984), we noted that where close scrutiny is required as to what representations are made to each plaintiff, it cannot be said that the common issues predominate.

Conversely, in *Lemarco, Inc. v. Wood*, 305 Ark. 1, 804 S.W.2d 724 (1991), a suit by members of a buyers' club against the club, the record shows that there was testimony that salesmen were trained by video tape, that they were instructed what to say and how to make the sales presentations, and that the presentations were virtually the same for each customer. Further, the mail solicitation and retail sales were the same for each member of the class. We relied upon these facts in upholding the trial court's order of class certification. As this is an action involving questions of misrepresentation and reliance, I do not believe we should affirm without such a showing in this case.

Superiority

Rule 23(b) also requires the court to find "that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." In determining the answer to this inquiry, the court must first consider what other procedures, if any, exist for disposing of the dispute before it. 17A CHARLES ALAN WRIGHT *ET AL*, FEDERAL PRACTICE AND PROCEDURE § 1779, at 551 (2d ed. 1986). It must then compare possible alternatives to determine "whether Rule 23 is sufficiently effective to justify the expenditure of the judicial time and energy that is necessary to adjudicate a class action and to assume the risk of prejudice to the rights of those who are not directly before the court." *Id.* No such determination was made by the trial court here. I would remand with directions to make the required determinations under Rule 23. I respectfully dissent.

OFFICE OF CHILD SUPPORT ENFORCEMENT *v.* Jimmy Clyde RAGLAND

96-888 954 S.W.2d 218

Supreme Court of Arkansas
Opinion delivered October 16, 1997

Lori Hoggard, for appellant.

The Blagg Law Firm, by: *Mel Jackson*, for appellee.

ANNABELLE CLINTON IMBER, Justice. At issue in this case is whether service of process under Ark. R. Civ. P. 4 is necessary to obtain a valid default judgment against an obligor for child-support arrearages. The trial court held that the service on the obligor was defective and set aside a default judgment obtained against him. We reverse and hold that personal service of process under Rule 4 was not necessary because the chancery court had continuing personal jurisdiction over the obligor and the obligee asserted no new or additional claims for relief.

Sara Jane Ragland and Jimmy Clyde Ragland were divorced pursuant to a decree entered by the Searcy County Chancery Court on March 16, 1978. Sara Jane was awarded custody of their minor children, and Jimmy Clyde was ordered to pay $200 monthly in child support through the office of the Chancery Clerk. In a contract dated August 15, 1977, and filed on May 22, 1978, Sara Jane assigned her right to child support to the Division of Social Services in consideration for public assistance.

On July 21, 1986, the Child Support Enforcement Unit, in its capacity as assignee, filed a "Motion for Judgment" requesting a judgment in the amount of $14,000 for arrearages unpaid by Jimmy Ragland. OCSE obtained a default judgment in the amount of $14,000 on October 8, 1986. Among other things, the judgment provided that "[Jimmy Ragland's] agent was duly served with a copy of the motion for judgment on 22nd day of July 1986, and no response has been filed herein and [Jimmy Ragland] stands wholly in default."

On October 30, 1995, Jimmy Ragland moved to set aside the default judgment following the institution of income withholding against him. Ragland alleged that the default judgment was "void because of insufficiency of service of process." Ragland

also moved to stay OCSE income withholding and attached an affidavit from the Searcy County Circuit Clerk who reviewed the underlying case file and did not find a "'green card'. . .nor. . . any proof of service upon the Defendant, Jimmy Ragland." In response, OCSE asserted that the service of its "Motion for Judgment" was valid because it was sent to Ragland via certified mail, return receipt requested. OCSE attached the "green card" which showed a July 22, 1986, delivery date, and bore the signature of Sandy Ragland on the "Signature — Agent" line.

On February 20, 1996, the trial court entered an order setting aside the default judgment because of insufficient service of process under Ark. R. Civ. P. 4(d)(8)(A). According to the trial court, OCSE did not comply with the rule's additional requirements that Ragland be served by restricted delivery, and that the record contain the "green card" before entry of the default judgment. OCSE brings the present appeal. The Court of Appeals certified the case to us as involving an interpretation of Rules 4(d)(8)(A) and 5(b) of the Arkansas Rules of Civil Procedure.

For its sole argument on appeal, OCSE argues that the trial court had continuing personal jurisdiction over Ragland, and thus no new service of process under Ark. R. Civ. P. 4 was necessary to obtain a valid default judgment on the past-due arrearages.[1] Because the trial court granted Ragland's motion to set aside the default judgment, we review this ruling for an abuse of discretion. *See, e.g., Tharp v. Smith*, 326 Ark. 260, 930 S.W.2d 350 (1996); *M. v. Clark*, 316 Ark. 439, 872 S.W.2d 410 (1994).

One of the earliest Arkansas cases addressing the trial court's continuing personal jurisdiction over the parties in a divorce action is *Jones v. Jones*, 204 Ark. 654, 163 S.W.2d 528 (1942). In *Jones* the chancery court awarded the obligee a monthly amount of

[1] OCSE does not contest that service was insufficient under Rule 4. Its argument on appeal is limited to the general assertion that the chancellor erred in finding that Rule 4 was the governing rule of service. Inexplicably, OCSE fails to cite Rule 5 in its appellate brief, or otherwise argue which rule of service besides Rule 4(d)(8)(A) is applicable. We nonetheless engage in a comparative analysis of Rules 4 and 5 because OCSE's abstract demonstrates that OCSE argued to the trial court below that the service provisions of Rule 5 governed its "Motion for Judgment."

alimony. The obligor later moved to Florida and fell behind on payments, and the obligee sought a decree for the amount in arrears. While the chancery court recognized that the obligor was delinquent on the payments, it nonetheless refused to render a decree for the arrearage because the entire arrearage had accumulated while the obligor resided in Florida, and no additional personal service of process had been obtained on him.

This court reversed the trial court's determination that additional personal service of process was necessary, characterizing the alimony award as a "continuing general decree" against the obligor that would endure until modified by a change in the condition of the parties. *Id.* Accordingly, the alimony award was not a final determination of the parties' respective rights, and the decree for future payments was not "a final decree upon which an execution might be issued or which might become a lien upon real estate." *Id.* In order to collect on this continuing general decree, the *Jones* court recognized the need to periodically ascertain arrearages and render a decree for the amount due:

> For these purposes the parties to the suit continue to be parties and, being parties already, it would not be necessary to get personal service upon them to carry out and enforce a continuing decree when an attempt is made to reduce the decree to a definite and certain amount, dependent upon whether there should be delinquencies in the payment of the monthly alimony allowed.

Id. Thus, the trial court was clearly erroneous in refusing to issue a "decree certain" for the alimony arrearage for lack of additional personal service of process on the obligor. *Id.*

Subsequent to *Jones*, a number of cases have reinforced this court's position that the chancery court has continuing personal jurisdiction over the parties to a divorce with respect to certain support/alimony matters. *See, e.g.*, *Rice v. Rice*, 213 Ark. 981, 214 S.W.2d 235 (1948) (no additional service of process is necessary to collect alimony arrearage under a separate maintenance decree); *Schley v. Dodge*, 206 Ark. 1151, 178 S.W.2d 851 (1944) (actual notice given to a nonresident alimony obligee was sufficient where the obligor petitioned to modify an award arising out of an Arkansas decree rendered when both parties resided in Arkansas).

Turning to an analysis under the modern rules of civil procedure, Rule 4 expressly governs the service of the complaint and summons, while Rule 5 governs the service of "every pleading and every other paper" filed after the complaint. Rule 5(a) does require that pleadings asserting any new or additional claims for relief against a party in default be served in the manner provided for service of summons under Rule 4. The crucial inquiry in the present case is which service rule governs OCSE's "Motion for Judgment" filed on July 21, 1986.

The answer to this question turns on the characterization of OCSE's cause of action, and whether it is a new, original cause of action being asserted against Ragland. *Jones* and its progeny suggest that an action to reduce past-due arrearages to an executable judgment is not a "new" cause of action, but instead flows from the original divorce decree. As such, personal jurisdiction over the parties continues without the need for additional service of process.

Ragland attempts to distinguish the *Jones* line of cases by arguing that OCSE was not an original party to the action, and thus that "continuing jurisdiction applies only to parties contemplated within the decree." This distinction is not persuasive. OCSE stands in Sara Ragland's shoes as the contractual assignee of her entitlement to support. Indeed, OCSE submitted to the trial court's personal jurisdiction by instituting the proceedings to obtain a judgment. Ragland cites to no authority for the proposition that the assignment of the obligee's rights creates a meaningful difference insofar as the chancery court's continuing personal jurisdiction over him as obligor. Rather, *Jones* suggests that an obligee's attempt to reduce past-due arrearages to judgment where the chancery court has continuing personal jurisdiction over the obligor is not a new or additional claim for relief necessitating new personal service of process.[2] Accordingly, service of OCSE's

[2] This characterization is consistent with Ark. Code Ann. § 9-14-234(b) (Supp. 1995), enacted as part of Act 383 of 1989. The statute provides that any child support payment that has accrued under an order providing for the payment of child support shall automatically become a final judgment subject to writ of garnishment or execution. *Id.*

"Motion for Judgment" was governed by Rule 5(b), rather than Rule 4(d)(8)(A).

The next question is whether service of OCSE's "Motion for Judgment" was properly made under Rule 5. Rule 5(b) generally requires service upon a party's attorney. However, contemplating the very issue presented in this case, Rule 5(b) adds that service upon a party's attorney is insufficient "in a case where there is a final judgment but the court has continuing jurisdiction."[3] In such cases, service is required to be made to the party. Service upon a party may be made by mailing a copy of the pleading or paper to the party at his last known address, and "service by mail is presumptively complete upon mailing."

In the present case, the certificate of service contained within OCSE's "Motion for Judgment" shows that it was mailed to Jim Ragland on July 18, 1986, at P.O. Box 728, Marshall, AR 72650. Moreover, the green card later attached to OCSE's response to Ragland's motion to set aside shows that the article was delivered via certified mail to "Jim Ragland P.O. Box 728, Marshall, AR 72650," on July 22, 1986. Sandy Ragland signed for the article in the box designated "Signature — Agent." Because service of OCSE's "Motion for Judgment" was presumptively complete upon mailing, the trial court abused its discretion in setting aside the default judgment due to insufficient service.

Reversed.

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[3] The Reporter's Note to Rule 5(b) states that it was amended to incorporate provisions from Ark. Stat. Ann. § 27-362 (Repl. 1979), now deemed superseded. (The Reporter's Note incorrectly cites the relevant statute as Ark. Stat. Ann. § 27-632). Ark. Stat. Ann. § 27-362(b) provided:

> In cases involving divorce, child custody, child support, or other cases wherein the court has continuing jurisdiction, the attorney of record shall be considered as such. . . only until such time of the entry of a final decree. In such cases wherein the court has continuing jurisdiction, it shall be insufficient to show that service was obtained on the attorney of record after the date of entry of the final decree. In such cases, service may be obtained by mailing a copy of the petition by certified mail, return receipt requested, to the address of the other party, or if no address be known, then to the last known address of said party.

Jeffrey Lyle SLATON *v.* Teresa Austin SLATON

97-337 956 S.W.2d 150

Supreme Court of Arkansas
Opinion delivered October 16, 1997

Davis & Watson, P.A., by: *Charles E. Davis*, for appellant.

Annie Powell and *Eddie N. Christian*, for appellee.

ANNABELLE CLINTON IMBER, Justice. This appeal questions whether the trial court had jurisdiction to rule upon a posttrial motion. We disagree with the trial court's conclusion that it had jurisdiction to enter the order, and accordingly we reverse and remand.

On September 26, 1991, Jeffrey Slaton obtained a divorce from Teresa Slaton in the Washington County Chancery Court. Jeffrey was awarded custody of the two children born of the marriage. Teresa was granted visitation rights and ordered to pay $300 a month child support. Several hours after the divorce decree was entered, Teresa Slaton filed a pleading entitled a "Motion for Reconsideration" in which she claimed that the divorce decree was contrary to the preponderance of the evidence adduced at trial.

In response, the trial court entered on September 30, 1991, an order stating that the divorce decree should be "stayed and held in abeyance until further hearing in this matter which is scheduled for October 8, 1991, at 9:00 a.m." The following day, the court appointed a guardian ad litem to investigate and represent the children's interests.

The court did not hold a hearing on the matter until February 24, 1992. During the hearing, the court explained that it granted Teresa's motion because:

> I didn't feel that I had all the information that I should to make a meaningful decision. And, quite frankly, my decision hasn't changed that much other than I have given full credence to the report of the ad litem, and this is going to be the order in regards to the minor children.

The court then orally announced its ruling.

On March 5, 1992, the court modified the initial divorce decree by providing that Jeffrey and Teresa would share joint custody of the children with neither parent being required to pay child support. Although joint custody was granted, Jeffrey

became the primary custodial parent with detailed visitation rights granted to Teresa.

Over the next three years, Jeffrey and Teresa filed numerous motions regarding child custody, support, and visitation. On December 26, 1995, the court granted Teresa sole custody of the children and ordered Jeffrey to pay child support in an amount to be determined at a later hearing. Five days later, Jeffrey filed a "Motion to Declare Order Void and to Set Arrearage." In this motion, Jeffrey claimed that the March 5, 1992, order was void because the trial court lost jurisdiction by failing to rule upon Teresa's motion for reconsideration within thirty days as required by Ark. R. App. P.—Civ. 4(c). Because the March 5, 1992 order was void, Jeffrey argued that the original September 26, 1991 divorce decree was still in effect, and that Teresa owed him over $14,000 in past-due child-support payments under that decree.

In an order entered on February 12, 1996, the trial court found that it had jurisdiction to issue the March 5, 1992 order pursuant to Ark. R. Civ. P. 60(b) which allows a trial court to modify an order within ninety days of its having been filed with the clerk. In the alternative, the court found that Jeffrey had waived his jurisdiction argument by appearing before the court and participating in the hearing. Finally, the court found that Jeffrey was estopped to deny the validity of the March 5, 1992 order because both parties had relied upon it for several years. Accordingly, the court denied Jeffrey's motion. From this order, Jeffrey filed a timely notice of appeal in the Arkansas Court of Appeals.

In an unpublished decision, the Court of Appeals found that Teresa's September 26, 1991 motion for reconsideration was actually a motion for a new trial under Ark. R. Civ. P. 59, and that the trial court had jurisdiction to issue the March 5, 1992 order because it had granted Teresa's motion for a new trial on September 30, 1991, which was well within the thirty-day limit mandated by Ark. R. App. P.—Civ. 4(c). *Slaton v. Slaton*, No. CA 96-670, Slip Op. (Ark. Ct. App. March 5, 1997). We granted Jeffrey's petition for review. Upon granting a petition for review, we review the case as if the appeal was originally filed in this court and give no deference to the ruling rendered by the

Court of Appeals. *Goston v. State*, 327 Ark. 486, 939 S.W.2d 818 (1997); *Mullinax v. State*, 327 Ark. 41, 938 S.W.2d 801, *cert. denied*, 117 S. Ct. 2411 (1997).

I. Abstract Deficiencies

In her brief, Teresa made a motion to strike the portions of Jeffrey's abstract of the September 26, 1991 divorce decree regarding the grounds for divorce and why custody was initially granted to Jeffrey. We agree that these matters were irrelevant to the issues on appeal, and thus they were not considered. *See* Ark. Sup. Ct. R. 4-2(a)(b); *Purtle v. McAdams*, 317 Ark. 499, 879 S.W.2d 401 (1994).

Teresa also included in her brief a motion for costs arguing that according to Ark. Sup. Ct. R. 4-2(b)(1), she is entitled to reimbursement for the costs she incurred to supplement the deficiencies in Jeffrey's abstract. This motion is denied because as in *McNair v. McNair*, 316 Ark. 299, 870 S.W.2d 756 (1994), we find it "impossible to separate the time and costs for the Supplemental Abstract portions essential only to the appeal itself."

II. Continuing Jurisdiction

The sole issue on appeal is whether the trial court had jurisdiction to issue the March 5, 1992 order. Teresa presents several arguments supporting the trial court's finding that it had jurisdiction to enter the order. First, Teresa argues that the trial court's order should be affirmed because a chancery court has continuing jurisdiction to modify child support and custody orders. *See* Ark. Code Ann. § 9-12-314(b) (Repl. 1993). The chancery court, however, has continuing jurisdiction to modify such orders only when the moving party has demonstrated a change in circumstances requiring modification. *Williams v. Williams*, 253 Ark. 842, 489 S.W.2d 774 (1973); *Campbell v. Richardson*, 250 Ark. 1130, 468 S.W.2d 248 (1971). In her September 26, 1991 motion, Teresa stated that the trial court's custody and support order was clearly against the preponderance of the evidence, and not that the circumstances had changed such that modification was required. Accordingly, we find no merit to this argument.

III. Arkansas Rule of Civil Procedure 59

Next, Teresa claims that the trial court had jurisdiction to enter the March 5, 1992 order pursuant to Ark. R. Civ. P. 59 and Ark. R. App. P.—Civ. 4(c). Teresa argues that her September 26, 1991 "Motion for Reconsideration" was a motion for a new trial which the trial court granted in its September 30, 1991 order. Teresa further asserts that because the court granted her motion within thirty days, as required by Ark. R. App. P.—Civ. 4(c), the court had jurisdiction to hold a new trial on the issue of child custody and support on February 24, 1992, and enter its order regarding the same on March 5, 1992. *See Williams v. Hudson*, 320 Ark. 635, 898 S.W.2d 465 (1995); *Arkansas State Highway Comm'n v. Ayres*, 311 Ark. 212, 842 S.W.2d 853 (1992); *Wal-Mart Stores, Inc. v. Isely*, 308 Ark. 342, 823 S.W.2d 902 (1992).

■■ Before we can answer this issue, we must first decide whether Teresa's "Motion for Reconsideration" was actually a motion for a new trial pursuant to Ark. R. Civ. P. 59. We have previously held that motions should be liberally construed, and that courts should not be blinded by titles but should look to the substance of motions to ascertain what they seek. *Cornett v. Prather*, 293 Ark. 108, 737 S.W.2d 159 (1987). For example, in *Jackson v. Arkansas Light & Power Co.*, 309 Ark. 572, 832 S.W.2d 224 (1992), we held that a motion to vacate which stated that the judgment was void because "it is contrary to the facts, public policy and is clearly contrary to the preponderance of the evidence" was really a motion for a new trial under Ark. R. Civ. P. 59(a)(6). As in *Jackson*, Teresa claimed in her motion for reconsideration that the divorce decree was contrary to the preponderance of the evidence, which is a specifically enumerated ground for a new trial under Ark. R. Civ. P. 59(a)(6). Thus, we hold that Teresa's September 26, 1991, pleading was a motion for a new trial.

■■ The next issue is whether the trial court's September 30, 1991 order granted Teresa's request for a new trial. Jeffrey asserts that it did not because the court failed to make a ruling in the order specifying the particular basis for which the new trial was granted. Jeffrey did not raise this argument before the trial

court and thus, we will not consider it for the first time on appeal. *Jones v. Jones*, 320 Ark. 449, 898 S.W.2d 23 (1995). Moreover, in *General Motors Corp. v. Tate*, 257 Ark. 347, 516 S.W.2d 602 (1974), we said that when "an order granting a new trial is expressed in general terms without a specification of grounds, it must be affirmed if it can be supported on any ground alleged in the motion."

By looking to the substance of the trial court's order and the court's explanation for why it granted Teresa's motion, we hold that the trial court's September 30, 1991 order did not grant Teresa's request for a new trial pursuant to Ark. R. Civ. P. 59(a)(6). As previously mentioned, Teresa asserted in her September 26, 1991 motion that the findings in the initial divorce decree were clearly against the preponderance of the evidence adduced at trial. In response to Teresa's motion, the trial court appointed a guardian ad litem to represent the children and granted the guardian unlimited access to the children's medical, psychiatric, and school records. Additionally, the court announced at the beginning of the February 24, 1992 hearing that it granted Teresa's motion for reconsideration because it did not have enough evidence at the time it initially entered the divorce decree to "make a meaningful decision." Thus, it is apparent from the court's order and its comments during the hearing that the court was attempting to stay the effect of its September 26, 1991 divorce decree, so that it could hear *additional evidence*. Instead of reviewing the evidence it heard at the initial divorce hearing as requested by Teresa in her Rule 59(a)(6) motion, the trial court decided to hear additional evidence.

We have previously held that a Rule 59(a)(6) motion cannot be used to bring into the record that which does not otherwise appear in the record. *Burge v. Pack*, 301 Ark. 534, 785 S.W.2d 207 (1990); *Sharp Co. v. Northwest Ark. Planning & Consulting, Co.*, 269 Ark. 336, 602 S.W.2d 627 (1980). For these reasons, we find that the trial court's September 30, 1991 order did not grant a new trial pursuant to Ark. R. Civ. P. 59(a)(6). Because the court did not, therefore, act upon Teresa's motion for a new trial within thirty days as required by Ark. R. App. P.—Civ. 4(c), the motion was deemed denied and the trial court did

not have jurisdiction under Rule 59 to enter the March 5, 1992 order. *See Williams, supra*; *Ayres, supra*; *Isely, supra.*

IV. Arkansas Rule of Civil Procedure 60

Instead of relying upon Ark. R. Civ. P. 59, the trial court found that it had jurisdiction to issue the March 5, 1992 order under Ark. R. Civ. P. 60(b) which states that:

> To correct any error or mistake or to prevent the miscarriage of justice, a decree or order of a circuit, chancery or probate court may be modified or set aside on motion of the court or any party, with or without notice to any party, within ninety days of its having been filed with the clerk.

On numerous occasions, we have held that a trial court loses jurisdiction to set aside or modify an order pursuant to Ark. R. Civ. P. 60(b) if it does not do so within ninety days of the entry of the original order. *Griggs v. Cook*, 315 Ark. 74, 864 S.W.2d 832 (1993); *City of Little Rock v. Ragan*, 297 Ark. 525, 763 S.W.2d 87 (1989). In this case, the court did not modify or set aside its September 26, 1991 divorce decree until March 5, 1992, which is well beyond the ninety-day limitation period contained in Rule 60(b).

A trial court may modify or set aside its order beyond the ninety-day limitation contained in Rule 60(b) if the specifically enumerated conditions listed in Rule 60(c) exist. As in *Cigan Ins. Co. v. Brisson*, 294 Ark. 504, 506-A, 746 S.W.2d 558 (1988) (supplemental opinion granting rehearing), there is nothing in the record to suggest that these conditions exist in this case, nor were they argued below or upon appeal. Thus, we conclude that the trial court did not have jurisdiction to enter its March 5, 1992 order pursuant to Ark. R. Civ. P. 60.

V. Waiver

The trial court alternatively held that Jeffrey waived the issue of the trial court's jurisdiction when he appeared before the court on February 24, 1992, and argued the merits of Teresa's motion for reconsideration. We have continuously held that a

party may not consent to subject-matter jurisdiction where no such jurisdiction lies, nor may jurisdiction be waived. *Douthitt v. Douthitt*, 326 Ark. 372, 930 S.W.2d 371 (1996); *Priest v. Polk*, 322 Ark. 673, 912 S.W.2d 902 (1995). Thus, we conclude that Jeffrey did not waive the issue of the trial court's jurisdiction to enter the March 5, 1992 order.

VI. Estoppel and Res Judicata

Finally, the trial court found that Jeffrey was estopped from contesting the court's jurisdiction to enter the March 5, 1992 order because both parties had relied upon the order for approximately three and a half years until it was eventually modified on December 26, 1995. Teresa, however, failed to assert the affirmative defense of estoppel in her answer to Jeffrey's motion to set aside the March 5, 1992 order, as required by Ark. R. Civ. P. 8(c). Instead, Teresa only asserted the defense of res judicata. Because Teresa failed to obtain a ruling from the trial court on the issue of res judicata, we will not consider it upon appeal. *See Morrison v. Jennings*, 328 Ark. 278, 943 S.W.2d 559 (1997).

As to Teresa's estoppel argument, we have previously held that a party may correct his or her failure to plead an affirmative defense by amending the answer at any time pursuant to Ark. R. Civ. P. 15(c). *Terminix Int'l Co. v Stabbs*, 326 Ark. 239, 930 S.W.2d 345 (1996); *Burge v. Pack*, 301 Ark. 534, 785 S.W.2d 207 (1990); *Brooks v. Town & Country Mutual Ins. Co.*, 294 Ark. 173, 741 S.W.2d 264 (1987). This argument must fail, as it did in *Burge* and *Brooks*, because there is nothing in the record to suggest that Teresa ever requested that her answer be amended to include the affirmative defense of estoppel.

We have also held that under Ark. R. Civ. P. 15(c), an issue not set forth in the responsive pleading may be raised by express or implied consent of the parties and thereby treated in all respects as though it had been properly pled. *Porter v. Harshfield*, 329 Ark. 130, 948 S.W.2d 83 (1996); *Hackleton v. Larkan*, 326 Ark. 649, 933 S.W.2d 380 (1996); *Brooks, supra.* Once again, there is nothing in the record to suggest that the affirmative defense of estoppel became an issue during the hearing by either

express or implied consent of the parties. Accordingly, we find that Jeffrey was not estopped from asserting that the trial court did not have jurisdiction to enter the March 5, 1992 order.

For these reasons, we find that the trial court did not have jurisdiction to enter the March 5, 1992 order modifying custody and child support. We reverse and remand for the trial court to determine the amount that Teresa owes in past-due child-support payments. This determination should take into account how long the September 26, 1991 child-support order remained in effect, in view of various orders entered subsequent to March 5, 1992, that may or may not have incorporated by reference the terms of the March 5, 1992 order.

Reversed and remanded.

Robert Say McINTOSH *v.* STATE of Arkansas

CR 97-1161 952 S.W.2d 167

Supreme Court of Arkansas
Opinion delivered October 16, 1997

Alvin D. Clay, for appellant.

No response.

PER CURIAM. Robert Say McIntosh, by his attorney, has filed a motion for rule on the clerk.

His attorney, Alvin D. Clay, admits in his motion that the record was tendered late due to a mistake on his part.

We find such an error, admittedly made by the attorney for a criminal defendant, is good cause to grant the motion. *See In Re: Belated Appeals in Criminal Cases*, 265 Ark. 964 (1979) (per curiam).

The motion for rule on the clerk is, therefore, granted. A copy of this opinion will be forwarded to the Committee on Professional Conduct.

Mike WILSON, Olan Ashbury, Johnny Mass and Mike McNew *v.* PULASKI ASSOCIATION OF CLASSROOM TEACHERS, Deen Minton, President, Lois Hughes, Vice President, and Sandra Roy

96-1048 954 S.W.2d 221

Supreme Court of Arkansas
Opinion delivered October 23, 1997

Ramsay, Bridgforth, Harrelson & Starling, by: *Spencer F. Robinson*, for appellants.

Roachell Law Firm, by: *Richard W. Roachell*, for appellee.

W.H. "DUB" ARNOLD, Chief Justice. This action was filed by Mike Wilson and a group of taxpayers of Pulaski County Special School District who have children in the Pulaski County School District against the Pulaski Association of Classroom Teachers, the collective bargaining representative of certified employees of the school district. Appellants filed a lawsuit challenging the legality of a teachers' strike.

A teachers' strike began on August 19, 1996. On August 23, 1996, appellants filed suit in the Pulaski County Chancery Court seeking a preliminary injunction to stop the strike. A hearing was held on August 23, 1996. The chancery court denied the preliminary injunction based upon the findings that appellants did not meet the burden of proving that a teachers' strike was illegal and that the appellants did not meet the burden of proving irreparable harm.

On August 28, 1996, a federal district court, through its jurisdiction over Pulaski county and the teachers association in a suit regarding Pulaski County desegregation, enjoined the strike and ordered the parties to mediate. Following this order, the strike ended.

Despite the ending of the strike, appellants' challenge the chancellor's denial of the preliminary injunction claiming that the chancellor erred by failing to find that a teachers' strike is illegal *per se* pursuant to Arkansas law and that due to this illegality, the preliminary injunction should have been ordered. As a procedural matter for granting preliminary injunctions, appellants contend that a showing of irreparable harm is not necessary in instances where an activity is illegal *per se*. Appellants do not challenge the finding by the chancellor that they did not prove that they had suffered irreparable harm. We do not agree with appellants' characterization of the standard for granting preliminary injunctions and affirm the chancellor's denial of the preliminary injunction.

Appellee challenged the jurisdiction of this court based upon the doctrine of mootness relying upon the traditional rule that this court will not render advisory opinions. It is true that

appellants have requested an order from this court enjoining a teachers' strike in the event that the teachers attempt to strike again in the future. This is speculative in nature, and no one knows if the teachers will ever do such. It is well settled that this court does not render advisory opinions nor answer academic questions. *See, Saunders v. Neuse*, 320 Ark. 547, 898 S.W.2d 43 (1995); *Dougan v. Gray*, 318 Ark. 6, 884 S.W.2d 239 (1994); *Walker v. McCuen*, 318 Ark. 508, 886 S.W.2d 577 (1994); *Gladden v. Bucy*, 299 Ark. 523, 772 S.W.2d 612 (1989); and *Neely v. Barber*, 288 Ark. 384, 706 S.W.2d 358 (1986).

Under Arkansas law, a case becomes moot when any judgment rendered would have no practical legal effect on an existing legal controversy. *Dillon v. Twin City Bank*, 325 Ark. 309, 924 S.W.2d 802 (1996); *Arkansas Intercollegiate Conference v. Parnham*, 309 Ark. 170, 828 S.W.2d 828 (1992). An exception to the mootness doctrine, however, allows review for appeals involving the public interest and the prevention of future litigation. *Richie v. Board of Educ.*, 326 Ark. 587, 933 S.W.2d 375 (1996); *Duhon v. Gravett*, 302 Ark. 358, 790 S.W.2d 155 (1990). Although the teachers' strike ended over one year ago, it is clear that the ability of public employees to withhold their services involves a question of significant public interest, the resolution of which would certainly preclude future litigation.

Appellants urge this court to recognize that it has already declared strikes by public employees to be illegal *per se* in *Potts v. Hay*, 229 Ark. 830, 318 S.W.2d (1958), and *City of Ft. Smith v. No. 38, AFL-CIO*, 245 Ark. 409, 433 S.W.2d 153 (1968). The right of public employees to strike was not the issue in those cases. We will note, however, that there is *dicta* in those cases which states that such strikes are illegal in Arkansas, but neither of these cases directly addresses the issue of whether a teachers' strike or a strike by public employees is legal. Nevertheless, even assuming that the categorical statements in those cases about public strikes answers the illegal-strike question, appellants still cannot succeed.

An order granting or denying a preliminary injunction is within the chancery court's discretion. *McCuen v. Harris*, 321 Ark. 458, 466, 902 S.W.2d 793 (1995). *See also, Smith v. American*

Trucking Ass'n, 300 Ark. 594, 781 S.W.2d 3 (1989); *American Trucking Ass'n v. Gray*, 280 Ark. 258, 675 S.W.2d 207 (1983). We will not reverse a chancellor's ruling on a preliminary injunction unless there has been an abuse of discretion. *Smith v. American Trucking Ass'n, supra; Scrivner v. Portis Mercantile Co.*, 220 Ark. 814, 250 S.W.2d 119 (1952); Riggs v. Hill, 201 Ark. 206, 144 S.W.2d 26 (1940).

Arkansas Rules of Civil Procedure, Rule 65(a)(1) provides that, where a preliminary injunction is to be given without notice to the adversary of the one requesting it, it must be alleged by affidavit or verified complaint that, absent the injunction, irreparable harm will result to the appellant. Where notice is given, the rule contemplates that a hearing will be held at which such irreparable harm must be shown. The prospect of irreparable harm or lack of an otherwise adequate remedy is the foundation of the power to issue injunctive relief. *See, Amalgamated Clothing v. Earle Indus., Inc.*, 318 Ark. 524, 886 S.W.2d 594 (1994); *Paccar Financial Corp. v. Hummell*, 270 Ark. 876, 878, 606 S.W.2d 384 (Ark. App. 1980). *See also, Ahrent v. Sprague*, 139 Ark. 416, 214 S.W. 68 (1919); *Ex Parte Foster*, 11 Ark. 304 (1850)

This court has previously explained the jurisdiction of equity with respect to public employees as follows:

> There is no doubt but that equity will exercise jurisdiction to restrain acts or threatened acts of public corporations or of public officers, boards, or commissions which are *ultra vires* and beyond the scope of their authority, or which constitute a violation of their official duty, whenever the execut[i]on of such acts would cause irreparable injury to, or destroy rights and privileges of, the complainant, which are cognizable in equity, and for the protection of which we would have no adequate remedy at law.

Jensen v. Radio Broadcasting Co., Inc., 208 Ark. 517, 520, 186 S.W.2d 931, 932 (1945). Clearly, for equity to act, there must be proof of (1) irreparable harm and (2) no adequate remedy at law. *See, East Poinsett Sch. Dist. No. 14 v. Massey*, 317 Ark. 219, 876 S.W.2d 573 (1994).

Thus, in order for a chancellor to grant a preliminary injunction, the moving party must establish irreparable harm; this is true

in all instances where injunctive relief is sought regardless of whether the party may additionally prove that an activity is illegal *per se*. In this case, appellants are precluded from establishing that the chancellor abused her discretion because they do not challenge her ruling that no irreparable harm had been suffered. Indeed, they contend that the strike was illegal *per se* and that this factor alone supports injunctive relief. For over a century, this court has required proof of facts establishing that the moving party is entitled to injunctive relief from a court of equity. *See, e.g., Foster Ex Parte*, 11 Ark. 304 (1850)(requiring proof of irreparable harm to enjoin a trespass). Appellants make no attempt to prove irreparable harm. In effect, they ask us to change this court's longstanding posture on equity jurisdiction without the support of any convincing legal authority. Under such circumstances, this court has, and should, decline to do so. *See, e.g., Qualls v. Ferritor*, 329 Ark. 235, 947 S.W.2d 10 (1997); *Porter v. Harshfield*, 329 Ark. 130, 948 S.W.2d 83 (1997).

Because appellants failed to prove irreparable harm, we affirm the chancellor's order.

Affirmed.

GLAZE, J., dissents.

CORBIN, J., concurs in part and dissents in part.

IMBER, J., not participating.

DON DONNER, Special Justice, concurs in part and dissents in part.

DONALD L. CORBIN, Justice, concurring in part and dissenting in part. While I agree with the majority that the chancellor correctly denied Appellants' request for an injunction, as Appellants have not challenged the chancellor's finding that they failed to make a showing of irreparable harm, I disagree with the majority's refusal to reach the merits of Appellants' claim that strikes by public employees are illegal in Arkansas.

The majority's refusal to address the merits of this argument is predicated on the ground that the issue is moot, apparently because the strike had ended prior to this appeal. I believe, how-

ever, that this issue falls within one of the exceptions to the mootness doctrine recognized by this court. Where considerations of public interest or the prevention of future litigation are present, this court may choose to elect to settle an issue, even though moot. *Duhon v. Gravett*, 302 Ark. 358, 790 S.W.2d 155 (1990). The issue of whether teachers, being public employees, may strike against their government employers, is an issue of significant public interest that must be addressed by this court in light of the two decisions rendered in *Potts v. Hay*, 229 Ark. 830, 318 S.W.2d 826 (1958), and *City of Fort Smith v. No. 38, AFL-CIO*, 245 Ark. 409, 433 S.W.2d 153 (1968).

In *Potts*, this court addressed the issue of whether police officers could be denied employment on the basis of their membership in a union. One of the arguments raised by the appellants was that police officers should not be permitted to belong to unions because the public interest would suffer in the event the officers were allowed to exert "union pressure" upon their employer, the city of Little Rock. As the chancellor in the present case correctly observed, the reference in *Potts* to "union pressure" was actually a reference to strikes against the city. In an effort to assure the appellants that no such union pressure would be permitted under the law, this court cited two cases from other jurisdictions, which provided that public employees may seek union membership, but that there is no right of public employees to strike against the government. *See Norwalk Teachers' Ass'n v. Board of Education*, 83 A.2d 482 (1951); *Beverly v. City of Dallas*, 292 S.W.2d 172 (Tex. Civ. App. 1956).

In *City of Fort Smith*, the issue presented was whether a municipality could be required to engage in collective bargaining with its union employees. Notwithstanding that issue's resolution, this court made clear in the first sentence of the opinion that strikes by public employees were illegal, stating:

> Under Amendment 34 to the Arkansas Constitution municipal employees have the right to belong to labor unions, *but they do not have the right to strike against the government. Potts v. Hay*, 229 Ark. 830, 318 S.W.2d 826 (1958).

245 Ark. at 410, 433 S.W.2d at 154 (emphasis added).

Although I do not dispute the majority's characterization of the above-recited language as *dicta*, in that it was not the ultimate holding of the case, I cannot ignore the fact that the language is unequivocal and is, at the very minimum, persuasive authority for the proposition that strikes by public employees are illegal. Unless this court is prepared to overrule those two decisions, they must be recognized for what they have clearly stated — that there is no right of public employees to strike against the government.

Because I believe this issue should be put to rest one way or the other, in the interest of avoiding future strikes and the litigation that inevitably follows, I must dissent from the majority's refusal to reach the merits of Appellants' argument. Given this court's reluctance to address this important issue, I strongly urge the General Assembly to consider this matter at its next session.

DON DONNER, Sp.J., joins in this opinion.

TOM GLAZE, Justice, dissenting. In my view, the court is wrong in refusing to address the merits of this case. It unquestionably has the discretion to do so. This issue concerning the validity of striking school teachers has now occurred at least twice in Pulaski County, since I have served on this court.[1] On both occasions, the strikes ended before this court was asked to decide their validity.

Teachers, students, parents, and taxpayers should be apprised concerning the validity of such strikes, so when a dispute arises again, the participating parties can pursue what they know is a lawful course of action and Arkansas citizens can predictably measure its outcome. Until this court grapples with and decides whether teachers may strike against their public employer, confusion and uncertainty will continue to prevail in the management of our schools. That is not a happy prospect.

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[1] In oral argument, counsel for appellees said that he had been involved in four other public strike cases and in two of those, chancery judges had found it was not clearly illegal for public employees to strike. Those cases were not later appealed and decided by this court.

Floyd WILSON *v.* J. WADE QUINN COMPANY, Inc.

97-344 952 S.W.2d 167

Supreme Court of Arkansas
Opinion delivered October 23, 1997

W. Scott Davidson, for appellant.

Snellgrove, Laser, Langley , Lovett, & Culpepper, by: *P. Sanders Huckabee*, for appellee.

DAVID NEWBERN, Justice. This is a slip-and-fall case. Floyd Wilson alleged he fell down in a Jr. Foods Store ("the store"), operated by J. Wade Quinn Company, Inc. ("Quinn Co."). He alleged that he slipped on a foreign substance on the floor, fell into a soft-drink display, and sustained injuries. We are asked to review a summary judgment in favor of Quinn Co. We hold that summary judgment was improperly granted as conflicting affidavits left a genuine issue of material fact. Ark. R. Civ. Pro. 56(c).

Mr. Wilson alleged his fall was due to slipping on a liquid substance and mashed food particles. In support of its summary-judgment motion, Quinn Co. produced the affidavit of Christopher Ramsey, the store's assistant manager. Mr. Ramsey stated that, after hearing a noise near the soft-drink display, he went to investigate. He did not see anyone there; however, Mr. Wilson came out of the restroom and informed Mr. Ramsey that he fell on a french fry but was fine. He inspected the area where Mr. Wilson allegedly fell, but he did not see and was not made aware of a french fry, foreign substance, or anything slippery in the area. He said that, to the best of his knowledge, a store employee did not place any foreign matter in or near the area where Mr. Wilson fell. No employee had been made aware of the existence of any foreign matter in this area nor had any employee been asked to remove any such matter. Mr. Ramsey said his duties included checking the floor for food, spilled drinks, debris, and other foreign matter. Employees are trained to watch for and clean up any such matters on the floor, and the floors are cleaned on an hourly basis. He said that, approximately thirty minutes before Mr. Wilson fell, the area where he fell was cleaned and that the store did not serve french fries on the day in question.

In his counteraffidavit Mr. Wilson stated that there was a "dirty looking liquid" mixed with food particles on the floor that "looked like it had been walked through for quite some time." The substance spread over nearly four feet, approximately the width of the aisle. After being helped up by an unidentified person, he went into the bathroom to stop his chin from bleeding. Mr. Wilson stated that when he left the restroom, a store employee asked him if he would be alright, and that the employee then turned to another employee and said, "I thought you cleaned that up." Mr. Wilson also stated that the store employees had a clear view of the aisles from their usual position at the cash register behind the counter. He said that he was not warned of a substance on the floor, and there were no barriers or signs preventing him from walking down the aisle where the substance was allegedly on the floor. He was using crutches at the time of the fall and the employees were present when he wiped the substance from the floor off of his crutch.

■ Summary judgment should be granted only when it is clear that there is no genuine issue of material fact to be litigated. *Kelley v. National Union Fire Ins. Co.*, 327 Ark. 329, 937 S.W.2d 660 (1997). A summary judgment should not be granted when reasonable minds could differ as to the conclusions they could draw from the facts presented. *Brunt v. Food 4 Less, Inc.*, 318 Ark. 427, 885 S.W.2d 894 (1994). The burden of proving there is no genuine issue of material fact is upon the movant, and all proof submitted must be viewed favorably to the party resisting the motion. *Wyatt v. St. Paul Fire & Marine Ins.*, 315 Ark. 547, 868 S.W.2d 505 (1994). Any doubts and inferences must be resolved against the moving party. *Kelley v. National Union Fire Ins. Co.*, 327 Ark. 329, 937 S.W.2d 660 (1997). When the movant makes a prima facie showing of entitlement, the respondent must meet proof with proof by showing a genuine issue of material fact. *Brunt v. Food 4 Less, Inc.*, 318 Ark. 427, 885 S.W.2d 894 (1994).

■ ■ A property owner has a duty to exercise ordinary care to maintain the premises in a reasonably safe condition for the benefit of invitees. *Kelley v. National Union Fire Ins. Co.*, 327 Ark. at 335, 937 S.W.2d at 663; *Black v. Wal-Mart Stores, Inc.*, 316 Ark. 418, 872 S.W.2d 56 (1994).

> In order to prevail in a slip and fall case, the appellant must show either (1) that the presence of a substance upon the premises was the result of the defendant's negligence, or (2) that the substance had been on the premises for such a length of time that the defendant knew or reasonably should have known of its presence and failed to use ordinary care to remove it. The mere fact a person slips and falls does not give rise to an inference of negligence. Possible causes of a fall, as opposed to probable causes, do not constitute substantial evidence of negligence.

Kelley v. National Union Fire Ins. Co., 327 Ark. at 335, 937 S.W.2d at 663 (citations omitted).

Mr. Wilson's statement that the dirty water and mashed food particles looked as if they had been walked through for some time and that they had spread over a wide floor area raises the specter of a foreign substance having been present long enough that store employees should have known of its presence. In addition, his statement that one employee remarked to another that he thought "that" had been cleaned up adds considerable weight to the possible conclusion that the store was negligent by virtue of knowledge of the presence of the substance and failure to act to remove it.

Quinn Co. argues the statement alleged to have been made by its employee could have referred to an employee mentioning to another that the floor should have been cleaned *after* the accident. While that is a possibility, so is the possibility that it meant *before* the accident occurred. At any rate, the matter is one for a fact-finder.

Unlike cases, such as *Mankey v. Wal-Mart Stores, Inc.*, 314 Ark. 14, 858 S.W.2d 85 (1993), and *Sanders v. Banks*, 309 Ark. 375, 830 S.W.2d 861, in which we have affirmed a summary judgment or directed verdict due to lack of a showing as to how long the substance was on the floor prior to the fall, the evidence here is such that a fact finder could determine that there was a foreign substance on the store's floor and that it was known to employees but not removed or that it had been present for a time sufficient to require its notice and removal by employees.

As all doubts and inferences must be resolved in favor of the nonmoving party, Mr. Wilson's affidavit was sufficient to raise

a material issue of fact. *See Kelley v. National Union Fire Ins. Co.*, 327 Ark. at 336, 937 S.W.2d at 663. The affidavits conflict as to whether the substance had been on the premises for such a length of time that the store employees knew or reasonably should have known of its presence and failed to use ordinary care to remove it. A genuine issue of material fact remains to be decided.

Reversed and remanded.

Devolyn Kay LEE *v.* John William LEE, Jr.

97-338 954 S.W.2d 231

Supreme Court of Arkansas
Opinion delivered October 23, 1997

Bagby Law Firm, P.A., by: *Philip A. Bagby*, for appellant.

Annie Powell and *Eddie N. Christian*, for appellee.

TOM GLAZE, Justice. This case involves a custody dispute over the two sons of appellant Devolyn Kay Lee and appellee John William Lee. Crawford County Chancery Judge Jim Spears, by *ex parte* order of protection, initially awarded temporary custody of the boys to Devolyn. However, Chancery Judge Charles Clawson was later assigned to hear Judge Spears's cases, and after hearing the Lees' divorce case on December 5, 1996, Judge Clawson granted Devolyn a divorce, but awarded permanent custody of the two boys to John. Judge Spears actually signed the initial divorce decree, which was entered on December 19, 1996, but after

Devolyn filed a motion for a new trial on December 20, 1996, Judge Clawson signed a second decree, which was entered on December 27, 1996. Other than reflecting Judge Clawson's signature, in place of Spears's, the second decree read the same as the first decree. When the trial court failed to rule on Devolyn's new-trial motion, Devolyn filed a timely notice of appeal on January 23, 1997. On appeal, Devolyn raises four points for reversal, but none has merit.

In her first argument, Devolyn contends that, immediately after Judge Clawson heard and decided the Lees' case, she had acquired newly discovered evidence entitling her to a new trial. Devolyn alleged in her motion for new trial that John had informed Devolyn's father, Donald Love, that he did not have adequate housing for the boys, that it would be impossible for him to keep the boys in their present school district, and that neither Devolyn nor Mr. Love and his wife would see the boys again. Based on these remarks attributed to John, Devolyn asserted John had not been forthright with the court and had shown it was not in the best interest of the boys to be awarded to John. In his response, John denied having made any of the statements.

It is settled law that a new trial based on newly discovered evidence is not a favored remedy, and whether to grant a new-trial motion on such grounds is within the sound discretion of the trial court. *Piercy v. Wal-Mart Stores, Inc.*, 311 Ark. 424, 844 S.W.2d 337 (1993). This court has also established that, in a hearing on a motion for new trial based on newly discovered evidence, the burden is on the movant to establish that he or she could not with reasonable diligence have discovered and produced the evidence at the time of the trial, that the evidence is not merely impeaching or cumulative, and that the testimony would have changed the result of the trial. *Id.*

Here, the statements attributed to John were denied by him, and the trial court was well within its province to disbelieve Donald Love. In addition, the remarks attributed to John could only have been used to impeach his earlier testimony. The fact that new information has been discovered which might merely impeach or otherwise test the credibility of a witness is not suffi-

cient reason to warrant a new trial. Accordingly, we hold the trial court did not abuse its discretion in denying Devolyn's motion.

For her second point, Devolyn argues that Judge Clawson's assignment in this case, made pursuant to Ark. Code Ann. § 16-10-101 (Repl. 1993), violated Art. 7, § 13, of the Arkansas Constitution and Ark. Code Ann. § 16-13-2003 (Repl. 1993). The constitutional provision cited provides for the establishment of judicial circuits and for judges who shall be elected and reside within each circuit. Section 16-13-2003, establishes the number of judges and chancellors to be elected in the Twelfth Judicial Circuit, which includes the Crawford County Chancery Court. In sum, Devolyn submits that, contrary to Art. 7, § 13, Judge Clawson was never elected to serve in the Twelfth Judicial Circuit, and other judges who had been elected within the circuit could have served if they had been given the opportunity. *See* Ark. Code Ann. § 16-13-403 (Repl. 1993). Devolyn further argues that Judge Clawson's appointment or assignment under Ark. Code Ann. § 16-10-101 (Repl. 1993) was not proper because there was no showing his assignment was necessary "for the efficient and proper administration of justice," as is required by the statute.

The short answer to Devolyn's argument is that, while Devolyn argues she had no opportunity to object to Judge Clawson's appointment on December 4, 1996, the record belies her charge. Judge Clawson was appointed on December 4, 1996, so she could have raised this issue either on December 4 or before trial commenced on December 5, 1996. Thus, Devolyn is procedurally barred from raising this issue for the first time on appeal. *See Jones v. Jones*, 320 Ark. 449, 898 S.W.2d 23 (1995); *see also Neal v. . Wilson*, 321 Ark. 70, 900 S.W.2d 177 (1995) (court held it is the parties' or trial court's responsibility to apprise the supreme court as to whether an assignment is necessary under Act 496 [now codified as § 16-10-101], and once that assignment is made, that responsibility continues).[1]

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[1] The *Neal* court upheld an assignment under § 16-10-101 even though another judge, who had been elected within the circuit, could have served. *See also George v. State*, 250 Ark. 968, 470 S.W.2d 93 (1971) (court held selection and assignment of a judge under § 16-10-101 as an alternate method to judges in different circuits serving on exchange).

Devolyn next argues that Judge Clawson's appointment was limited to the trial on December 5, 1996, and therefore his signing of the parties' decree and entering it on December 27, 1996, exceeded his authority. Again, Devolyn made no objection to Judge Clawson's having signed the December 27 decree. Our *de novo* review of chancery matters does not mean that this court can entertain new issues on appeal when the opportunity presented itself for them to be raised below and that opportunity was not seized. *Jones*, 320 Ark. 449, 898 S.W.2d 23.

In her final point, Devolyn suggests Judge Spears committed reversible error when he signed the parties' initial decree even though he had not heard the case. She cites *Waddle v. Sargent*, 313 Ark. 539, 855 S.W.2d 919 (1993), and argues that once an order of assignment of another judge has been entered, the assignment deprives any other judge of authority to act in any proceeding related to that case. Of course, we have already upheld the validity of Judge Clawson's appointment and his signing and entry of the December 27 decree in this case. Consequently, Devolyn's argument became moot when Judge Clawson entered the December 27 decree.

For the reasons above, we affirm.

MERCANTILE BANK, n/k/a Union Planters Bank of Northeast Arkansas *v.* B & H ASSOCIATED, INC., Fred Boling and Clara Boling

97-280 954 S.W.2d 226

Supreme Court of Arkansas
Opinion delivered October 23, 1997

Snellgrove, Laser, Langley , Lovett, & Culpepper, by: *Todd Williams*, for appellant.

Larry Boling, for appellees.

TOM GLAZE, Justice. Appellee B & H Associates and Fred and Clara Boling[1] owned what is called the Uni-Banc System — a complete in-house processing system designed in 1979 to handle the accounting needs of banks. In February of 1992, B & H sold a copy of the Uni-Banc System software program to Sparak Financial Systems, Inc., and it is the 1992 sales contract that, in part, plays a role in the litigation now before us involving Mercantile Bank and B & H Associates.[2] Under the 1992 contract, Sparak acquired broad authority to market, license, develop, and use the Uni-Bank System. Sparak could use the copy as if it were the original software program, and was not required to pay B & H any royalties or licensing fees. The parties' contract provided that Sparak's and B & H's interests in the system were exclusive except as to each other's interest, and that neither Sparak nor B & H could transfer, sell, assign, or encumber the system without the prior consent of the other. Moreover, each party had the right of first refusal on any sale or any proposed sale of the system by the other, and in the event B & H sold its interest, B & H was required to pay Sparak $60,000.00 from the sale proceeds. Signifi-

[1] Hereinafter, for writing purposes, appellees collectively are often referred to as B & H and B & H Associates.

[2] Mercantile Bank is now Union Planters Bank of Northeast Arkansas.

cant to this present suit between Mercantile Bank and B & H, the 1992 Sparak contract provided that, in the event either B & H or Sparak went into bankruptcy or had a judgment entered against it in excess of $50,000.00, the obligated party would sell its interest in the Uni-Banc system to the other for the sum of $25,000.00.

The present dispute between Mercantile Bank and B & H arose from a September 22, 1993 loan that the Bank made to B & H and the Bolings in the sum of $150,000.00. The parties' promissory note evidencing the loan was secured by B & H's Uni-Banc System. When B & H defaulted, the Bank sued, and subsequently took possession of B & H's computer software identified as the Uni-Banc System. Afterwards, Mercantile Bank, at a private sale, sold the copy of the system to Sparak for $25,000.00 and the Bank then sought a deficiency judgment against B & H and the Bolings. However, B & H and the Bolings defended the Bank's action, claiming Mercantile Bank's sale of the Uni-Banc System's software had not been conducted in a commercially reasonable manner. After a jury trial, B & H and the Bolings were favored with a defendants' verdict, and when the trial court denied the Bank's motion for a new trial or judgment notwithstanding the verdict, the Bank brought this appeal.

Mercantile Bank first contends the trial court erred in denying its new-trial motion because there was no evidence from which reasonable minds could conclude that its sale of the Uni-Banc System to Sparak was not conducted in a commercially reasonable manner. The Bank's contention is largely based upon Mr. Boling's earlier inability to obtain a purchaser for the Uni-Banc System. It submits the $150,000.00 loan was made essentially to give Mr. Boling an opportunity to sell the system's software to pay off B & H's indebtedness. Although Mr. Boling had made a number of contacts seeking buyers for the system, the Bank's Vice-President, Brad Edwards, said Boling had been unable to obtain a purchaser. Edwards claimed the Bank had used Mr. Boling's contacts, but the Bank, too, failed to find a buyer. Bank officer Edwards related the Bank further used the assistance of Tim Gibson, the president of a local computer system business, and Gibson, among other things, opined Sparak's purchase price of $25,000.00 was "quite a bit." Another witness, James V. Burnett,

had a current interest in Uni-Bank System which permitted him to re-market the system to banks. The Bank points out that, when Burnett was asked if he would be interested in buying a copy of the system's software, he responded no because Sparak's 1992 contract presented "too many strings" attached to any sale.

Mercantile Bank emphasizes the foregoing evidence to support its argument that it had conducted a commercially reasonable sale when obtaining $25,000.00 from Sparak for B & H's Uni-Banc System. However, this court's review of the trial court's denial of the Bank's new-trial motion is whether there is any substantial evidence to support the jury's verdict. *Fisher v. Valco Farms*, 328 Ark. 741, 945 S.W.2d 369 (1997). In examining whether substantial evidence exists, all evidence must be examined in the light most favorable to the party on whose behalf the judgment was entered and given its highest probative value, taking into consideration all reasonable inferences deducible from it. *Esry v. Cordin*, 328 Ark. 153, 942 S.W.2d 846 (1977). In such situations, the weight and value [of testimony] is a matter within the exclusive province of the jury. *Id.*

Before reviewing the evidence in B & H's favor to determine if the verdict should stand, we first discuss the law relevant to a creditor's right to dispose of collateral securing an indebtedness. In this respect, a secured party after default may sell, lease, or otherwise dispose of any or all of the collateral in its then condition or following any commercially reasonable preparation or processing, Ark. Code Ann. § 4-9-504(1) (Repl. 1991), and the disposition of the collateral may be by public or private proceedings . . ., but every aspect of the disposition including the method, manner, time, place, and terms must be commercially reasonable. Ark. Code Ann. § 4-9-504(3) (Repl. 1991). While a creditor is given the right to a deficiency judgment under Ark. Code Ann. § 4-9-504(2) (Repl. 1991), the creditor's right to such judgment depends on whether he has complied with the statutory requirements concerning disposition and notice. *First State Bank of Morrilton v. Hallett*, 291 Ark. 37, 722 S.W.2d 555 (1987). When the debtor defends upon the ground that the secured creditor did not proceed in accordance with the provisions of the Uniform Commercial Code, the creditor has the burden of proving that he pro-

ceeded in a commercially reasonable manner. *Farmers Equipment Co. v. Miller*, 252 Ark. 1092, 482 S.W.2d 805 (1972); *Henry v. Trickey*, 9 Ark. App. 47, 653 S.W.2d 138 (1983). Courts have held, and we agree, that whether a sale of collateral was conducted in a commercially reasonable manner is essentially a factual question. *United States v. Conrad Publishing Co.*, 589 F.2d 949 (8th Cir. 1978); *Cheshire v. Walt Bennett Ford, Inc.*, 31 Ark. App. 90, 788 S.W.2d 490 (1990); *Henry*, 9 Ark.App. 47, 653 S.W.2d 138. And, if a secured party sells the collateral in a commercially unreasonable manner, a presumption arises that the value of the collateral is equal to the outstanding debt; however, the secured party can still recover a deficiency upon proving that the reasonable value of the collateral was less than the debt. *Barker v. Horn*, 245 Ark. 315, 432 S.W.2d 21 (1968); *Henry*, 9 Ark. App. 47, 653 S.W.2d 138; and J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE (2d ed. 1980). Finally, when determining whether the sale of a collateral was handled in a commercially reasonable manner, this court has held that a major consideration is the determination of the fair market value of the collateral. *Thrower v. Union Lincoln-Mercury, Inc.*, 282 Ark. 585, 670 S.W.2d 430 (1984).

After a careful review of the record, we conclude that Mercantile Bank failed to overcome its legal burdens as set out above and that there is substantial evidence to support the jury's decision that the Bank's sale to Sparak was not commercially reasonable. We now allude to that evidence that favors B & H's verdict.

■ While Mr. Edwards testified that he had incurred in excess of 100 hours in trying to find potential buyers for the Uni-Banc System, he conceded that, other than a company he had located named Advance Data, the Bank essentially limited its contact to eight persons or entities given it by Mr. Boling. The Bank admitted that it did not advertise in magazines, *American Bankers' Journal*, state bank journals, banking computer trade magazines, or newspapers. Yet, a banker and financial consultant, Johnny Ray McFarland, testified that, in locating potential buyers for Uni-Banc, he would not have limited his contacts to Mr. Boling's prospects and would have advertised in the most accessible market and utilized trade publications sent to bankers. We point out, as well,

that sales have been held not to have been commercially reasonable where there was minimal advertising of the sale and where there was a great disparity between the sale price and the fair market price. *United States v. Conrad Publishing Co.*, 589 F.2d 949 (8th Cir. 1978).

Edwards also admitted Mercantile Bank had a duty to obtain a fair market value when selling the system, but the Bank obtained no such value. The Bank's witness, Tim Gibson, who sells licenses for computer software systems, stated that he was unable to place a value on the Uni-Banc System. In his opinion, Gibson said "there was no way to determine whether the system was worth $25,000.00, $1,000.00, $500,000.00, or $1,000,000.00." In sum, there is substantial evidence in the record that reflects the Bank made no reasonable effort to determine the fair market value or identify potential buyers.

On the other hand, the Bank was well aware that Sparak had purchased its interest in the Uni-Banc System for $805,000.00, and knew James V. Burnett had purchased an interest in the Uni-Banc System in 1993, and his contract had resulted in payments to B & H in the approximate annual amount of $25,000.00 in royalties. Concerning Sparak's purchase, Mr. Boling testified that Sparak had licensed the Uni-Banc software to eighty banks and had earned $1.5 million on its $805,000.00 investment.

Because the foregoing reflects substantial evidence to support the jury's decision that the Bank's sale to Sparak was not commercially reasonable, we conclude the trial court did not abuse its discretion in denying the Bank's request for a new trial.

In its second point for reversal, Mercantile Bank argues value testimony given over its objection at trial had prejudiced its case and caused reversible error. It first challenges Mr. Boling's trial testimony concerning an offer that he had received in August 1994 from Oracle Corporation to buy B & H's Uni-Banc System. The Bank objected on hearsay grounds. The trial court ruled Mr. Boling could discuss the sale of the property to the people (Oracle), but he could not mention the amount offered. When Boling resumed testifying, he was asked the purpose of Oracle's contacting him, and he responded that Oracle wanted to make an offer.

Boling then volunteered, "I asked [Mr. Smith] to contact Mercantile Bank and also give Mercantile Bank the information about the price that he was asking which was in excess of $400,000.00." The Bank's counsel approached the bench, renewed his objection, and requested a mistrial. The trial judge rejoined that a mistrial was too drastic, but he would (and did) instruct the jury to disregard the amount mentioned by Mr. Boling because it was hearsay.

The rule is well settled that a mistrial is an extreme remedy to be taken only when it is apparent that justice cannot be served by continuing the trial. *Bull Shoals Community Hosp. v. Partee*, 310 Ark. 98, 832 S.W.2d 829 (1992). It is proper only when the error is beyond repair and cannot be corrected by any curative relief. *Nobles v. Casebier*, 327 Ark. 440, 938 S.W.2d 849 (1997). The granting of a mistrial is within the sound discretion of the trial court, and the exercise of that discretion will not be disturbed on appeal absent a showing of abuse.

As discussed in detail above, considerable evidence was presented, bearing on Uni-Banc System's worth or value, and some of that testimony offered figures well in excess of the $400,000.00 offer which Boling mentioned at trial. Considering the circumstances, we simply are unable to say the trial court's cautionary instruction to the jury did not cure any prejudice caused by Boling's offer statement.

The Bank also questions the trial court's allowing Johnny Ray McFarland to testify as an expert and specifically permitting him to give value testimony concerning Uni-Banc System's software. First, in reviewing the abstract of record, we do not find a definitive ruling on accepting or rejecting McFarland as an expert. However, the Bank did question whether B & H had established a proper foundation upon which McFarland could offer an opinion in putting a market value on the Uni-Banc System's software. We believe such foundation was sufficient.

McFarland explained his long-standing experience with B & H's software. He had been a Senior Vice President with the Bank of Wynne, and in that capacity, he became intimately familiar with the Uni-Banc System. During his thirteen years with the Bank of Wynne, he worked with the system. He testified in detail

how the system worked, compared it as being superior to others, and related that the Wynne Bank had paid B & H $25,000.00 just for the right to use B & H's software. While McFarland admitted he had no college course or education with respect to placing a market value on software, he said that he had been involved in the purchase or sale of source codes for software. He said that his company, Alpha Financial Services, evaluated properties and businesses, and he mentioned the three appraisal approaches he utilized when establishing a market value.

After giving the foregoing testimony, McFarland was asked if he had an opinion concerning the Uni-Banc System, to which Mercantile Bank objected. And while McFarland started to mention an offer he knew had been given to Mr. Boling, the trial court interrupted, by instructing McFarland his opinion could not be based on what somebody else told him. McFarland then stated without objection he valued the system at $1.2 million. Later, when the Bank and the trial court questioned McFarland's basis for arriving at his value testimony, he assured them his opinion was not based on someone else's opinion as to the software's worth, but instead he reached his opinion by employing the hours that went into developing the B & H software and using the knowledge that, in 1992, Sparak had paid more than $800,000.00 for a copy of the software.

This court has long recognized that the admissibility of expert testimony rests largely within the broad discretion of the trial court, and the appellant bears the burdensome task of demonstrating the trial court abused its discretion. *Collins v. Hinton*, 327 Ark. 159, 937 S.W.2d 164 (1997). Generally, the tendency is to permit the jury to hear the testimony of the person having superior knowledge in a given field unless clearly lacking in either training or experience, and too rigid a standard should be avoided. *Mine Creek Contractors, Inc. v. Grandstaff*, 300 Ark. 516, 780 S.W.2d 543 (1989). If some reasonable basis from which it can be said the witness has knowledge of the subject beyond that of persons of ordinary knowledge, his evidence is admissible. *Id.*

Here, given McFarland's background and his intimate knowledge of the Uni-Banc System, there was more than a suffi-

cient basis to uphold the trial court's ruling allowing his value testimony.

Affirmed.

Clint LAMMERS *v.* STATE of Arkansas

CR 97-417 955 S.W.2d 489

Supreme Court of Arkansas
Opinion delivered October 23, 1997

[Supplemental opinion upon granting of rehearing January 8, 1998.]

[redacted]

Green and Henry, by *J.W. Green, Jr.*, for appellant.

Winston Bryant, Att'y Gen., by: *Vada Berger*, Asst. Att'y Gen., for appellee.

RAY THORNTON, Justice. Appellant Clint Lammers was tried and convicted of capital murder in the slaying of Lois Wallace, a clerk at a grocery store in Stuttgart. He was convicted at a jury trial and sentenced to life imprisonment without parole. He argues four points on appeal, none of which contains reversible error. However, pursuant to the provisions of Ark. Sup. Ct. R. 4-3(h), we have examined the complete record for any prejudicial error that was objected to below, but not argued on appeal. We have concluded that there was reversible error when the trial court ruled that appellant's peremptory challenge of a middle-aged white male juror violated the requirements of *Batson v. Kentucky*, 476 U.S. 79 (1986), and ordered the juror to serve over appellant's objection.

Appellant's conviction was based upon evidence that he and two accomplices, Sean Smith and Brandon Isbell, who were tried separately, planned to rob Goacher's IGA grocery store and shoot the clerk to eliminate her as a witness. They went to the grocery store on the morning of October 28, 1994, where they first purchased batteries and remained in the store while they discussed their next move. Isbell picked up a pair of gloves and went to the front of the store, while appellant and Smith remained in the back. Isbell had a gun with him. He went to the cash register to pay for the gloves and shot the clerk, Ms. Wallace, in the head. When they could not open the cash register, they grabbed some cigarettes and fled to appellant's home. They took the gun, cigarettes, batteries, and gloves to a shed near appellant's house, where they

hid the gun. They called police from appellant's house and turned themselves in. All three gave statements while in custody.

After the police arrived at the house, Smith told them what was hidden in the shed. The officers immediately conducted a warrantless search of the shed and found a .357 caliber revolver hidden under a stuffed animal and a .22 caliber handgun in a paper bag. They found the cigarettes, batteries, and gloves lying outside on the ground. Appellant argues that the confession and search were illegal, and that without this evidence, there was not substantial evidence to convict him.

Before we discuss the error upon which we reverse, or any of the other points on appeal, we must first consider his challenge to the sufficiency of the evidence. We do not consider trial errors until after we have considered arguments regarding the sufficiency of the evidence, *including that which perhaps should not have been admitted. Scroggins v. State*, 312 Ark. 106, 848 S.W.2d 400 (1993).

There was an abundance of evidence to support a conviction. Appellant's argument that the evidence was insufficient because some of it should have been suppressed is based upon a mistaken premise. *See Scroggins v. State, supra.* Further, this issue was not preserved for appeal because his motions lacked the requisite specificity. At the close of the State's case, appellant stated that he moved for "a directed verdict of dismissal based on the sufficiency of the evidence." He renewed his motion at the close of his case. We cannot consider this argument because his motions did not state "the specific grounds therefor." *Walker v. State*, 318 Ark. 107, 108, 883 S.W.2d 831, 832 (1994). A general motion such as the one made by appellant is not sufficient to apprise the trial court of the missing proof so that it can be made aware of any deficiency. *Id.* Therefore, the argument is procedurally barred from our review.

In capital murder cases, we are required by Ark. Sup. Ct. R. 4-3(h) to " . . . review all errors prejudicial to the appellant in accordance with Ark. Code Ann. § 16-91-113(a)." Pursuant to the requirements of this rule, we make our own examination of the record and reject or accept on their merits all objections made

at trial, whether or not argued on appeal, but we do not consider a matter in the absence of an objection. *Fretwell v. State*, 298 Ark. 91, 708 S.W.2d 630 (1996). We review prejudicial, erroneous rulings even when such objections are not briefed by either the appellant or the State. *Griffin v. State*, 322 Ark. 206, 909 S.W.2d 625 (1995). We have concluded that the trial court committed prejudicial error in denying appellant's peremptory challenge of Mr. Clifford Burdett on the basis of the principles established by *Batson v. Kentucky*, 476 U.S. 79 (1989).

We note that before Mr. Burdett was challenged, the selection of twelve jurors had been completed without an objection being preserved as to any peremptory challenge or dismissal for cause. However, the trial court determined that two alternate jurors should be chosen in the event that one or more of the jurors could not serve. Appellant, a seventeen-year-old white male, attempted to exercise a peremptory challenge of Mr. Burdett, and the prosecutor asked for a bench conference, arguing that appellant struck Mr. Burdett because he is a "white male of middle age." The following colloquy ensued:

> MR. J.W. GREEN, JR.: My client told me to strike him, Your Honor. My client sits here facing a possible death sentence. My client does not feel comfortable with this gentleman sitting as a juror. And in this particular case, I follow my client's recommendation.
>
> [A recess was taken in order for the court to review *J.E.B. v. T.B. ex rel. Alabama*, 114 S. Ct. 1419 (1994)]
>
> . . .
>
> MR. DITTRICH [PROSECUTOR]: . . . there have been a large number of middle age, or older, white males struck by the defendant regardless of the answers to their questions. And it is our position that a conscious pattern to strike those individuals. I realize J.E.B. versus Alabama does not deal with the age issue, but we would make both a gender and an age based discrimination argument.
>
> . . .

> THE COURT: Well, for the record, we should note that Mr. Harris is on the jury, and he is thirty — in his thirties? Do you all have a questionnaire?
> MR. DITTRICH: Mr. Harris is thirty-two years old, Your Honor — I'm sorry, Your Honor, forty-two. He was born in 1954.
> THE COURT: Forty-two. And . . . let's see, Mr. Stovesand — Mr. Stovesand was struck by the defendant, and I know he is in his twenties. Mr. Winfrey was excused by the defendant, and he is in his fifties.
> THE COURT: Ms. Sells was excused by the defendant. She is a white woman. Mr. Berry was seated on the jury. Do we know how old Mr. Berry is?
> MR. DITTRICH: Mr. Berry . . . Let me look just a minute, Your Honor. . . .Mr. Berry is thirty-six years old. But I would point out for the record that Mr. Berry is an African-American.

The court then proceeded to inquire into the age of each of the white males who had been peremptorily challenged. Appellant's attorney asked whether the State's *Batson* challenge was based upon race, gender, or age, and the prosecutor replied that it was based upon all three. The court disallowed the peremptory challenge.[1] Appellant's attorney then explained his objection for the record as follows:

> MR. J.W. GREEN, JR.: Your honor, the defendant's objection goes not only to the fact that he is a white man. It wouldn't make any difference if it was a white female. The defendant's objection goes to the fact — further to the fact that he did not

[1] The trial court's finding that seven out of nine strikes exercised by the defendant were against white males is factually incorrect. A careful review of the record reveals that in the selection of the twelve original jurors, appellant had peremptorily challenged three white females, two young white males, and four older white males. During the selection of alternates before Mr. Burdett had been chosen as first alternative, three white males and one white female had been struck by the court for cause, and the court had upheld the State's peremptory strike of a black male notwithstanding a *Batson* challenge.

None of appellant's peremptory strikes had been challenged during the selection of the first twelve jurors, and therefore no race-neutral or gender-neutral explanation was required to be given. However, a review of the record discloses that at least four of the peremptorily stricken white males had responded to questions disclosing (1) that a potential witness, the acting police chief David Cowart, was a client of the venireman, (2) an ambiguous or contradictory response as to whether the potential juror could presume innocence, (3) membership in the same church with the victim's sister, and (4) that the venireman worked with and saw the husband of the deceased every day.

> feel comfortable with the answers that were asserted by Mr. Burdett up there. The defendant is sitting here in a capital murder case. His life is on the line. And he is exercising a peremptory challenge that he thought, and believes that he has a right to exercise. If it had been a black man, or if it had been a black woman, if it had been a white man, or if it had been a white woman, would the, what he perceived and what he heard from where he sits, he would have excluded that person from the juror — jury.

Although there was no finding by the court that this explanation was pretextual, Mr. Burdett was seated on the jury without further inquiry.

The threshold question is whether a prima facie case of discrimination has been presented by the State. In *Mitchell v. State*, 323 Ark. 116, 913 S.W.2d 264 (1996), we articulated the requirements for establishing a prima facie case as follows:

> (1) showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose, (2) demonstrating total or seriously disproportionate exclusion of [the group in question] from the jury, or (3) showing a pattern of strikes, questions or statements by [the proponent of the strike] during voir dire.

Id. at 123-24, 913 S.W.2d at 268. By trying to discern a pattern, the trial court followed the correct procedure in attempting to determine whether a prima facie case had been established. However, its ruling was based upon a faulty premise, which was that age can be a basis for a *Batson* challenge.

In *Sonny v. Balch Motor Co.*, 328 Ark. 321, 944 S.W.2d 7 (1997), we approved the trial court's finding that no *Batson* violation existed when the proponent of the strike in question there explained to the court that it was looking for mature, conservative business people. We noted that age and occupation are neutral criteria. *Id.*; *accord United States v. Ross*, 872 F.2d 249 (8th Cir. 1989); *United States v. Garrison*, 849 F.2d 103 (4th. Cir. 1988). While we recognize that the United States Supreme Court has expanded *Batson*, as provided in *Georgia v. McCollum*, 505 U.S. 42 (1992), and extended the principles to a consideration of gender, *J.E.B. v. T.B. ex rel. Alabama*, 511 U.S. 127 (1994), it is obvious from the record that the trial court's focus here was on the exclu-

sion of *middle-aged* white males, as it inquired into the age of each juror. Therefore, its ruling was in error.

Had there been a prima facie case, the court failed to properly apply the remaining parts of the *Batson* test. The explanation offered by appellant was both race and gender neutral.[2] There was no finding by the trial court that it was pretextual. When a racially neutral explanation is offered to rebut a prima facie case, the trial court shall then determine from all relevant circumstances the sufficiency of the explanation. *Colbert v. State*, 304 Ark. 250, 801 S.W.2d 643 (1990). This was not done; the trial court ended its inquiry after appellant's race-neutral explanation, and seated the juror over appellant's objection.

Mr. Burdett, who was originally the first alternate, replaced a juror before the trial commenced and participated in the decision. As appellant received a life sentence without parole, we cannot say this error was harmless. We pointed out the following in *Sonny*:

> The goal of fairness in jury trials is also enhanced by the venerable practice of peremptory challenges, which dates back beyond the founding of the Republic to origins in the common law. The historical practice of allowing the litigant to strike jurors for any reason came into being for the purpose of fostering both the perception and the reality of an impartial jury. The rationale supporting this practice remains valid except where the constitutional principles articulated by *Batson* and its progeny are violated.

Sonny v. Balch Motor Co., 328 Ark. at 325, 944 S.W.2d at 90 (citations omitted). As there was no constitutional violation in appellant's peremptory strike, the trial court erred in overruling it.

We will address appellant's remaining points on appeal, as they are likely to arise on retrial. Prior to trial, appellant filed a motion to suppress evidence seized during the warrantless search

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[2] With regard to the question whether appellant's peremptory strikes reflected a systematic exclusion of members of the white race, we note that following the seating of Mr. Perry, a black male, it appears that every potential black juror was either dismissed for cause by the court, or peremptorily struck by the State. Thus, there was no opportunity for appellant to exercise a peremptory challenge against any non-white person.

of a metal building located behind the duplex where he and his mother lived. In his motion, he contended that the search and seizure violated his Fourth Amendment rights because it was made "without the consent of the defendant or his mother, the other occupant of the premises and with the absence of any exigent circumstances to justify a warrantless search." The trial court denied the motion, finding that because neither appellant nor his mother had a property interest in the shed, he lacked standing to object to the search. The trial court was correct.

"The rights secured by the Fourth Amendment are personal in nature." *Littlepage v. State*, 314 Ark. 361, 368, 863 S.W.2d 276, 280 (1993) (citing *Rakas v. Illinois*, 439 U.S. 128 (1978)). Before a search can be challenged on Fourth Amendment grounds, the challenger must have standing. *Id.* To have standing, appellant must show that (1) he manifested a subjective expectation of privacy in the area searched and (2) society is prepared to recognize that expectation as reasonable. *Dixon v. State*, 327 Ark. 105, 937 S.W.2d 642 (1997).

The testimony at the suppression hearing revealed that appellant's mother had once rented the house to which the shed belonged from Ray Freeman. Mr. Freeman also owned the duplex that Mrs. Lammers was renting at the time of the offense, and it is located near the house and the shed. However, Freeman testified that the shed went with the house. After Mrs. Lammers moved out of the house and into the duplex, the house was sold, but Mr. Freeman reacquired it when the buyer was unable to keep up with the payments. He said that Mrs. Lammers had put a motorbike in the shed at one time and left it there when the property was sold, but that the buyer had taken the motorbike and sold it.

It is not clear from the testimony whether Freeman or the buyer owned the house at the time of the offense, but the following facts are clear: (1) neither appellant nor his mother owned or rented the house with the shed, at the time of the offense and (2) the duplex where appellant lived, while in close proximity to the house and the shed, was not a "common area," and each tenant was responsible for a fifty-foot lot that surrounded

each residence. It follows that appellant did not have a reasonable expectation of privacy in the storage building, as he neither owned nor rented the property. The trial court's decision that appellant did not have standing to object to the search is supported by a preponderance of the evidence, as presented in the suppression hearing.

Appellant next argues that the statement he made to police while in custody should have been suppressed because he did not knowingly and voluntarily waive his Fifth Amendment right to remain silent. Appellant contended in his motion to suppress that he did not knowingly, intelligently, or voluntarily waive his rights; that he was not properly or sufficiently advised of his rights; and that he was not capable of understanding those rights, due to his age and his mental and emotional state. However, the trial court's ruling stated that there was "no evidence whatsoever of involuntariness." It appears that appellant made an argument that his *waiver* was involuntary, but he received a ruling that his *statement* was not involuntary. The arguments are not the same.

In *Clay v. State*, 318 Ark. 122, 883 S.W.2d 822 (1994), we discussed the difference between the contention that a statement was made involuntarily and the contention that an accused did not knowingly and voluntarily waive his right to remain silent. The "voluntary statement" argument addresses whether the *statements* were made as the result of coercion. *Id.* at 129, 883 S.W.2d at 826. The "waiver of rights" argument focuses upon whether *the waiver* was made with a "full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it," as well as whether the accused made the choice, "uncoerced by police, to *waive his rights*." *Id.*, 883 S.W.2d at 825-26 (emphasis added). We pointed out in *Clay* that while we sometimes do not take time to point out the distinctions between the two arguments, they are clearly different arguments. *Id.; see, e.g., Shaw v. State*, 299 Ark. 474, 773 S.W.2d 827 (1989) (reaching the waiver issue but not the voluntariness issue because the voluntariness argument had not been made to the trial court). It is incumbent upon a movant to obtain a ruling in order for his argument to be considered on appeal. *Foreman v. State*, 328 Ark. 583, 945 S.W.2d 926 (1997). Appellant should be mindful of the

distinction between the two arguments and should he make this argument at his retrial, he will need to obtain a specific ruling on either or both arguments if he wishes to preserve the issues for our review. *See Foreman v. State, supra.*

Appellant's final argument is that the trial court abused its discretion in denying his motion to recuse. Prior to trial, appellant filed a motion requesting that the trial judge recuse from the case because one of appellant's attorneys, J.W. Green, Jr., who was also Stuttgart City Attorney, had approved a charge of battery against the judge, resulting from an incident at a night club in Stuttgart. The Stuttgart Municipal Court had issued a warrant for the judge's arrest, but the charge was nolle prossed at the request of the alleged victim.

At a hearing, appellant noted that after the incident, the judge had recused from another case in which the defendant was represented by Mr. Green. After hearing the arguments, the judge declined to recuse, stating that he had no argument with Mr. Green, as he was only doing his job, and that he did not have any prejudice against appellant as a result of the incident in municipal court.

We see no evidence of bias in the record that would cause us to conclude that the trial court abused its discretion in declining to recuse. The mere presence of a complaint or suit against a judge, is not, by itself, a reason to require recusal. *Smith v. State*, 296 Ark. 451, 757 S.W.2d 554 (1988). When a party has acted contemptuously toward a judge, embroiling him in a personal dispute, or when a judge cannot lay aside attitudes toward individual practitioners, we have said that he should recuse. *E.g, Rosenzweig v. Lofton*, 295 Ark. 573, 751 S.W.2d 729 (1988); *Clark v. State*, 287 Ark. 221, 697 S.W.2d 895 (1985). There was no such showing here.

Bias is a subjective matter which is to be confined to the conscience of the judge. *Bradford v. State*, 328 Ark. 701, 947 S.W.2d 1 (1997). Unless there is an objective showing of bias, there must be a *communication* of bias in order to require recusal for implied bias. There is no such showing on the record before us in this appeal.

In summary, we determine that the trial court's error in not allowing appellant to exercise his peremptory strike against Mr. Burdett was prejudicial error requiring a new trial. We reverse and remand.

NEWBERN, GLAZE, and IMBER, JJ., dissent.

TOM GLAZE, Justice, dissenting. The majority court reverses this case on a *Batson* issue the trial court favorably decided in the State's favor. *See Georgia v. McCollum*, 505 U.S. 42 (1992); *Batson v. Kentucky*, 476 U.S. 79 (1986). In sum, when defendant Lammers peremptorily challenged venireman Mr. Burdett, the prosecutor objected that Lammers's strike was based solely on race, gender, and age. The prosecutor pointed out that of Lammers's nine peremptory strikes, seven were against white males. He also emphasized that, in making his strikes, Lammers's counsel announced, "It is widely known in the community that black individuals tend to be less severe than white people in criminal juries in Arkansas County." Considering Lammers's pattern of strikes and his discriminatory statement regarding race and gender when striking veniremen, I believe the trial court was correct in finding the State had shown a prima facie case of discrimination.

While the majority opinion seems to find fault with the trial court's reference to *middle-aged* white males, the record is clear that the judge's ruling dealt with gender and race.[1]

The Court in *J.E.B. v. T.B. ex rel Alabama*, 511 U.S. 127 (1994), extended the *Batson* principle to gender-based strikes, and the trial court here determined Lammers improperly utilized gender in striking white males. The trial judge then required Lammers to provide a gender-neutral explanation in striking Mr. Burdett. Lammers failed to do so, but instead he gave the following general, rather rambling, statement:

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[1] THE COURT: All right. Well, for the record I will note that out of nine strikes exercised by the defendant, seven of them were against white males. Two were accepted, one white and one black. Only two of the nine strikes were against women. And under the ruling of *J.E.B.*, and in the absence of a better explanation or basis for the exclusion of Mr. Burdett, I will have to overrule the peremptory challenge under the law. Mr. Burdett will be our first alternate.

> MR. J. W. GREEN, JR.: Your honor, the defendant's objection goes not only to the fact that he is a white man. It wouldn't make any difference if it was a white female. The defendant's objection goes to the fact — further to the fact that he did not feel comfortable with the answers that were asserted by Mr. Burdett up there. The defendant is sitting here in a capital murder case. His life is on the line. And he is exercising a peremptory challenge that he thought, and believes that he has a right to exercise. If it had been a black man, or if it had been a black woman, if it had been a white man, or if it had been a white woman, would the, what he perceived and what he heard from where he sits, he would have excluded that person from the juror — jury.

Lammers's foregoing statement merely conflicts with his earlier remarks and preconceived notions that white males are more severe than black males in criminal cases. And while Lammers mentions his case is a capital murder case, he made no suggestion that Mr. Burdett could not decide the case fairly. In fact, Lammers's statement made no specific reference to Mr. Burdett that could be categorized as a gender-neutral explanation for his striking Burdett.

In conclusion, I would not reverse the trial court's ruling on the *Batson* issue. The trial judge was correct in finding that the State made a prima facie case of discrimination, and that Lammers offered no articulate explanation for his peremptory strike of Burdett.

NEWBERN and IMBER, JJ., join this dissent.

SUPPLEMENTAL OPINION GRANTING
PETITION FOR REHEARING

JANUARY 8, 1998

959 S.W.2d 35

Green & Henry, by: *J.W. Green*, for appellant.

Winston Bryant, Att'y Gen., by: *Vada Berger*, Asst. Att'y Gen., for appellee.

TOM GLAZE, Justice. In its original opinion, this court considered appellant Clint Lammers's four points on appeal, and found no reversible error. *Lammers v. State*, 330 Ark. 324, 954 S.W.2d 489 (1997). However, because Lammers was convicted of

capital murder and sentenced to life imprisonment without parole, the court examined the complete record under Ark. Sup. Ct. R. 4-3(h), and concluded that the trial court had erred in ruling Lammers's peremptory challenge of a middle-aged white male juror violated the requirements of *Batson v. Kentucky*, 376 U.S. 79 (1986). The court reversed and remanded this case for retrial on the *Batson* issue.

The State now files a timely petition for rehearing wherein it suggests that, in rendering this court's decision, the court failed to give proper consideration to the trial judge's findings when the trial court rejected Lammers's motion to strike juror Burdett. Upon careful study and review of the record, we believe the State's petition has merit.

During voir dire and in support of its position that juror Burdett should be seated, the State showed that (1) Lammers had used seven of his nine peremptory challenges on white males,[1] and (2) Lammers made the remark, "black individuals are less harsh on criminal defendants in Arkansas County than white persons." Considering Lammers's pattern of strikes and his discriminatory statement regarding race and gender when striking veniremen, the trial court found and ruled that the State had demonstrated a prima facie case of discrimination.

In this respect, this court has repeatedly held that the trial court is in a good position to determine whether the reason for exclusion was genuine or pretextual, and the review for reversal of a trial court's *Batson* ruling is whether the trial court's findings are clearly against the preponderance of the evidence. *Green*

[1] The trial judge found that seven out of the nine peremptory challenges used by Lammers were against white males, the other two against women. In a footnote in the original opinion, the court suggested the trial court was wrong in finding seven white males since Lammers employed only six challenges against white men before the venireman in question, Clifford Burdett, was chosen as the first alternate juror. However, the trial court was correct because Lammers's seventh challenge went against Burdett, and the trial court considered it when overruling Lammers's peremptory challenge. Whether a pattern of strikes was made as a result of six or seven peremptory strikes is insignificant, especially in view of Lammers's obvious discriminatory statement that black individuals are less harsh on criminal defendants than white persons.

v. State, 330 Ark. 458, 956 S.W.2d 849 (1997); *Sonny v. Balch Motor Co.*, 328 Ark. 321, 944 S.W.2d 87 (1997), quoting *Hernandez v. New York*, 500 U.S. 352 (1991) (where Supreme Court stated that deference to the trial court findings on the issue of discriminatory intent makes particular sense in this context because, as noted in *Batson*, the finding "largely will turn on an evaluation of credibility"); *Wooten v. State*, 325 Ark. 510, 931 S.W.2d 408 (1996), *cert. denied*, 117 S. Ct. 979 (1997). The Supreme Court has stated that the decisive question in a *Batson* ruling will be whether counsel's explanation for a peremptory challenge should be believed and the evaluation of counsel's state of mind based on demeanor and credibility lies "peculiarly within a trial judge's province." *Hernandez*, 500 U.S. at 365; *see also Purkett v. Elem*, 514 U.S. 749 (1995) (per curiam) (noting that a trial judge may choose to disbelieve implausible or fantastic reasons tendered by counsel).

Here, the record clearly supports the trial court's findings and refusal to strike juror Burdett. Upon granting the State's petition for rehearing, the court holds no reversible error has been shown. Therefore, we affirm.

ARNOLD, C.J., BROWN and THORNTON, JJ., dissent.

RAY THORNTON, Justice, dissenting. Clint Lammers was convicted as an accomplice to capital murder and sentenced to life without possibility of parole. Because I believe he was deprived of a fair trial by the erroneous denial of his right to a peremptory challenge during jury selection, I respectfully dissent from the majority decision on rehearing to deny Lammers a new trial. In my view, the trial court erred in its interpretation and application of the law.

Late in the process of jury selection, Lammers exercised a peremptory challenge to excuse Clifford Burdett from service. The State objected to the use of the peremptory challenge on the basis of *Batson v. Kentucky*, 476 U.S. 79 (1986). The State's objection was premised on a novel approach that combined the elements of gender, age, and race; and the State persuaded the trial

court that the principles of *Batson* required that Lammers's peremptory challenge of Mr. Burdett, a middle-aged white male, be denied. The trial court denied the peremptory challenge and seated Mr. Burdett over Lammers's objection. The State made its objection in the following words:

> Your Honor, it is my understanding that *Batson* works both ways. It not only deals with race; it also deals with issues of gender. I believe I can show to the Court that . . . Mr. Burdett was stricken — stricken solely because he is a white male of middle age.

Following a discussion of *J.E.B. v. T.B. ex rel. Alabama*, 511 U.S. 127 (1994), relating to gender-based discrimination, Lammers inquired whether the objection to the peremptory challenge was based on gender. The State replied:

> Your Honor, although the — the case cited . . . does not specifically deal with the area of age, it would be both a gender-based and age-based discrimination. . . . I realize *J.E.B. v. Alabama* does not deal with the age issue, but we would make — make both a gender and age based discrimination argument. And, I guess, to a certain extent, based upon Mr. Green's [counsel for Lammers] arguments made against some of my peremptory challenges. Also, I believe Mr. Burdett is being stricken also because he is a white, middle-age male.

Mr. Green's arguments supporting his *Batson* objection to some of the State's frequent peremptory challenges to black potential jurors occurred at a much earlier point in the jury-selection process. Following the State's peremptory exclusion of Angela Silverman, a black female, and James Scaife, a black male, from service on the jury, the State peremptorily challenged Louis Berry, a black male, and the following exchange took place:

> *Mr. Green* [making a *Batson* objection]: It appears to me that the only reason he is being excluded by the State is the fact that he is an Afro-American. — his statements have been very appropriate and right down the line.
>
> *The State*: I am not . . . seeking his exclusion because of anything having to do with his color, simply because of my feelings or my beliefs about his ability to comprehend what we are dealing with today.

The Court: Mr. Green?

Mr. Green: Well, it's, from where I stand, from the defense's point of view, it's the fact that he is an Afro-American, and the fact that he does —; in the community here it is well known that Afro-Americans do have some tendency to be lesser inclined to convict someone to such a point as to give them a death sentence.

A careful reading of this exchange leads to the conclusion that Mr. Green was arguing to the court that the State was seeking to exclude Mr. Berry from the panel because the State had adopted a community belief that black jurors were less inclined to enter a death sentence. On the basis of this *Batson* challenge, Mr. Berry was seated.

Following this exchange twenty potential jurors were given voir dire examinations, and five jurors were selected before the next black male, Floyd Ice, was presented for consideration. After failing to have him excused for cause, the State exercised a peremptory challenge, and Lammers's *Batson* challenge was denied. Mr. Green did not specifically renew his earlier criticism of the State's racial motives during consideration of this peremptory challenge, and Mr. Ice was excluded from jury duty. Two white males and one white female were then excused for cause by the court before Lammers peremptorily challenged Mr. Burdett. Over Lammers's objection, Mr. Burdett was seated on the jury.

It is quite a stretch of Lammers's argument that the State was racially motivated in its peremptory challenge of Louis Berry to reach the majority view that, having made this argument against the invidious exclusion of black jurors by the State, Lammers had made a prima facie case against his own later peremptory strike of a white juror.

It is such a stretch that the State never contends that the peremptory challenge of Mr. Burdett should be denied on the sole basis of Mr. Burdett's race. To the contrary, when repeatedly asked for the basis of its *Batson* objection, the State consistently argues: "And it is our position he was stricken solely because of his

gender, and his age to a certain extent, and to a certain extent his race."

Clearly the *Batson* challenge to Lammers's peremptory strike could not be sustained solely on the basis of Mr. Burdett being white. Under our well-defined standards for evaluating *Batson* challenges, a prima facie case of discrimination must first be shown. *Sonny v. Balch Motor Co.*, 328 Ark. 321, 944 S.W.2d 321 (1997); *see also Mitchell v. State*, 323 Ark. 116, 913 S.W.2d 264 (1996). If a prima facie case is shown, the party seeking to exercise a peremptory challenge must give a neutral explanation for the strike. *Id.*

Here, Lammers pointed out that his peremptory challenges had been used to strike females and persons of all ages, and stated: "If it had been a black man, or if it had been a black woman, if [it] had been a white man, or if it had been white woman, would the, what he perceived and what he heard from where he sits, he would have excluded that person from the jury." This is a race-neutral explanation, and under the holdings of *Purkett v. Elem*, 115 S.Ct. 1769 (1995) (per curiam), the burden regarding discriminatory motivation remained upon the State, as the opponent of the strike, to demonstrate invidious discrimination.

The State thereupon attempted to show a pattern of strikes, which it argued related entirely to the age and gender of the veniremen who were peremptorily challenged by Lammers. During this sensitive inquiry into the age and gender of the challenged jurors, the State made no showing of any racial pattern of discrimination by the defendant Lammers. This may have been based upon a reluctance to open that door too wide, in view of the fact that of the State's five peremptory challenges, at least four were used against black veniremen.[1]

[1] This pattern of challenges supports Lammers's charge that the State had adopted the community belief that black jurors were reluctant to impose a death sentence. Lammers did not make any statement indicating any invidious discrimination against the selection of white jurors, but attacked the State's pattern of using peremptory challenges to exclude black veniremen.

The sensitive inquiry disclosed that the defendant Lammers had used peremptory challenges to strike two young males, three females, and four middle-aged males. However, in finding that a prima facie pattern of gender discrimination existed, the trial court miscounted the males and females, and stated:

> All right. Well, for the record I will note that out of nine strikes exercised by the defendant, seven of them were against white males. . . Only two of the nine strikes were against women. And under the ruling of *J.E.B.*, and in the absence of a better explanation or basis for the exclusion of Mr. Burdett, I will have to overrule the peremptory challenge under the law.

The three females peremptorily challenged by Lammers were Paula Smith, Mary Hayes, and Carol Sells. We cannot guess whether the trial court would have found a prima facie case of gender discrimination if it had correctly counted three females, and four middle-aged males, but the trial court clearly erred in this basic count, an error which the majority endorses as being insignificant.

The one remaining element of the cumulative gender, age, and race objection to be considered is whether the trial court erred in interpreting the law by finding that age may be the basis for a *Batson* challenge to a peremptory strike. That is the issue on which this case was first decided, and remains the issue that should be determinative upon rehearing. This is an issue of law, and our review should be whether the trial court erred in interpreting and applying the correct law.

In numerous cases, we have held that age is a neutral criterion, and may be properly asserted as a race-neutral reason for making a peremptory challenge. *See Sonny v. Balch Motor Co., supra* (citing *United States v. Ross*, 872 F.2d 249 (8th Cir. 1989);

In that regard, the majority asserts that the statement "black individuals are less harsh on criminal defendants in Arkansas County than white persons" is a reflection of Lammers's racial bias. However, a careful review of the record reveals that those words were not used by Lammers's counsel. They appear in the State's argument at T. 1232, where they are attributed to Lammers by the State.

United States v. Garrison, 849 F.2d 103 (4th Cir. 1988); *People v. Mack*, 128 Ill.2d 231, 538 N.E.2d 1107 (1989)).

Here the trial court was not asked to find, and did not find, a prima facie case of racial discrimination. Further, the trial court miscounted the number of males and females for the purpose of ruling on the question of gender discrimination and applied an erroneous interpretation of the law with reference to the issue of discrimination on the basis of age. As a result of these errors, the trial court denied Lammers a peremptory challenge, which he had the right to exercise. This error should require a new trial, and I respectfully dissent.

ARNOLD, C.J., and BROWN, J., join in this dissent.

STATE of Arkansas OFFICE OF CHILD SUPPORT ENFORCEMENT as Assignee of Andrea Kolen *v.* Garry MITCHELL

97-51 954 S.W.2d 907

Supreme Court of Arkansas
Opinion delivered October 23, 1997

[redacted]

Mona Mizell, for appellant/cross-appellee.

Mike Everett, for appellee/cross-appellant.

RAY THORNTON, Justice. This case involves two issues: the interpretation of Arkansas Rules of Civil Procedure relating to personal service inside the State, and sovereign immunity as a bar to appellee's claim against the State.

Rule (4)(d)(1) of the Arkansas Rules of Civil Procedure provides that substituted service of process may be made on an individual by delivering a copy of the summons and complaint "at his dwelling house or usual place of abode with some person residing therein who is at least 14 years of age . . . ." Appellant, the State of Arkansas Office of Child Support Enforcement (OCSE) asks us to adopt a liberal interpretation of the phrase, "dwelling house or usual place of abode." The rules do not define these terms.

OCSE, acting on a paternity complaint against appellee, Garry Mitchell, served process on Mitchell by handing the summons and complaint to his mother at her house on 714 Lindsey, in Marked Tree, Arkansas. The evidence showed that Mitchell used his mother's address for his mailing address, but that he lived at 507 Sam Anderson, in Marked Tree. When Mitchell failed to appear at the paternity hearing, a default judgment was entered under which Mitchell's wages were garnished for child support. Mitchell immediately filed a motion to have the judgment set aside, claiming that he was not properly served and that he was not the child's father as alleged by the child's mother in the complaint. Mitchell failed to request an abeyance of support payments.

Six months later, the trial court suspended Mitchell's wage garnishment pending the outcome of genetic testing for paternity. By this time, Mitchell had paid $1377 in support to OCSE. When the paternity results showed that Mitchell could not be the child's father, OCSE moved to dismiss its paternity complaint. Mitchell counterclaimed for return of the support payments on the basis that he had not been properly served. The trial court held that service of process was invalid because Mitchell did not live at the location where process was delivered; therefore, the judgment for paternity and child support was void *ab initio*. Further, it found that Mitchell was precluded from suing the State for return of payments under the doctrine of sovereign immunity. OCSE appeals the judgment of the trial court on the validity of service of process, and Mitchell crossappeals the sovereign immunity ruling. We affirm on both points.

OCSE asks the court to broaden the meaning of the phrase, "dwelling house or usual place of abode" to include that location which could be reasonably calculated to provide notice to defendant of a pending action against him. OCSE supports its argument with two opinions from other jurisdictions. In *Doyle v. Barnett*, 658 N.E.2d 107 (Ind. Ct. App 1995), a personal-injury case, Doyle sought to have a default judgment against him set aside because service of process was not delivered to his residence, but rather to his father's house. The evidence showed that Doyle received all of his mail at his father's address, he listed his father's address on the accident report, the address he maintained with his

insurance company was his father's address, and, at the time service was attempted and when he sought to have the default judgment set aide, Doyle's driver's license showed his father's address. In construing dwelling house or usual place of abode, the Indiana Court of Appeals concluded that "[b]ased on the totality of this evidence, we find that it was within the trial court's discretion to determine that Doyle's father's address was Doyle's usual place of abode, and because [plaintiff's] complaint was delivered to that address, that Doyle received proper service of the complaints." *Id.* at 109.

The Washington Supreme Court construed its substituted service statute so as to "effectuate the purpose of the statute while adhering to its spirit and intent." *Sheldon v. Fettig*, 129 Wash. 2d 601, 607, 919 P.2d 1209, 1211 (Wash. 1996). The court recognized two purposes to its statute: "to (1) provide means to serve defendants in a fashion reasonably calculated to accomplish notice and (2) allow injured parties a reasonable means to serve defendants." *Id.* at 608, 919 P.2d at 1212. In *Sheldon*, the defendant had lived away from her parent's home for over two years, but maintained her driver's license, her car insurance, her voter's registration, and mailing address at her parent's house. At the time of service, the defendant was living in another state. The court, recognizing that a defendant can "maintain more than one house of usual abode if each is a center of domestic activity where it would be most likely that defendant would promptly receive notice if the summons were left there," held that defendant had received valid service when process was delivered to her parent's home. *Id.* at 612, 919 P.2d at 1214.

As in *Doyle* and *Sheldon*, above, the facts in this case establish that the defendant, Mitchell, had significant contacts with the place of service. Mitchell received most of his mail at 714 Lindsey. In addition, his driver's license, his employer, and his property assessments all listed 714 Lindsey as his address. The only two sources Mitchell identified as having his 507 Sam Anderson address were his landlord and the gas company, but it appears that he had moved from his mother's house to the Sam Anderson address six years before the commencement of this litigation, and had not thereafter resided at his mother's house. The record

reflects that Mitchell maintained significant ties with his mother's house. He testified that he stops by 714 Lindsey at least three time a week to see his mother and pick up his mail. OCSE claims that a defendant, who represents to most of the world that his address is at a certain location, should not be able to deny that it is otherwise. As a conscientious plaintiff, OCSE pleads that it should not suffer an adverse judgment when it relied on an address that Mitchell reported to sources that OCSE regularly uses for locating putative fathers.

Notwithstanding the views of the courts cited above and OCSE's argument, we are bound to prior case law under the doctrine of stare decisis. The policy behind stare decisis is to lend predictability and stability to the law. *Parish v. Pitts*, 244 Ark. 1239, 1252, 429 S.W.2d 45, 52 (1968) (superseded by statute on other grounds). In matters of practice, "adherence by a court to its own decisions . . . is necessary and proper for the regularity and uniformity of practice, and that litigants may know with certainty the rules by which they must be governed in the conducting of their cases." *Brickhouse v. Hill*, 167 Ark. 513, 523, 268 S.W. 865, 868 (1925) (quoting 7 R.C.L. 1008 (1915)). In *Parish*, this court held that "[p]recedent governs until it gives a result so patently wrong, so manifestly unjust, that a break becomes unavoidable." *Parish,* 244 Ark. at 1252, 429 S.W.2d at 52. The test is whether adherence to the rule would result in "great injury or injustice." *Independence Fed. Bank v. Webber*, 302 Ark. 324, 331, 789 S.W.2d 725, 730 (1990).

The issue of substituted service was squarely addressed in *Sims v. Prescott Feed Mills, Inc.*, 286 Ark. 22, 688 S.W.2d 743 (1985). In *Sims*, the defendant and his brother lived in the same dwelling. The sheriff attempted to deliver service by handing a copy of the summons and complaint to defendant's brother at law offices of plaintiff's attorney. The defendant never saw the papers. We held that service was void because an attorney's office is not the defendant's dwelling. In so ruling, we said: "Substituted service is a departure from the common law, and rules or statutes providing for it are mandatory and to be complied with exactly." *Id.* at 23, 688 S.W.2d at 744 (citing *Edmonson v. Farris*, 263 Ark. 505, 565 S.W.2d 617 (1978)). We said that this

construction of the rule is the "most certain mode of conveying actual notice to an absent defendant." *Id.* at 23-24, 688 S.W.2d at 744. In *Edmonson*, like the case at bar, the appellant moved the court to set aside the default judgment on the ground of defective service of process. The appellant's wife testified that she collected the summons and complaint at the sheriff's office. In that case, we stated that because the deputy failed to comply with the mandatory provisions of substituted service, the judgment was void *ab initio*. *Id.* at 509, 565 S.W.2d at 618.

OCSE argues that the *Sims* and *Edmonson* cases did not address construction or definition of "dwelling" or "abode," but rather, that these cases are predicated upon obvious departures from the rule. In *Sims*, the summons and complaint were left at a lawyer's office, not at the defendant's, or anyone else's residence. In *Edmonson*, defendant's wife was served at the sheriff's office. OCSE argues that these cases are not on point with the facts present here, as the court did not have to decide whether a residence where service was effected was the defendant's dwelling or usual place of abode.

OCSE's point is well taken. This court, however, defined the term, "usual place of abode" in *McGill v. Miller*, 183 Ark. 585, 37 S.W.2d 689 (1931). In *McGill*, we held that "[o]ne's usual place of abode, in its ordinary acceptation and in the sense used by the statute, means the place where a person lives or has his home, that is, his fixed permanent home; the place to which he has — whenever he is absent — the intention of returning." *Id.* at 589, 37 S.W.2d at 690. The defendant in *McGill* had moved to Little Rock three months before the institution of the suit. He had a permanent job and intended to move his family to Little Rock as soon as he could sell his house in Lafayette County. We held that service was insufficient when his wife was served at the Lafayette County home because the defendant had changed his usual place of abode.

Applying the *McGill* definition of place of abode to the facts in this case, we hold that Mitchell has his usual place of abode in a trailer at the 507 Sam Anderson address. He lives in the trailer, and pays the rent and utilities at that address. Mitchell tes-

tified that he does not live with his mother at the 714 Lindsey address. In light of our holdings that the rule for substituted service of process must be complied with exactly, and because Mitchell intends 507 Sam Anderson as his fixed and permanent home, it follows that service of process at 714 Lindsey was insufficient for the purpose of proper notice.

The factual circumstances in this case are such that continued adherence to precedent does not "give a result so patently wrong, so manifestly unjust, that a break becomes unavoidable." *Parish*, at 1252, 429 S.W.2d at 52. It may be that a change in rules to place a liberal construction on the meaning of dwelling house or usual place of abode to include a "reasonable notice" component might become appropriate in the future, but we choose to proceed with caution. We should not lose the predictability of knowing that the method of service is the most certain to convey actual notice to an absent defendant. A departure from the settled rule could lead to an escalation of litigation over notice as parties dispute whether notice was actually received, or whether the chosen method was reasonable.

We also note that the current rule does not unduly burden a conscientious plaintiff. If the defendant cannot be served in person or at the place he resides, then the rules provide that the plaintiff may serve process by sending "any form of mail addressed to the person to be served with a return receipt requested and delivery restricted to the addressee or the agent of the addressee." Ark. R. Civ. P. 4(d)(8)(A). For these reasons, in keeping with the doctrine of stare decisis we adhere to the current rule.

Because service of process was insufficient to give notice, the default judgment below is void *ab initio*. Ark. Code Ann. § 16-65-108 (1987). We reach now Mitchell's claim that the doctrine of sovereign immunity does not bar the court from awarding judgment and assessing damages against the State for monies paid to the custodial parent as child support by him. The doctrine of sovereign immunity comes from constitutional law providing that "[t]he State of Arkansas shall never be made Defendant in any of her courts." Ark. Const. art. 5, § 20. We have held that the doctrine of sovereign immunity is rigid and, as

such, immunity may be waived only in limited circumstances. *Cross v. Arkansas Livestock & Poultry Comm'n*, 328 Ark. 255, 258, 943 S.W.2d 230 (1997) (citing *State v. Staton*, 325 Ark. 341, 934 S.W.2d 478 (1996)). Under the doctrine, the State possesses jurisdictional immunity from suit. *Department of Human Servs. v. Crunkleton*, 303 Ark. 21, 791 S.W.2d 704 (1990). Where the suit is one against the State and there has been no waiver of immunity, the trial court acquires no jurisdiction. *Cross*, 328 Ark at 259, 943 S.W.2d at 232. We have recognized exceptions to the doctrine of sovereign immunity when an act of the legislature has created a specific waiver of immunity, and when the State is the moving party seeking specific relief. *Id.* (citing *State v. Tedder*, 326 Ark. 495, 932 S.W.2d 755 (1996); *Fireman's Ins. Co. v. Arkansas State Claims Comm'n*, 301 Ark. 451, 784 S.W.2d 771 (1990), *cert. denied* 498 U.S. 824 (1990)). Mitchell argues that, here, the State waived its immunity defense when it brought the paternity and child-support actions against him. We disagree.

In *Fireman's Insurance*, we noted that "[t]he only exception to total and complete sovereign immunity from claims which have been recognized by this court occurs when the state is the moving party seeking specific relief. In that instance[,] the state is prohibited from raising the defense of sovereign immunity as a defense to a counterclaim or offset." *Fireman's Ins. Co. v. Arkansas State Claims Comm'n*, 301 Ark. 451, 455, 784 S.W.2d 771, 774 (1990), *cert. denied* 498 U.S. 824 (1990) (quoting *Parker v. Moore*, 222 Ark. 811, 262 S.W.2d 891 (1953). In *Parker*, this court refused to consider the State's immunity defense when the State Commissioner of Revenues, who was named as a defendant, intervened and crosscomplained, asking for specific relief. *Parker v. Moore*, 222 Ark. 811, 812, 262 S.W.2d 891, 892 (1953). Relying on *Fireman's Insurance*, Mitchell concludes that he is not precluded from claiming a refund because his action in this case was by counterclaim.

In addressing the sovereign-immunity issue, we first decide whether Mitchell has made a claim against the State. If he has, then sovereign immunity applies unless the State has waived its defense. We established the test for determining whether a suit is one against the State in *Page v. McKinley*, 196 Ark. 331, 118

S.W.2d 235 (1938). There, we held that when the relief sought by a decree "operates to control the action of the state or subjects it to liability, the suit is in effect a 'suit against the state' and cannot be maintained without state consent." *Ralls v. Mittlesteadt*, 268 Ark. 741, 743, 596 S.W.2d 349, 351 (1980) (citing *Page*, 196 Ark. at 336-37, 118 S.W.2d at 235)). Accordingly, it is the effect of tapping the state treasury that makes the State a defendant. *See Magnolia Sch. Dist. 14 v. Arkansas State Bd. of Educ.*, 303 Ark. 666, 799 S.W.2d 791 (1990) (noting that this court will not order the State Treasurer to refund money already spent, as such an action would amount to a suit against the State).

We conclude that Mitchell has made a claim against the State. In the action below, OCSE served only as a conduit for support payments. OCSE collected the money from Mitchell and disbursed it directly to the custodial parent. Were OCSE ordered to refund previously paid child support, the only source of payment would be the State Treasury. Such a judgment would subject the State to liability, making the State a defendant as contemplated by the prohibition in Ark. Const. art. 5, § 20. As such, the suit is one against the State, which cannot be maintained unless the State has waived its immunity defense.

To determine whether the immunity defense has been waived, we address two questions: (1) Did the State become a "moving party" by virtue of bringing the paternity and child-support actions; and (2) is the State asking for specific relief. Two recent cases inform our decision that the State is not a moving party. *Arkansas Dep't of Human Servs. v. State*, 312 Ark. 481, 850 S.W.2d 847 (1993); *D.H.S. v. Crunkleton*, 303 Ark. 21, 791 S.W.2d 704 (1990). In *Crunkleton*, we held that the statute providing for wage assignments and deductions for child support "affords no jurisdiction over the state." *Crunkleton*, 303 Ark. at 23, 791 S.W.2d at 705 (referring to Ark. Code Ann. § 9-14-102 (Repl. 1993)). Instead, the statute "merely provides a means by which the payment of child support can be more effectively enforced." *Id.* In that case, DHS did not become a moving party for the purposes of waiver when it acted under the provisions of the statute to collect child-support payments. The next case extends this proposition.

In *Arkansas Dep't of Human Servs. v. State*, the precipitating act was DHS's petition for custody of certain juveniles. In a subsequent action against DHS for court costs and restitution arising from offenses these juveniles committed, DHS claimed the immunity defense. We held that the State was not a moving party when it sought custody of juveniles and appeared in dependency-neglect proceedings. *Id.* at 488-89, 850 S.W.2d at 850. We acknowledged the trial court's finding that DHS is obligated, by statutory mandate, to initiate petitions in juvenile court whereby it voluntarily subjects itself to the jurisdiction of the court. We held that because DHS was under an obligation to appear, it did not voluntarily waive sovereign immunity. *Id.* at 489, 850 S.W.2d at 851 (distinguishing *Arkansas Game & Fish Comm'n v. Lindsey*, 299 Ark. 249, 771 S.W.2d 769 (198)).

Like the State in *Arkansas Dep't of Human Services* and *Crunkleton*, OCSE, in bringing its paternity and child-support actions, is acting pursuant to statutory mandate. Under Title IV, part D of the Social Security Act, a state receiving federal funds to administer a plan for child and spousal support must "provide services relating to the establishment of paternity or the establishment, modification, or enforcement of child support obligations . . . to . . . any other child, if an individual applies for such services with respect to the child; and enforce any support obligation established with respect to . . . the custodial parent of such a child." 42 U.S.C. § 654(4)(A)(ii), 654(4)(B)(ii) (Supp. 1997). Select sections within Title 9 of the Arkansas Code, including wage assignments and deductions for child support, govern OCSE actions. Applying the reasoning of *Crunkleton* and *Arkansas Dep't of Human Servs.*, OCSE did not become a moving party for the purpose of waiver when it initiated a paternity and child-support action against Mitchell. Pursuant to statutory law, OCSE was obligated to subject itself to the jurisdiction of the court to procure and enforce child support for the custodial parent. In so doing, it did not voluntarily waive sovereign immunity.

As to whether OCSE sought specific relief, we note, again, that OCSE initiated the action on behalf of the custodial parent for whom it sought specific relief. That parent and the child were not welfare recipients, so OCSE did not itself benefit from the suit

by recouping any of the monies collected from Mitchell as an offset to a welfare debt. It follows, then, that even if OCSE were a moving party, it did not waive its immunity defense because it did not seek specific relief for itself.

Mitchell has not sought permission to sue the State, nor has the State waived its immunity. *See Arkansas Dep't of Human Servs. v. State; D.H.S. v. Crunkleton, supra.* Therefore, the trial court was correct in ruling that Mitchell's claim is barred by the doctrine of sovereign immunity. Plaintiffs like Mitchell, however, are not left without remedy. The Arkansas State Claims Commission was established to provide for payment of all just and legal debts of the State. Ark. Code Ann. §§ 19-10-201 to -210 (Repl. 1994).

We are bound by the doctrine of stare decisis and the rule of construction of laws in derogation of the common law. As a result, we decline to place a liberal construction on the meaning of dwelling house or usual place of abode in the substituted process rule. This phrase means what it says it means: the place where the defendant lives or resides. Because service of process was delivered to Mitchell's mother's residence, service was invalid to give notice, resulting in void paternity and wage-garnishment judgments. Under the principles of sovereign immunity, this court does not have jurisdiction to order the State to refund Mitchell's child-support payments.

Affirmed.

FARM BUREAU POLICYHOLDERS and MEMBERS, Dennis Lee, Class Representative *v.* FARM BUREAU MUTUAL INSURANCE COMPANY of ARKANSAS, INC., and Southern Farm Bureau Casualty Insurance Company, Inc.

97-1028 952 S.W.2d 675

Supreme Court of Arkansas
Opinion delivered October 23, 1997

Gibson Law Office, by: *Charles S. Gibson*, for appellants.

Friday, Eldredge & Clark, by: *Robert S. Shafer* and *William A. Waddell, Jr.*, for appellees.

PER CURIAM. Appellees Farm Bureau Mutual Insurance Company, Inc., and Southern Farm Bureau Casualty Insurance Company, Inc., have moved to dismiss the appellant's appeal. The basis of this motion is the contention that Judge Lawrence Dawson did not have the authority to extend the time for filing the record on appeal.

Judge Dawson was assigned this case on April 4, 1994, after the recusal of the other chancellors in Chicot County. The case was tried and Judge Dawson entered a decree on December 31, 1996, finding in favor of appellees and dismissing appellants' complaint with prejudice. Judge Dawson's term of office expired on December 31, 1996. On January 23, 1997, Judge Dawson's assignment was terminated and Judge Jim Gunter was assigned to preside in the case. On January 28, 1997, Judge Gunter notified the administrative office of the courts that he must recuse. On February 12, 1997, the assignment of Judge Gunter was terminated.

Appellants' motion for new trial was not acted upon and was deemed denied by operation of law on February 10, 1997. On February 21, 1997, appellants timely filed notice of appeal and designation of record. On March 31, 1997, appellants timely moved for an extension of time to lodge the record of appeal; this motion was granted and signed by Judge Dawson on April 7, 1997. The order was filed on April 9, 1997; Judge Dawson extended the time to lodge the record on appeal to September 21, 1997. Appellant filed the record with this court on September 4, 1997.

Appellees contend that Judge Dawson had no authority to enter the order extending time to lodge the record on appeal. Based upon this lack of authority, appellees claim that such filing of the record is outside of time prescribed by Rule 5(a) of the Arkansas Rules of Appellate Procedure—Civil and is untimely.

On February 27, 1997, pursuant to Act 274 of General Assembly, Governor Mike Huckabee appointed Judge Dawson Chancellor of the Fifth Division of the Chancery Court of the Eleventh Judicial Circuit-West for a two-year term expiring on December 31, 1998. Section (d) of the Act provides that said Chancellor "may be assigned to any and all . . . chancery circuits of the State of Arkansas where the local chancellor or chancellors have recused or have been disqualified."

Judge Dawson was the original trial judge in this case and was a duly qualified chancellor at the time he signed the order of April 7, 1997, despite the fact that the case was not officially assigned to him. Judge Dawson was a *de facto* judge on that date. *American Jurisprudence* defines a *de facto* judge as follows:

> A *de facto* judge may be defined as one who occupies a judicial office under some color of right, who exercises the duties of the judicial office under color of authority pursuant to an appointment or election thereto, and for the time being performs those duties with public acquiescence, though having no right in fact, because the judge's actual authority suffers from some procedural defect.

46 AM. JUR. 2D *Judges* § 242 (1994).

The rule governing validation of acts of *de facto* officials is based upon public policy, and its origin and history show it is founded in comparative necessity. *Landthrip v. City of Beebe*, 268 Ark. 45, 593 S.W.2d 458 (1980), *citing Adams v. Lindell*, 5 Mo. App. 197 (1878). The doctrine rest upon principles of protection of the public and third parties, and was engrafted upon the law as a matter of policy and necessity to protect the interest of the public and individuals involved in the acts of persons performing the duties of an official without actually being one in law. *Landthrip v. City of Beebe, supra*, citations omitted. *See also, Chronister v. State*, 55 Ark App. 93, 931 S.W.2d 444 (1996). In *Landthrip v. City of Beebe*, this court extended the doctrine of *de facto* officials to the courts based upon the fact that such courts are authorized by law, even when defectively done.

In the case before us, a time existed where no judge was formally assigned to this case. Judge Dawson's jurisdiction

would have continued had his term not expired. Judge Gunter's recusal left this case without a presiding judicial officer; therefore, as a matter of law, motions were denied by the absence of a timely ruling. We conclude that Judge Dawson was a *de facto* judge when he ruled upon the motion for an extension of time. Although his authority over the case at hand was defective, he was a duly authorized chancellor. In the interest of public policy, we hold that his ruling is effective, and the appellees motion to dismiss is denied.

GLAZE and CORBIN, JJ., not participating.

Jesse Dewayne WICKLIFFE *v.* STATE of Arkansas

TEN 96-108 953 S.W.2d 60

Supreme Court of Arkansas
Opinion delivered October 23, 1997

John Wesley Hall, for appellant's counsel, A. Wayne Davis.

No response.

PER CURIAM. On October 2, 1997, we issued an order for A. Wayne Davis, counsel for the appellant, to appear before this court at 9:00 a.m., Thursday, October 16, 1997, to show cause why he should not be held in contempt of this court for his failure to perfect appellant Wickliffe's appeal in a timely manner.

A. Wayne Davis appeared with his attorney, John Wesley Hall, on October 16, 1997. At that time, he entered a plea of

not guilty and requested a hearing. Therefore, we appoint the Honorable Robert H. Dudley as a master to conduct the hearing. After the hearing, we direct the master to make findings of fact and file them with the court. Upon receiving the master's findings, we will decide whether A. Wayne Davis should be held in contempt.

Barbara J. BEATTY, Individually and as Natural Guardian of Kristi Beatty, and Kristi Beatty *v.* USAA CASUALTY INSURANCE CO.

97-349 954 S.W.2d 250

Supreme Court of Arkansas
Opinion delivered October 30, 1997

Pike & Bliss, by: *George E. Pike, Jr.*, and *Deborah Pike Bliss*; and *Clifton H. Hoofman*, for appellants.

Wright, Lindsey & Jennings, by: *Patrick J. Goss*, for appellee.

W.H. "DUB" ARNOLD, Chief Justice. This case involves an interpretation of the term insurable interest found in Ark. Code Ann. § 23-79-104(b) (Repl. 1992). Appellants claim that they have an insurable interest in an automobile and are entitled to the policy proceeds of an insurance contract covering property damage to the automobile. The trial court granted summary judgment for the insurer based upon the finding that appellants did not have an insurable interest. Appellants claim error in this ruling; we agree and reverse and remand.

On June 24, 1993, Douglas Beatty had a Toyota Celica delivered to his daughter Kristi for her sixteenth birthday. Mr. Beatty lived outside of the State of Arkansas, visited Arkansas, selected a car to purchase for his daughter, and made arrangements for its delivery on her birthday. Barbara Beatty, as natural guardian of Kristi, added the car to her existing insurance policy with USAA Casualty Insurance Company (*hereinafter*, "USAA"). The policy included coverage for liability as well as property damage. The policy's loss clause read as follows: "Loss or damage under this policy shall be paid, as interest may appear, to you and the loss payee shown in the Declarations." No loss payee was listed in the declarations.

On November 20, 1994, Kristi was involved in an automobile accident that resulted in the total loss of the car. USAA determined that the net loss was $13,924.75. Before acting on the claim, USAA discovered that Douglas Beatty held certificate of title for the automobile and additionally found a lien on the car securing a promissory note executed by Douglas Beatty on behalf of the Arkansas Federal Credit Union (*hereinafter*, "Credit Union"). USAA paid $11,772.50 to the Credit Union in satisfaction of the lien and accepted title of the car to sell for salvage value. The lien by the Credit Union was unbeknownst to Barbara and Kristi Beatty, and the Credit Union was not noted as a loss payee on the policy. USAA tendered payment to Barbara Beatty for the remaining $2,152.25 as payment in full for the claim. Ms.

Beatty refused payment based upon the contention that she was entitled to the entire $13,924.75.

Barbara Beatty brought suit against USAA, individually and in her capacity as natural guardian of Kristi Beatty. Ms. Beatty claimed that full payment should have been made to her by USAA because she was the policy holder and there was no loss payee named in the policy. Ms. Beatty contends that USAA was not authorized to pay the proceeds of the insurance contract to a third party with whom she had no contractual obligation. USAA contends that neither Barbara Beatty nor Kristi Beatty had an insurable interest in the automobile and that its payment to the Credit Union was proper. The trial court granted USAA's motion for summary judgment ruling that neither Barbara Beatty nor Kristi Beatty had an insurable interest. This ruling was based solely upon the fact that Douglas Beatty held the title to the automobile, and thus, neither Barbara or Kristi Beatty could have an insurable interest.

Barbara and Kristi Beatty appeal this ruling. Appellants contend that Douglas Beatty's holding title does not preclude another party from also having an insurable interest. Appellants contend that Kristi had an insurable interest in the automobile upon receiving it as a gift from her father, Douglas Beatty. Appellants also contend that Barbara Beatty had an insurable interest in the automobile through her duty as natural guardian of Kristi to protect her minor daughter's property. Additionally, appellants argue that Arkansas statutes imposing liability on Barbara Beatty as the natural guardian of Kristi Beatty by requiring her to assume joint and several liability in order for Kristi to obtain a driver's license creates an insurable interest in the automobile. In addition to the insurable interest issue, appellants also contend that USAA is not authorized to pay a third party who is not designated as a loss payee under the original insurance contract and who is not in privity with the insured.

We agree with appellants that the trial court erroneously ruled on the issue of insurable interest and reverse and remand this case on that basis. The issue of whether USAA was authorized to make a payment to a third party not named as a loss payee and not

in privity with the insured was not directly ruled upon by the trial court, so we will not address that issue.

The remedy of summary judgment should only be granted when there exists no genuine issue of material fact, and the party moving for summary judgment is entitled to judgment as a matter of law. Ark. R. Civ. P. 56; *Smothers v. Clouette*, 326 Ark. 1017, 1020, 934 S.W.2d 923 (1996). The issue is to be viewed in the light most favorable to the party opposing summary judgment, and all inferences and doubts should be resolved against the moving party. *Id.* If the party moving for summary judgment makes a *prima facie* showing that no issues of fact exist and the nonmoving party fails to show that such issues do exist, then this court must affirm a trial court's granting of summary judgment. *Pyle v. Robertson*, 313 Ark. 692, 694, 858 S.W.2d 662 (1993).

In reviewing appellants' argument that Kristi Beatty had an insurable interest in the automobile, we will view all inferences and doubts against USAA. The most important inference in this situation is whether there was a gift of the automobile to Kristi Beatty. This issue was disputed by the parties' briefs, and it is plausible that this issue alone could warrant reversal of the granting of summary judgment as the existence of a genuine issue of material fact; however, the trial court's ruling was not based upon this issue, but upon the determination that two parties cannot have an insurable interest in the same automobile. Therefore, for purposes of this appeal, we will accept that there was a valid gift made to Kristi Beatty upon the receipt of the automobile for her sixteenth birthday. We do note, that upon remand, this issue may be contested, and a factual determination can then be made.

A person must have an "insurable interest" in property in order to have an enforceable insurance contract. Ark. Code Ann. § 23-79-104(a) (Repl. 1992). "*Insurable interest*" is defined in § 23-79-104(b) as "any actual, lawful, and substantive economic interest in the safety or preservation of the subject of the insurance free from loss, destruction, or pecuniary damage or impairment."

The trial court determined that neither Barbara nor Kristi Beatty had an insurable interest based solely upon the fact that Douglas Beatty retained the title. Title indeed establishes a

prima facie case of ownership; however, ultimate ownership is to be established by all evidence regarding property. *See Robins v. Martin*, 231 Ark. 43, 328 S.W.2d 260 (1959). It is obvious that the trial court did not examine the factors surrounding the ownership of this car; the ruling relies solely upon the holding of the certificate of title by Douglas Beatty.

The trial court erroneously concluded that Douglas Beatty's insurable interest, by virtue of holding title, precluded another party from also having an insurable interest. It is not inconsistent that two parties can have independent insurable interests in one piece of property. *See Page v. Scott*, 263 Ark. 684, 567 S.W.2d 101 (1978) (both lessor and lessee have an insurable interest in leased property, and either may insure his interest for his own benefit); *see also Hale v. Simmons*, 200 Ark. 556, 558, 139 S.W.2d 696 (1940); JOHN ALAN APPLEMAN ET AL., 4 INSURANCE LAW & PRACTICE § 2134, at 54. In such a situation, both parties are free to insure their respective interests in the property.

Initially, we will address the facts supporting Kristi Beatty's insurable interest through receiving the automobile as a gift from her father. In the affidavits supporting the motion for summary judgment, Barbara Beatty stated that Douglas Beatty had promised Kristi a car for her sixteenth birthday. Before her birthday, he visited Little Rock from out of state, purchased a car and had it delivered to Kristi on her birthday. The delivery was made to the address where Barbara and Kristi lived. At the time of the delivery of the car and at all times subsequent, Barbara had sole custody of Kristi. None of these facts are disputed by USAA.

According to *Irvin v. Jones*, 310 Ark. 114, 117, 832 S.W.2d 827 (1992), a valid *inter vivos* gift is effective when the following requirements are proven by clear and convincing evidence:

> (1) the donor was of sound mind; (2) an actual delivery of the property took place; (3) the donor clearly intended to make an immediate, present, and final gift; (4) the donor unconditionally released all future dominion and control over the property; and (5) the donee accepted the gift.

See also Ragland v. Commercial Nat'l Bank of Ark, 276 Ark. 418, 420, 635 S.W.2d 258 (1982). In the case at hand, there was clearly actual delivery. The evidence is undisputed that Douglas Beatty lived in another state and never attempted to exercise dominion or control over the automobile and that Kristi Beatty accepted the car. The sole issue is whether Douglas Beatty intended to make the automobile a gift or whether his retaining title indicated that he did not consider the automobile a gift.

In order for a gift to be valid, transfer of title is not necessary. The intent of the donor can negate the fact that actual title was not transferred. In *Shipp v. Davis*, 25 Ala. App. 104, 141 So. 366 (1932), a father delivered an automobile to his son, paid for the license and assessment in his own name, and retained title. A valid gift was found despite retention of title because the father passed possession of the automobile to his son on the date of purchase and never exercised dominion or control again. *Id; see also*, 100 A.L.R. 2d 1219, 1232 (1965).

Based upon the evidence before us, we determine that there could have been a valid *inter vivos* gift of the automobile to Kristi Beatty, thus giving her an insurable interest in the automobile. Thus summary judgment in favor of USAA was erroneous.

Secondly, Kristi Beatty has an insurable interest based upon her possessory interest in the automobile. In *Hinkle v. Perry*, 296 Ark. 114, 119, 752 S.W.2d 267 (1988), we determined that "an insurable interest is not dependent upon ownership. The fact that one has an insurable interest is not probative of ownership but only goes to prove that the interest is among those considered insurable as opposed to those which are not." The court of appeals defined insurable interest by citing *Couch on Insurance*, which states:

> Generally speaking, a person has an insurable interest in property whenever he would profit by or gain some advantage by its continued existence and suffer some loss or disadvantage by its destruction. If he would sustain such loss, it is immaterial whether he has, or has not, any title in, or lien upon, or possession of, the property itself.

Hartford Fire Ins. Co. v. Stanley, 7 Ark. App 94, 96, 644 S.W.2d 628 (1983) *citing*, 3 COUCH ON INSURANCE §24:13 (2d ed. 1960).

According to RICHARDS ON INSURANCE, *Insurable Interest* §2:5, in order to have an insurable interest, a party does not have to have legal title to the property insured, but some legal basis for the assertion of interest. This legal interest can be based upon "(a) factual expectation of damages, (b) property interests, (c) legal liability, (d) and contract right." *Id.* at p. 174. If Douglas Beatty did effectuate a gift to Kristi, she has a property interest in the car by right of a legal property interest. Additionally, Kristi also has an insurable interest through the expectation of economic disadvantage if there is damage to the insured property. Kristi was placed in economic disadvantage when the car was destroyed; she has no car and no proceeds from an insurance policy to procure another one. According to *Couch on Insurance 3d.*, §41:10, "if the insured would sustain a loss by the destruction of the insured property, it is immaterial whether he or she has any title in, lien upon, or possession of, the property itself." *Id., citing Hartford Fire Ins. Co. v. Stanley*, 7 Ark. App. 94, 644 S.W.2d 628 (1983). Furthermore, according to Couch, "any interest in property, legal or equitable, conditional, contingent, or absolute is insurable. Even the mere right to use property is insurable. . ." COUCH ON INSURANCE 3D., §41:10.

Based upon the foregoing reasons, we hold that Kristi Beatty had an insurable interest in the automobile. As the natural guardian of Kristi Beatty, Barbara Beatty is required by Ark. Code Ann. § 28-65-501 (Supp. 1995) to "have the care and management of the estate" of her daughter. In *Howard et al. v. Ark. Nat'l Bank of Hot Springs et al.*, 214 Ark. 70, 214 S.W.2d 914 (1948), we determined that a guardian could be held liable for failures to exercise prudence and due care in managing the estate of a minor. This legal obligation certainly gives Barbara Beatty an insurable interest in the automobile on behalf of her minor daughter.

USAA argues that allowing Barbara and Kristi Beatty to recover the insurance proceeds would constitute unjust enrichment because they had no legal obligation to pay for the automo-

bile. We do not find that to be a compelling argument. Given the fact that more than one party can have an insurable interest in a piece of property, Douglas Beatty, too, was free to purchase property insurance to insure against his indebtedness in the car; he simply chose not to do so. Both parties cloud this issue with arguments regarding the duty and ability of one parent over the other to purchase liability insurance to insure Kristi's driving; however, liability insurance is not at issue here. An insurable interest for the purpose of property insurance on the automobile is the only issue. The important facts are undisputed, Barbara, as guardian of Kristi, purchased both liability insurance and property insurance in the same policy; this property insurance was to insure against Kristi's loss of her car; Douglas Beatty did not procure any insurance on the automobile.

Based upon these the findings of insurable interests, we hold that the trial court erroneously determined that Barbara Beatty and Kristi Beatty did not have insurable interest in the automobile based upon the fact that Douglas Beatty held the certificate of title. Therefore, the court was in error in granting summary judgment to USAA.

Appellants' second argument is that USAA was not authorized to pay the insurance proceeds to a party that was not designated as loss payee on the insurance contract and that was not in privity with the insured. This argument certainly may have merit given the personal nature of insurance contracts and the theory of unjust enrichment; however, it is not clear that the trial court actually addressed this issue, so we will not reach the merits of this argument. In ruling on the issue of insurable interest, the trial court stated, "I further think that USAA may well have made a voluntary payment that they didn't have to make since this lien was not recorded. . .nor was. . .a security interest ever shown. . . ." Since it is clear that the trial court based its granting of summary judgment on the sole finding that neither Barbara Beatty nor Kristi Beatty had an insurable interest, it is on that issue that we remand this case for further proceedings consistent with this opinion.

Reversed and remanded.

NEWBERN and IMBER, JJ., not participating.

STATE of Arkansas *v.* Mike GRAY

CR 97-460 955 S.W.2d 502

Supreme Court of Arkansas
Opinion delivered October 30, 1997

[Supplemental opinion on denial of rehearing issued December 18, 1997.*]

* GLAZE, J. dissents.

Winston Bryant, Att'y Gen., by: *Kelly S. Terry*, Asst. Att'y Gen., for appellant.

Castleman Law Firm, by: *Bob Castleman*, for appellee.

W.H. "DUB" ARNOLD, Chief Justice. The State brings this interlocutory appeal under Ark. R. App. P.—Crim. 3(c), asserting the grounds that the trial court (1) improperly suppressed a one-pound bag of marijuana allegedly abandoned by appellee Mike Gray; and (2) erroneously concluded that appellee had standing to challenge the validity of a search warrant to search another person's residence. The Attorney General maintains, as it is required to do under Rule 3(c), that the correct and uniform administration of justice requires our review of the trial court's suppression order. Because we conclude that neither issue raised by the State involves the correct and uniform administration of justice, we dismiss the appeal.

On June 24, 1994, officers with the Third District Judicial Task Force met with a confidential informant to arrange an undercover sale of marijuana and crystal methamphetamine to Lavern Bruton at his residence in Pocahontas, Arkansas. Later that evening, the informant went to Bruton's residence with ten pounds of marijuana and an eight-ball of crystal methamphetamine that had been provided to him by the task force. While the informant was inside the residence, Bruton telephoned appellee Mike Gray and instructed him to come to his house. When appellee arrived in a silver van, officers who were conducting surveillance observed Bruton come outside and sell him one pound of marijuana. After the sale, appellee drove away from the residence. Soon thereafter, officers executed a search warrant of the Bruton residence and recovered nine pounds of marijuana. When officers stopped appellee in his van, they found no controlled substances. However, while appellee was stopped, officers found a bag of marijuana in a ditch. The mark on the bag matched the markings on the other bags found in the Bruton residence that the informant had given Bruton.

Appellee was charged by felony information with possession of a controlled substance with intent to deliver. Thereafter, he filed a pretrial motion to suppress the one-pound bag of marijuana on the ground that it had been obtained pursuant to an invalid search warrant of Bruton's residence. He further argued that he was on Bruton's private property upon Bruton's invitation when he was "unlawfully observed" by the officers. He further claimed that the warrant to search Bruton's residence was invalid because it was an "anticipatory warrant." The trial court conducted a suppression hearing at which Bruton testified, confirming that he had indeed delivered one pound of marijuana to appellee on the night in question. At the conclusion of the hearing, the trial court granted appellee's motion and suppressed the bag of marijuana found in the ditch, from which the State now brings this interlocutory appeal.

The first issue presented is whether the trial court should have determined that appellee abandoned the marijuana in question and thus abandoned his rights under the Fourth Amendment. Before addressing the merits of this claim, we must first decide whether this issue is properly before us under Rule 3(c). Specifically, we must decide whether the correct and uniform administration of justice requires us to review this point.

In support of its argument, the State refers us to three cases regarding abandonment of Fourth Amendment rights. See *Edwards v. State*, 300 Ark. 4, 775 S.W.2d 900 (1989) (cocaine admissible where appellant tossed aside container of cocaine when he saw officers approaching him); *Wilson v. State*, 297 Ark. 568, 765 S.W.2d 1 (1989) (jacket and gun left at friend's home held abandoned); and *Cooper v. State*, 297 Ark. 478, 763 S.W.2d 645 (1989) (appellant who fled his vehicle after traffic stop abandoned any expectation of privacy in car and its contents). A review of these decisions illustrates that the issue of abandonment necessarily turns on the facts in a given case. *See State v. Tucker*, 268 Ark. 427, 428, 597 S.W.2d 584 (1980) ("[A]bandonment is a fact question generally determined by a combination of acts and intent").

Because the trial court's decision in the present case necessarily turned on whether appellee in fact abandoned the

marijuana, we must conclude that the resolution of this issue does not require an interpretation of our criminal rules with widespread ramifications. See *State v. Hart*, 329 Ark. 582, 952 S.W.2d 138 (1997); *citing State v. Harris*, 315 Ark. 595, 597, 868, S.W.2d 488 (1994):

> Where the trial court acts within its discretion after making an evidentiary decision based on the facts at hand or even a mixed question of law and fact, this court will not accept an appeal under Ark. R. Crim. P. 36.10 (now Ark. R. App. P.—Crim. 3(c)).

We reach a similar conclusion regarding the State's second allegation of error; that is, that the trial court erred in determining that appellee had standing to challenge the validity of the search warrant obtained to search Bruton's residence. Resolution of this issue required the trial court to determine whether appellee manifested a subjective expectation of privacy in Bruton's residence and whether society is prepared to recognize this expectation as reasonable. See *Dixon v. State*, 327 Ark. 105, 937 S.W.2d 742 (1997). Because this issue presented a mixed question of law and fact, it too is not appealable.

It is well-settled that we only accept appeals by the State when our holding would establish important precedent. *State v. Hart, supra; State v. Rice,* 329 Ark. 219, 947 S.W.2d 3 (1997); *State v. Townsend,* 314 Ark. 427, 863 S.W.2d 288 (1993). As neither issue presented by the State involves the correct and uniform administration of justice, we dismiss the appeal.

Appeal dismissed.

GLAZE, J., dissents.

TOM GLAZE, Justice, dissenting. I respectfully dissent. The majority court misreads appellee Mike Gray's and the State's briefs. This case does not deal only with abandonment of the one pound of marijuana with which Gray was charged. Nor is this appeal about a trial judge who failed to follow or misapplied established precedent concerning abandonment of contraband. The issue argued and considered by the trial judge, and now on appeal by both parties, is as follows: Assuming Gray had no standing to

suppress the marijuana because he threw it from his vehicle and abandoned it, did other earlier events, occurring that same evening, constitute an illegal seizure that made the marijuana the product of an unlawful seizure and therefore inadmissible? Gray cites Rule 16.2(a)(4) of the Arkansas Rules of Criminal Procedure in support of his argument that the trial court correctly suppressed the marijuana as having been unlawfully seized.

Gray's argument is that the one-pound bag of marijuana that was thrown from his vehicle had earlier been illegally seized by Officer Poe. Gray explains that, earlier the same evening when he was arrested, Poe was unlawfully positioned on the private property of Lavern Bruton when Poe saw Bruton come out of his house to enter Gray's car parked in the driveway. Poe witnessed Bruton and Gray transact the sale of marijuana. Gray argues he had a legitimate expectation of privacy while his car was parked in Bruton's driveway, and because Poe was on Bruton's property without his consent, the one-pound bag of marijuana was deemed illegally seized at that stage. Specifically, Gray, utilizing language in Rule 16.2(a)(4), urges that the one pound of marijuana suppressed by the trial judge had been obtained as a result of "other evidence" unlawfully obtained. That "other evidence," he claims, was Officer Poe's unlawful observation of Gray.

The State points out that, although our court has never addressed the issue raised here, other appellate courts have, and held the defendant in such circumstances does not have a legitimate expectation of privacy in an open driveway. Again, the issue presented is precedent setting and, in my view, worthy of this court's consideration under Ark. R. App. P.—Crim. 3(c). The precedent setting question aside, this court has said that, even when it has already decided the issue presented in a case and has created precedent which will assure the correct application of the law, *the court still will permit an appeal that will foster uniform application of the law. State v. Rice*, 329 Ark. 219, 947 S.W.2d 3 (1997); *see also State v. Dennis*, 318 Ark. 80, 883 S.W.2d 811 (1994). At the least, that is the situation here.

Finally, I would be remiss if I failed to mention that even Gray in no way suggests by argument that the State's appeal should

not lie. Because I believe the Fourth Amendment issue and needed interpretation of Rule 16.2 fit well within the dictates of Criminal Appellate Rule 3(c), I would grant this appeal.

SUPPLEMENTAL OPINION ON DENIAL
OF REHEARING

DECEMBER 18, 1997

958 S.W.2d 302

Winston Bryant, Att'y Gen., by: *Kelly Terry*, Asst. Att'y Gen., for appellant.

No response.

W.H. "DUB" ARNOLD, Chief Justice. The State files its petition suggesting that we erred in refusing to accept its appeal. While we agree that we misstated our guidelines regarding the acceptance of State's appeals, we do not agree that we should have accepted the State's appeal in Gray's case.

Citing *State v. Hart*, 329 Ark. 582, 952 S.W.2d 138 (1997), *State v. Rice*, 329 Ark. 219, 947 S.W.2d 3 (1997), and *State v. Townsend*, 314 Ark. 427, 863 S.W.2d 288 (1993), we said that

"we *only* accept appeals by the State when our holding would establish important precedent." (Emphasis added.) Our review of State's appeals is not limited to cases that would establish precedent. We correctly stated our guidelines for accepting State's appeals under Ark. R. App. P.—Crim. 3(c) in our recent decision in *State v. Stephenson*, 330 Ark. 594, 955 S.W.2d 518 (1997):

> We accept appeals by the State when our holding would be important to the correct and uniform administration of the criminal law. Rule 3(c). As a matter of practice, this court has only taken appeals "which are narrow in scope and involve the interpretation of law." *State v. Banks*, 322 Ark. 344, 345, 909 S.W.2d 634, 635 (1995). Where an appeal does not present an issue of interpretation of the criminal rules with widespread ramifications, this court has held that such an appeal does not involve the correct and uniform administration of the law. *State v. Harris*, 315 Ark. 595, 868 S.W.2d 488 (1994). Appeals are not allowed merely to demonstrate the fact that the trial court erred. *State v. Spear and Boyce*, 123 Ark. 449, 185 S.W. 788 (1916).

330 Ark. at 595. Resolution of the issue of abandonment in the present appeal turned on the facts unique to Gray's case, and thus did not require interpretation of our criminal rules with widespread ramifications. Thus, because the issues presented by the State in this appeal did not involve the correct and uniform administration of justice, we correctly dismissed the appeal. Accordingly, we deny the State's petition for rehearing.

GLAZE, J. dissents.

TOM GLAZE, Justice, dissenting. While the majority has corrected its opinion to reflect the proper standard or rule this court utilizes when determining if it will grant the State's appeal under Ark. R. App. P.—Crim. 3(c), the majority then incorrectly applies the rule to the circumstances of this case. In other words, the majority opinion rejects the State's appeal, stating "resolution of the issue of abandonment in the present appeal turned on the facts unique to Gray's case, and thus did not require interpretation of our criminal rules with widespread ramification." Not true.

As I pointed out earlier, the State asks this court to interpret Criminal Rule 16.2(a)(4) and the meaning of "other evidence" as employed by that rule. *See State v. Gray*, 330 Ark. 364, 367-369, 955 S.W.2d 502 (1997), Glaze, J., dissenting, 330 Ark. at 367-369. *Gray* used Rule 16.2(a)(4) to support his argument that the one-pound bag of marijuana, which was the subject of the suppression hearing, had been illegally seized when Officer Poe was unlawfully

positioned on Bruton's private property. *See Id.* at 368. This issue has never been addressed by any Arkansas appellate court, and is reason alone to grant the State's appeal. Obviously, this legal issue regarding the interpretation of Rule 16.2(a)(4) has widespread ramifications, since our appellate courts, until now, have never had an opportunity to address the question. Accordingly, I would grant the State's petition for rehearing.

ARKANSAS STATE HIGHWAY COMMISSION *v.*
Charles K. POST, Shelby Jean Post, and First Financial Savings and Loan

96-1403 955 S.W.2d 496

Supreme Court of Arkansas
Opinion delivered October 30, 1997

Robert L. Wilson, Chief Counsel, *Barbara A. Griffin* and *Lawrence W. Jackson*, Staff Attorneys, for appellant.

Ronald L. Griggs, for appellee.

DAVID NEWBERN, Justice. This is an eminent domain case. For the purpose of widening a highway, the Arkansas State Highway Commission ("the Commission") condemned .14 acres of frontage which was part of a tract owned by the appellees Charles and Shelby Post. The Posts reside on the remaining portion of the tract consisting of some 4.2 acres. Appellee First Financial Savings and Loan holds a mortgage on the Posts' property. Along with its condemnation complaint, the Commission deposited $1,600 into the court registry as "just compensation." The Posts contended that the deposited amount was inadequate, and a jury trial was held to determine proper compensation. The Commission's liability for the taking was not contested. A judgment was entered upon a jury verdict awarding the Posts $7,000, and the Commission appealed. The Arkansas Court of Appeals affirmed by an opinion not designated for publication. *Arkansas State Hwy. Comm'n v. Post,* No. CA95-906 (Nov. 6, 1996). We review the decision of the Trial Court as if it had come to this Court in the first instance. *See Allen v. State*, 326 Ark. 541, 542, 932 S.W.2d 764, 765 (1996). We granted review and now reverse and remand on three of the four points raised by the Commission.

We hold that the Trial Court erred by (1) requiring the party who did not have the burden of proof, *i.e.,* the Commission, to

present its case first; (2) allowing the Posts to introduce a photograph of the temporary conditions on their property caused by ongoing construction; and (3) refusing to strike the speculative testimony of Peter Emig, the Posts' expert witness, regarding the property's after-taking value. As a new trial is in order, we need not consider the Commission's fourth argument that the damages verdict was excessive.

1. Order of proof

Over the Commission's objection, the Trial Court ruled that the Commission would present its case before the Posts presented their case. Ms. Griffin, counsel for the Commission, was not permitted to make an objection on the record until after she had concluded the Commission's case. She asserted that the Posts had the burden to prove that the $1,600 deposit was inadequate and that they therefore should have proceeded first. Ms. Griffin argued that the Commission had been prejudiced by "having to go forward first and having the burden of proof placed on us." She maintained that the Commission had prepared its case on the assumption that its presentation of evidence would follow the Posts' and that its witnesses had expected to be in the position of rebutting the testimony given by the Posts' witnesses. Mr. Griggs, counsel for the Posts, responded that the Commission had the burden of proving the value of the Posts' property and that the Commission had not been prejudiced by the Trial Court's ruling.

The Trial Court stated that its ruling caused only "minimal prejudice" to the Commission and that the Commission would have the opportunity to present rebuttal evidence after the Posts completed their case. The Trial Court referred to Ark. Code Ann. § 27-67-316 (Repl. 1994), which provides that eminent domain actions should proceed "as in other civil cases," and observed that, in the pleadings, the Commission was listed as the plaintiff and the Posts as the defendants. The Trial Court agreed with the Commission that the Posts would have the burden of proving their entitlement to the damages claimed and said that it would make that clear in a jury instruction. The Trial Court later instructed the jury that "the burden of proof is on the landowner

to prove his claim for just compensation due him by a preponderance of the evidence."

The order of trial in civil cases is clearly prescribed by Ark. Code Ann. § 16-64-110 (1987). Subsection (3)(A) of that statute provides, "The party on whom rests the burden of proof in the whole action must first produce his evidence." In an eminent domain proceeding such as this one, the "whole action" is devoted to allowing proof that the landowners have not been adequately compensated for the taking. The law clearly provides that they are to present their proof first.

In *Springfield and Memphis Railway v. Rhea,* 44 Ark. 258 (1884), we held that it was proper for the defendant landowner "to open and close" the case because he had the burden of proof on the issue of his entitlement to damages. *Id.* at 260. That case was followed by the Court of Appeals in *Property Owners Improvement Dist. 247 v. Williford,* 40 Ark. App. 172, 843 S.W.2d 862 (1992), in which it was held that the landowner had the right to "open and close" in the presentation of evidence and argument to the jury.

In the case at bar, the Trial Court should have required the Posts to present their evidence first because "the burden of proof in the whole action" rested on them. § 16-64-110(3)(A). The Trial Court identified no "special reasons," and we can think of none, that warranted a departure from the order prescribed by § 16-64-110(3). Thus, we must conclude the Trial Court's failure to follow the procedure outlined in this provision was erroneous.

The error was prejudicial. Although the Trial Court correctly instructed the jury that the Posts had the burden of proof with respect to the adequacy of the $1,600 deposit, the unexpected decision to rearrange the order of proof unfairly hindered the Commission's ability to present its case. Having relied on the procedures long established by statute and case law, the Commission reasonably expected that the Posts would present their case first, and it tailored its own case to be in the form of a rebuttal. The Commission was put at an unfair disadvantage when it was made to proceed in the posture of a plaintiff and present what was in essence a rebuttal case at the beginning of trial. The Commis-

sion could not have anticipated this unorthodox procedure, and we cannot say that the eleventh-hour surprise encountered by the Commission was harmless.

2. *Construction photograph*

During the Posts' case-in-chief, the Posts' expert witness, Peter Emig, testified that the value of the Posts' land prior to the taking was $73,000 and that the value after the taking was $55,000. The Posts moved to introduce into evidence the appraisal report that Mr. Emig had produced and referred to during his testimony. The appraisal report included several photographs of the Posts' home and surrounding land.

One of the photographs included in the appraisal report was taken from the right-of-way in front of the Posts' home. The highway, located to the east of the home and right-of-way, appears on the far right side of the photograph. The driveway leading from the highway to the Posts' home is in the foreground, toward the bottom of the photograph. The middle portion of the photograph depicts three trees standing in the Posts' front yard. In the background, toward the top of the photograph, is the right-of-way to the north of the home. That portion of the photograph depicts piles of dirt and dead trees that appeared to have been cut in the course of construction work.

The Commission objected to the introduction of the photograph and suggested that the photograph was prejudicial because it might lead the jury to believe that the dead trees would remain on the land after completion of the construction project and affect the value of the property. The Posts responded that the photograph would not prejudice the Commission and that it simply revealed the part of the land that was being "taken." The Trial Court ruled that the photograph could be admitted because it depicted "the land at the time of the taking" and because it showed part of the basis for Mr. Emig's opinion and was an "accurate reflection of the property at the time he based his opinion on it." The Trial Court acknowledged that the photograph "obviously shows construction," but it stated it could not "see how that's going to be prejudicial."

Mr. Griggs questioned Mr. Emig about the photograph as follows:

> Q. Okay. Now, turn to the third page and it shows a photograph and I believe the caption is "Current construction of the right-of-way as seen from the right-of-way in front of the home," is that correct?
>
> A. That is correct.
>
> Q. Now, that is not the right-of-way as it will exist after the taking, is it? It's not gonna look like that after the taking, is it?
>
> A. The front of the property, once the trees are removed, will look like the area in the background.
>
> Q. Okay. And so those are trees that will be removed from the taking?
>
> A. My understanding is those are the trees.

The Trial Court erred by admitting the photograph of the piles of dirt and dead trees that had resulted from the ongoing construction work. Evidence is inadmissible in partial-taking cases when it pertains to the temporary conditions of the property during the course of construction. Such evidence does not assist the jury in determining "just compensation" in a partial-taking case because it is irrelevant to "(1) the value of the part taken; (2) the value of the part taken plus the damages to the remainder; [or] (3) the before- and after-value rule." *Arkansas State Hwy. Comm'n v. Frisby,* 329 Ark. 506, 508, 951 S.W.2d 305 (1997), *quoting Arkansas State Hwy. Comm'n v. Barker,* 326 Ark. 403, 405, 931 S.W.2d 138, 140 (1996). Temporary conditions prevailing on the land during the course of a construction project simply have no bearing on the worth of the land prior to the taking or what its worth will be after the project is completed. Thus, in a partial-taking case, evidence of temporary conditions caused by ongoing construction is irrelevant, as well as potentially misleading and prejudicial, and should not be admitted. *Arkansas State Hwy. Comm'n v. Ptak,* 236 Ark. 105, 364 S.W.2d 794 (1963); *Donaghey v. Lincoln,* 171 Ark. 1042, 287 S.W. 407 (1926); *City of Fort Smith v. Findlay,* 48 Ark. App. 197, 893 S.W.2d 358 (1995).

We note the Posts' suggestion that Mr. Emig, in his testimony, clarified that the conditions depicted in the photograph

were not permanent and that the property would look differently after completion of the construction project. That testimony supposedly cured any prejudice that resulted from the admission of the photograph. Nothing in Mr. Emig's testimony could have had such a remedial effect. When asked whether the right-of-way depicted in the photograph would look differently after the taking, Mr. Emig did not answer "yes." Rather, he testified that "[t]he front of the property, once the trees are removed, will look like the area in the background." As we noted, the "area in the background" of the picture contains the piles of dirt and dead trees. Mr. Emig's testimony, rather than suggesting the piles would be cleared after the project was complete, tended to suggest that the entire property, for an unspecified amount of time, would eventually be covered with dead trees. This testimony in no way clarified to the jury that the conditions depicted in the photograph were merely temporary. The error was not harmless.

3. Expert testimony on "after value"

Mr. Emig testified during the Posts' case-in-chief that the value of the Posts' land before the taking was $73,000 and that the value after the taking was $55,000. Mr. Emig testified that there are three approaches to valuing property — the market approach, the cost approach, and the income approach. He stated that he determined the "before value" using the market approach. Mr. Emig testified that he considered three sales of property similar to the Posts' property and adjusted for the differences between those properties and the Posts' property. Relying on these sales, Mr. Emig concluded the value of the Posts' property before the taking was $73,000.

Mr. Emig testified that he was unable to use the market approach to determine the property's "after value." In his appraisal report, Mr. Emig wrote that, "[t]ypically, three comparable sales are found which have the condition the Subject Property will have after the taking. After adjusting for the differences the indicated 'After Value' is subtracted from the 'Before Value' and that amount is considered as just compensation to the owner. In this assignment there were no comparable sales with which to estimate an 'After Value.'"

Thus, Mr. Emig indicated in his appraisal report that he determined the after value of the property using an "alternate method for estimating a market reaction to the change in the property configuration." In his testimony, Mr. Emig described his "alternate method" as follows.

Mr. Emig's opinion that the after value of the property was $55,000 rested on his assumption that the value of a home decreases in direct proportion to the decrease in the distance between the home and the right-of-way. Mr. Emig noted that, on account of the taking, the distance between the Posts' home and the right-of-way had decreased by one third from 120 feet to 80 feet. He testified that the Posts' property, prior to the taking, had an "improvement value" of $60,000. He said that, if the home were moved right next to the right-of-way, it would have only a "salvage value" of $5,000. (Relying on two other "salvage sales," Mr. Emig determined that a buyer would pay $5,000 to move the Posts' home to another location.) Thus, according to Mr. Emig's theory, the Posts' home would decrease in value by $55,000 if the right-of-way were moved from its position 120 feet away directly next to the home. As the right-of-way had been moved only one third of this distance, Mr. Emig reasoned, the home had decreased in value by one third of $55,000, or $18,333, which Mr. Emig rounded down to $18,000. Mr. Emig suggested this amount was the "just compensation" due the Posts. He subtracted it from the before value of $73,000 to arrive at an after value of $55,000.

During cross-examination, Ms. Griffin asked Mr. Emig about his valuation method.

> Q. What basis — what do you base that estimate on? Were there any sales in the market that indicate that a house that had set 120 feet from the right-of-way decreases a certain percentage amount for every percent it moves toward the right-of-way?
> A. No.
> Q. So that's based on what?
> A. Logic.
> Q. Just your personal opinion?
> A. Well, I think it's reasonable to assume that if it is 60 thousand for the improvement, as it is today, and if it were located next

to the highway, and it has a five thousand dollar salvage value, somewhere between those two points value was lost and I'm assuming that as this property gets closer and closer to the highway, the value diminishes and there is a direct relationship between the distance and a value lost. If it's 50 percent closer it's reasonable to say that 50 percent is lost.

Q. Okay. When you say it's reasonable, it's an assumption, is that based on your personal opinion, is that your assumption?

A. It is, that's my professional opinion.

Q. And there's nothing in the market that you found that would prove or disprove that?

A. No, I could not find any.

Q. Are you also aware that although the right-of-way is 40 feet closer to the home that the lanes of traffic, the closest one to the Post home is still 132, well a little more than 132 feet from their house?

A. I was not aware of the exact distances insofar as the distance from the home to the actual pavement.

Q. Okay. Have you examined any properties that were approximately 80 feet from the right-of-way to determine what their values were, what they sold for?

A. No.

Q. You also stated that you found no comparable sales with which to do an after-value, what approach would you call what you did in arriving at an after-value?

A. Well, I'm not sure that there's a specific name given to it.

Q. So, it's not one of the three generally accepted approaches?

A. Well, I think that most appraisers, most appraisal organizations, and the Uniform Standards of Professional Appraisal Practice, allow the appraiser the latitude to use whatever he considers appropriate for solving the value problem, and given the conditions in this case, I did the best that I could.

Q. Did you check for any sales that are 80 feet from the right-of-way or did you just not find any or did you look, search the market for that?

A. We looked for sales anywhere on 167 South that were being directly impacted by this property.

Q. Okay. And you said directly on 167, are your comps — none of your comps from the before-value except the first one is on North 167, were on 167, is that correct?

A. That's correct. . . .

* * *

Q. And also I want to bring up the fact, have you — first I want to ask you: Did you find any sales in the market when you were doing your research that would indicate a direct proportion between the distance of the right-of-way as it moves to the residence and the decrease in value of the residence?

A. I did not.

Ms. Griffin moved to strike Mr. Emig's after-value testimony. She asserted that his opinion on the matter of after value was speculative and lacked a reasonable basis. The Trial Court denied the motion.

The Trial Court erred by refusing to strike Mr. Emig's after-value testimony. Although an expert's opinion is admissible even if the expert fails on direct examination to explain the basis for his conclusions, the testimony must be stricken if the Commission demonstrates on cross-examination "that the landowners' expert witness[ ] had no reasonable basis for [his] opinions." *Arkansas State Hwy. Comm'n v. Johns*, 236 Ark. 585, 586-87, 367 S.W.2d 436, 438 (1963).

Mr. Emig's opinion that the value of the Posts' home would decrease in direct proportion to the decrease in distance between the home and the right-of-way was speculative and lacked a sound and reasonable basis. Mr. Emig conceded that his approach had no specific name and that it was not rooted in the three approaches to valuation previously recognized in eminent domain cases. He offered no foundation for comparing the Posts' home to the two homes that were sold for "salvage value" for the purpose of relocating them elsewhere. Those homes were sold for $3,000 and $5,000, but Mr. Emig did not establish that a buyer would pay a comparable figure for the Posts' home under such circumstances.

We also note that Mr. Emig was unable to point to any market data to corroborate his view that the value of a home decreases in direct proportion to the decrease in distance between the home and the right-of-way. In *Arkansas-Missouri Power Company v. Sain,* 262 Ark. 326, 556 S.W.2d 441 (1977), the landowner's expert witness testified that a newly installed transmission line would reduce the value of the property by $27,197. We held that the testimony was speculative and should have been stricken because

the "expert on cross-examination admitted that he could not think of a single instance where a transmission line had any effect on the market value of the property." *Id.* at 327-28, 556 S.W.2d at 442. "Therefore," we said, "his testimony that the damages amounted to some $27,000 did not have a sound and reasonable basis." *Id.*

Mr. Emig's testimony concerning the property's after value lacked a sound and reasonable basis. We must therefore reverse because "[t]he public . . . cannot be compelled to pay prices based . . . upon speculation . . . ." *Arkansas State Hwy. Comm'n v. Roberts,* 246 Ark. 1216, 1221, 441 S.W.2d 808, 812 (1969), *citing Arkansas State Hwy. Comm'n v. Watkins,* 229 Ark. 27, 313 S.W.2d 86 (1958); *Arkansas State Hwy. Comm'n v. Griffin,* 241 Ark. 1033, 411 S.W.2d 495 (1967).

Reversed and remanded.

GLAZE, J., concurs to point out that, by requiring the Commission to present its evidence first, the court caused the Commission to lose any effective right to a directed-verdict motion.

Stacy JOHNINSON *v.* STATE of Arkansas

CR 97-660 953 S.W.2d 883

Supreme Court of Arkansas
Opinion delivered October 30, 1997

William M. Brown, for appellant.

Winston Bryant, Att'y Gen., by: *Vada Berger* and *C. Joseph Cordi, Jr.*, Asst. Att'ys Gen., for appellee.

DAVID NEWBERN, Justice. Stacy Johninson pleaded guilty before Judge David Bogard to a number of felonies. The issues in this case are whether a motion to withdraw the guilty pleas was untimely and, if not, whether the motion was properly denied. We hold the motion was not untimely but that it was lacking in merit. We affirm as no error occurred in the denial of the motion to withdraw the pleas.

On September 16, 1996, Judge Bogard sentenced Mr. Johninson to imprisonment for forty years for aggravated robbery, ten years for theft by receiving, five years for being a felon in possession of a firearm, and five years due to revocation of probation of a previous sentence. Those sentences were pronounced in open court to be served consecutively for a total of sixty years' imprisonment. An additional five-year sentence for being a felon in possession of a firearm was pronounced to be served concurrently with the other sentences.

After pronouncing the sentence, Judge Bogard recused and transferred the case to a separate division of the Pulaski Circuit Court presided over by Judge Chris Piazza. On November 22, 1996, Mr. Johninson moved to withdraw his guilty pleas on the ground that his counsel had told him he would receive only a combined ten-year sentence for all of the offenses. The only request made of Judge Piazza was that Mr. Johninson be allowed to withdraw the pleas due to the ineffectiveness of his counsel. Mr. Johninson contended that, although he was guilty of the offenses, other than aggravated robbery, to which he had pleaded guilty, he would not have entered the pleas but for his counsel's promise of a ten-year sentence.

On December 5, 1996, Judge Piazza held a hearing on the motion. Testimony was taken from Mr. Johninson, his mother, and his sister, all of whom said the promise of ten years had been made by Mr. Johninson's lawyer. After reviewing the record of the proceedings before Judge Bogard and the thorough inquiry

made of Mr. Johninson by Judge Bogard with respect to whether he had been promised anything in return for his plea and whether he was pleading guilty because he was indeed guilty and knew the maximum sentences he might receive, Judge Piazza announced that he would follow the sentences imposed by Judge Bogard. The judgment and commitment order document, signed by Judge Piazza, was filed of record February 4, 1997.

1. *Timeliness*

The State argues that we must dismiss the appeal because the Trial Court lacked jurisdiction to permit withdrawal of the guilty pleas at the time the attempt to withdraw them occurred and, therefore, this Court lacks jurisdiction of the appeal. Two subsections of Ark. R. Crim. P. 26.1 are significant in this instance.

> (a) Prior to pronouncement of sentence, the court shall allow a defendant to withdraw his plea of guilty or nolo contendere upon a timely motion and proof to the satisfaction of the court that withdrawal is necessary to correct a manifest injustice.
>
> (b) A motion to withdraw a plea of guilty or nolo contendere to correct a manifest injustice is timely if, upon consideration of the nature of the allegations of the motion, the court determines that it is made with due diligence. Such motion is not barred because it is made after the entry of judgment upon the plea. If the defendant is allowed to withdraw his plea after judgment has been entered, the court shall set aside the judgment and the plea.
>
> * * *

If a sentence has been entered and placed in execution prior to the filing of a motion to withdraw the guilty plea upon which it was based, the motion must be treated as having been made pursuant to Ark. R. Crim. P. 37, and the provisions of that rule govern timeliness of the motion. *Shipman v. State*, 261 Ark. 559, 550 S.W.2d 454 (1977). *See also Travis v. State*, 286 Ark. 26, 688 S.W.2d 935 (1985); *Rawls v. State*, 264 Ark. 954, 581 S.W.2d 311 (1979).

Rule 26.1(b) provides for withdrawal of a guilty plea after entry of judgment upon the plea, but it is not limited to that situation. The previous sentence says the motion is timely if there has been "due diligence," and allowance is made for consideration of "the nature of the allegations of the motion." The question thus becomes whether a motion to withdraw a guilty plea that was not made prior to pronouncement of sentence or after entry of the judgment may be timely. If withdrawal motions, other than those made prior to pronouncement of sentence, are to be considered under Rule 37 and its provisions on timeliness, the answer is found in Rule 37.2(c) which provides:

> (c) If a conviction was obtained on a plea of guilty, or the petitioner was found guilty at trial and did not appeal the judgment of conviction, a petition claiming relief under this rule must be filed in the appropriate circuit court within ninety (90) days of the date of entry of judgment. *If the judgment was not entered of record within ten (10) days of the date sentence was pronounced, a petition under this rule must be filed within ninety (90) days of the date sentence was pronounced.*
>
> * * *

(Emphasis supplied.)

In this case, the judgment and conviction order document was not entered until February 4, 1997, and the motion to withdraw the guilty plea was made within ninety days of the pronouncement of sentence.

We are, of course, aware that subsections (a) and (b) of Rule 26.1 may be read as inconsistent with each other. The opinion in the *Shipman* case seemed to be an attempt to reconcile them. We are also aware of the history of the rule subsequent to the *Shipman* decision.

In *Malone v. State,* 294 Ark. 376, 724 S.W.2d 945 (1988), we noted that there was nothing in the record to show that the parties seeking to withdraw guilty pleas had moved to do so prior to "sentencing" as required by Rule 26.1. We acknowledged, however, that Rule 37 could have applied but did not because that remedy is confined to use by a prisoner who is in custody under sentence of a circuit court, and the parties at issue

were out on bond. Rule 37.2(c) and the provision with respect to the period from ten days after pronouncement of sentence and the entry of the judgment and commitment order document were not at issue and not discussed. While relief pursuant to Rule 37.1 is limited to prisoners incarcerated under sentence, that obviously is not contemplated by Rule 37.2 which, by its terms, applies prior to entry of the judgment.

In *Brown v. State*, 290 Ark. 289, 718 S.W.2d 937 (1986), we again acknowledged that a motion to withdraw a guilty plea could be treated pursuant to Rule 37 if there is a ruling on the merits of the motion. In the case now before us, there was such a ruling.

In *Scalco v. City of Russellville*, 318 Ark. 65, 883 S.W.2d 813 (1994), we discussed the history of Rule 26. We recited subsection (a) and emphasized the words "prior to pronouncement of sentence." We wrote, "once the guilty plea has been accepted, and the sentencing [apparently referring to pronouncement] has taken place, the trial court is without jurisdiction to set aside a plea of guilty, unless there was some kind of stay of the sentence." 318 Ark. at 70, 883 S.W.2d at 815. In the *Scalco* case, the sentence had been, in effect, "stayed" during an appeal of a suppression-of-evidence issue pursuant to Ark. R. Crim. P. 24.3 but had ultimately been affirmed by the Court of Appeals. We held that, as the sentence was not under any sort of a stay at the time the motion to withdraw the guilty plea was made, the Trial Court lacked jurisdiction to permit its withdrawal.

In *McCuen v. State*, 328 Ark. 46, 941 S.W.2d 397 (1997), a motion to withdraw a guilty plea was treated as a Rule 37 petition in the Trial Court. The contention was that Mr. McCuen's counsel had been ineffective in seeking withdrawal of his guilty plea. We ruled on the merits of the argument and held there was no right to counsel in a postconviction proceeding. In that case, the motion had been made after entry of the judgment and commitment order document.

In *Standridge v. State*, 290 Ark. 150, 717 S.W.2d 795 (1986), the issue was whether a defendant, the imposition of whose sentence had been delayed for five years and who had been

placed on probation for one year, could have probation revoked for an act which occurred prior to entry of the judgment. We held that the sentence was effective from the time of its pronouncement in open court. In *Redding v. State*, 293 Ark. 411, 738 S.W.2d 410 (1987), however, we held that "A sentence is placed into execution when the court issues a commitment order unless the trial court grants appellate bond or specifically delays execution upon other valid grounds." 293 Ark. at 413, 738 S.W.2d at 411. The State would have us overrule that language in favor of the rationale of the *Standridge* case.

We agree with the State that the *Standridge* opinion cited persuasive authority for its result and the *Redding* case opinion was lacking in cited authority. We decline, however, to follow the *Standridge* opinion here. The *Standridge* holding that a judgment of conviction and a sentence are "entered" and "placed in execution" upon pronouncement in open court is inconsistent with our Admistrative Order No. 3, which describes entry of judgment, and our rule for civil cases which clearly provides for the effectiveness of judgments upon their entry or filing. Ark. R. Civ. P. 58; *Standridge v. Standridge*, 298 Ark. 494, 796 S.W.2d 12 (1989). In addition, it conflicts with Rule 37.2(c) quoted above. The latter rule obviously contemplates a period of time which, for a variety of reasons, may occur between the pronouncement of sentence and entry of a judgment and commitment order. To the extent it conflicts with this opinion, *Standridge v. State, supra*, is overruled.

In the case now before us, the "sentencing" took place on September 16, 1996, but the judgment and commitment order document was not entered until February 4, 1997. The motion to withdraw the guilty pleas was made between those dates. As Rule 26.1(a) is obviously not applicable because the motion was not made prior to pronouncement of the sentence, we are relegated to subsection (b) and Rule 37. Again, Rule 37.2(c) settles the timeliness issue, and it permitted the Trial Court to consider the issue of ineffective assistance of counsel on its merits because the judgment was not entered within ten days of the pronouncement of the sentence.

2. *Ineffective assistance of counsel*

"We will not reverse a trial court's denial of postconviction relief unless the ruling was clearly erroneous." *Rowe v. State*, 318 Ark. 25, 26-27, 883 S.W.2d 804, 805, *citing Thompson v. State*, 307 Ark. 492, 821 S.W.2d 37 (1991). Mr. Johninson claims he is entitled to withdraw his guilty plea on account of ineffective assistance of counsel.

> In *Hill v. Lockhart*, 474 U.S. 52 (1985), [it was held that] the two-part standard adopted in *Strickland v. Washington*, 466 U.S. 668 (1984), for evaluating claims of ineffective assistance of counsel — requiring that the defendant show that counsel's representation fell below an objective standard of reasonableness, and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different — applies to guilty plea challenges based on ineffective assistance of counsel. *In order to satisfy the second requirement, the defendant must show that there is a reasonable probability that, but for counsel's error, he would not have pleaded guilty and would have insisted on going to trial.* It is the defendant's burden to prove ineffective assistance of counsel, and it is a heavy burden because counsel is presumed effective. *Hicks v. State*, 289 Ark. 83, 709 S.W.2d 87 (1986).

Duncan v. State, 304 Ark. 311, 316, 802 S.W.2d 917, 919-20 (1991)(emphasis added). *See Cranford v. State*, 303 Ark. 393, 797 S.W.2d 442 (1990). *See also Thompson v. State*, 307 Ark. 492, 494, 821 S.W.2d 37, 38 (1991). ("We have recognized that a defendant whose conviction is based on a plea of guilty will have difficulty in proving prejudice under the *Strickland* standard since his plea rests on his admission in court that he did the act with which he is charged."), *citing Huff v. State*, 289 Ark. 404, 711 S.W.2d 801 (1986); *Crockett v. State*, 282 Ark. 582, 669 S.W.2d 896 (1984).

In *Stobaugh v. State*, 298 Ark. 577, 769 S.W.2d 26 (1989), the defendant sought to withdraw his plea on the basis of his claim that his attorney provided ineffective assistance. The attorney's assistance was alleged to be ineffective on several grounds, one of which was that the attorney had misled the defendant by giving him the impression that he would receive a suspended or probated sentence if he pleaded guilty. The defend-

ant received a sentence of four years and a fine of $10,000. We rejected the argument as follows:

> A defendant who receives a greater sentence than expected is not entitled to have his plea withdrawn solely on that basis. In the absence of a plea agreement or other extenuating circumstances, the fact that a defendant hoped for, or even expected, a lighter sentence is not grounds for withdrawing the plea after an unfavorable sentence is pronounced.

Id. at 580, 769 S.W.2d at 28.

Despite the clear record showing that Mr. Johninson was advised of the sentences he might receive for the offenses to which he pleaded guilty and his statements that he understood that advice, he maintains that his attorney's advice was "invalid" because he ultimately received a sentence in excess of ten years. "The judge is not required to believe any witness's testimony." *McDaniel v. State*, 291 Ark. 596, 599, 726 S.W.2d 679, 681 (1987).

The Trial Court could also have reasonably disbelieved the testimony of Mr. Johninson's mother and sister. The prosecutor succeeded in showing some problems with their credibility. Even counsel for Mr. Johninson stated that the mother's testimony concerning the attorney's alleged promise of a ten-year sentence had changed since the meeting counsel had with her prior to the hearing before Judge Piazza.

Given our deference to the Trial Court's position with respect to evaluation of the testimony of witnesses, we cannot conclude that its decision that Mr. Johninson's counsel was not ineffective was clearly erroneous or clearly against the preponderance of the evidence.

Affirmed.

BOATMAN'S NATIONAL BANK of Northwest Arkansas (Successor-in-Interest to Worthen National Bank of Northwest Arkansas) *v.* Shirley A. MOSS, Sharon J. Hale and City of Springdale

97-127 953 S.W.2d 583

Supreme Court of Arkansas
Opinion delivered October 30, 1997

Stockland & Trantham, P.A., by: *Charles S. Trantham*, for appellant.

No brief filed for appellee.

TOM GLAZE, Justice. On February 23, 1996, appellant Boatmen's National Bank of Northwest Arkansas filed a foreclosure suit against Shirley and Sharon Moss when they defaulted on a loan. Boatmen's subsequently added the City of Springdale as a defendant because the city claimed an interest in the mortgaged property. In March 1996, Shirley Moss filed a pro se response to Boatmen's complaint, and the city filed its answer, reserving the right to file a counterclaim or cross claim. Sharon filed nothing.

On March 29, 1996, Shirley filed a notice in the foreclosure suit, reflecting she had filed a petition for Chapter 13 bankruptcy on March 14, 1996, and an automatic stay went into effect pursuant to 11 U.S.C. § 362(a) (Supp. 1994). No further pleadings were filed or actions taken in Boatmen's suit until December 5, 1996, when the chancery judge dismissed the case for want of prosecution under Rule 41(b) of the Arkansas Rules of Civil Procedure. Rule 41(b), in pertinent part, provides that, in any case in which there has been no action shown on the record for the past twelve months, 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.

On December 18, 1996, Boatmen's filed a motion to set aside the court's dismissal order, stating Shirley was currently in bankruptcy and Boatmen's foreclosure suit against Shirley had been automatically stayed. Boatmen's requested its foreclosure action be reinstated, otherwise, it would be forced to refile its lawsuit in the future. After the chancery judge denied Boatmen's motion, Boatmen's filed this appeal.

We initially mention the obvious fact that the twelve-month period under Rule 41(b) had not elapsed at the time Boatmen's case was dismissed. In this respect, the City of Springdale filed its answer on March 27, 1996, and Shirley filed notice of her bankruptcy on March 29, 1996, but the chancellor dismissed Boatmen's suit on December 5, 1996. The chancellor's dismissal was about four months premature. For this reason, alone, Boatmen's request for reinstatement of its case would appear to have merit, based on the failure of the court to comply with the terms of Rule 41(b). However, because this court will not reverse a case based on an argument not raised below, we will decide the question that Boatmen's raised below and now argues on appeal — Did the trial court err in dismissing Boatmen's suit for want of prosecution when a bankruptcy stay order was in effect at the time?[1]

This court has not addressed the question posed here, but courts in other jurisdictions have. For example, a Florida appellate court considered a lower court's dismissal of a plaintiff's nonsuit under a rule almost identical to Arkansas's Rule 41(b) when a bankruptcy stay order was in effect.[2] The appellate court reversed, stating the following:

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[1] Too, while this court could reverse on the failure of complying with Rule 41(b), the bankruptcy stay argument would likely arise again, and judicial economy would be served to decide the issue now and avoid another appeal.

[2] Rule 1.420(e) of the Florida Rules of Civil Procedure reads as follows:

> (e) FAILURE TO PROSECUTE. All actions in which it appears on the face of the record that no activity by filing of pleadings, order of court or otherwise has occurred for a period of one year shall be dismissed by the court on its own motion or on the motion of any interested person . . . unless a stipulation staying the action is approved by the court or a stay order has been filed or a party shows good cause in writing at least five days before the hearing on the motion why the action should remain pending.

> [I]f an action is stayed as to one or more of the parties either by court order or by an automatic stay invoked because of the federal bankruptcy act, it will not be dismissed for failure to prosecute. To hold otherwise would frustrate the purpose of the rule which is to expedite and simplify litigation, not to cause additional litigation through no fault of the one moved against.

Bowman v. Peele, 413 So.2d 90 (1982); *see also Bowman v. Dickey*, 505 So.2d 581 (1987); *Cf. Hughes v. Robo Bay Cities, Inc.*, 184 Cal. Rptr. 926 (1982). In addition to and consistent with the Florida decisions on the issue, the Texas Supreme Court held its court of appeals erred in issuing an opinion after a party to the appeal had filed bankruptcy and a stay order was in effect under 11 U.S.C. § 362(a).

Although no want-of-prosecution rule like Arkansas's Rule 41(b) was at issue, a number of federal cases dealing with dismissal of actions when bankruptcy stay orders were in effect are particularly insightful and essentially reach the same outcomes as the ones reached by the Florida and Texas courts. In *Dean v. Trans World Airlines, Inc.*, 72 F.3d 754 (9th Cir. 1995), for example, the court of appeals held the district court's dismissal of Dean's lawsuit against Trans World Airlines violated the § 362(a) automatic stay in effect when TWA filed for bankruptcy. The court of appeals explained its decision as follows:

> Section 362(a) has two broad purposes. First, it provides debtors with protection against hungry creditors:
>
> It gives the debtor a breathing spell from its creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.
>
> H.R.Rep. No. 595, 95th Cong., 1st Sess., at 340 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6296-97. Second, the stay assures creditors that the debtor's other creditors are not racing to various courthouses to pursue independent remedies to drain the debtor's assets:
>
> The automatic stay also provides creditor protection. Without it, certain creditors would be able to pursue their own remedies against the debtor's property. Those who acted first would

> obtain payment of the claims in preference to and to the detriment of other creditors.

See also Pope v. Manville Forest Products Corporation, 778 F.2d 238 (5th Cir. 1985).

The *Pope* case is particularly helpful. There, the Fifth Circuit Court of Appeals held that Pope's Title VII action against her employer Manville Forest Products must remain on the district court's docket until final disposition of Manville's bankruptcy proceedings or some relief is granted from the § 362(a) stay. The court in *Pope* set out the following rationale in support of its decision:

> We recognize that the stay, by its statutory words, operates against "the commencement or continuation" of judicial proceedings. No specific reference is made to "dismissal" of judicial proceedings. Nevertheless, it seems to us that ordinarily the stay must be construed to apply to dismissal as well. First, if either of the parties takes any step to obtain dismissal, such as motion to dismiss or motion for summary judgment, there is clearly a continuation of the judicial proceeding. Second, in the more technical sense, just the entry of an order of dismissal, even if entered sua sponte, constitutes a judicial act toward the disposition of the case and hence may be construed as a "continuation" of a judicial proceeding. Third, dismissal of a case places the party dismissed in the position of being stayed "to continue the judicial proceeding," thus effectively blocking his right to appeal. Thus, absent the bankruptcy court's lift of the stay, or perhaps a stipulation of dismissal, a case such as the one before us must, as a general rule, simply languish on the court's docket until final disposition of the bankruptcy proceeding.

We believe the foregoing cases, particularly the federal ones, set out compelling reasons why party debtors and creditors should be protected against early dismissals of those pending court actions when bankruptcy proceedings and stay orders are filed. Even though such protective stays under § 362(a) automatically go into effect upon the filing of a bankruptcy action, a party in interest is provided an opportunity to seek relief from the stay for good cause under 11 U.S.C. § 362(d) (Supp. 1994). Meanwhile, the stay provides debtors with protection against hungry creditors, and assures creditors are not racing to various courthouses to pursue

independent remedies to drain the debtor's assets. *Dean*, 72 F.3d at 755, 756. Also, this court's interpretation of its Rule 41(b) to prevent a want-of-prosecution dismissal of a pending state court action after a § 362(a) is in effect, eliminates a plaintiff from refiling the action in the future, serves judicial economy and avoids possible statute of limitation and priority claim problems.

For the reasons stated above, we reverse and remand with directions to reinstate Boatmen's case.

25 RESIDENTS of Sevier County and the United Transportation Union *v.* ARKANSAS HIGHWAY and TRANSPORTATION COMMISSION

97-340 954 S.W.2d 242

Supreme Court of Arkansas
Opinion delivered October 30, 1997

Youngdahl, Sadin, Morgan & McGowan, by: *Thomas H. McGowam* and *Nga Ostoja-Starzewski*, for appellant.

Robert Wilson, Chief Counsel and *Tom G. Lorenzo*, for appellee Arkansas State Highway & Transp. Comm'n.

Friday, Eldredge & Clark, by: *John Dewey Watson* and *Allison Graves*, for appellee DeQueen & Eastern R.R.

TOM GLAZE, Justice. On January 26, 1996, pursuant to Ark. Code Ann. § 23-12-611 (1987), the DeQueen and Eastern Railroad (Railroad) filed an application to discontinue its agency station in Dierks, Arkansas. The Railroad operates as a rail carrier that transports goods, property, and raw materials in interstate and intrastate commerce. By discontinuing the Dierks agency station, the Railroad intended to consolidate that station with the agency operation in nearby DeQueen, Arkansas. Notice of the proposed discontinuation was filed with the Arkansas Highway and Transportation (AHT) Commission, and it provided the discontinuation would be effective in ninety days.

Twenty-five registered voters, who were residents of Dierks, petitioned the AHT Commission, asking it to reestablish the agency station operation. *See* § 23-12-611(b). The Commission set a hearing on the matter for May 21, 1996, but the hearing was postponed so that the respective parties could brief the following question:

> Whether the federal Interstate Commerce Commission (ICC) Termination Act of 1995 preempts state jurisdiction of the discontinuation of railroad agency stations?

See 49 U.S.C. § 10101 (1994) *et seq.* On June 4, 1996, the Commission entered its report and order concluding that it no longer had jurisdiction over the matter, because the ICC Termination Act, specifically § 10501, granted the Federal Surface Transportation Board the exclusive jurisdiction over "transportation by rail carriers" as part of the interstate rail network. The Commission's decision resulted in its dismissing the residents' petition.

Next, the residents appealed the Commission's decision to the Pulaski County Circuit Court, and the court affirmed the holding of the Commission. The residents then filed this appeal, and assign two points of error by the circuit court. First, the residents argue that the federal act does not preempt § 23-12-611, and the AHT Commission retains jurisdiction over agency station closings in the state. Second, the residents contend that Congress's enactment of the ICC Termination Act violates the Commerce Clause. Only these two questions of law need be addressed to decide this appeal.

In their first point of error, the residents claim that state law is preempted only when it conflicts with federal law, and no conflict is shown to exist in the federal and state laws here. The residents further argue that the federal act not only lacks specific language requiring preemption, but also that the state has long regulated the discontinuation of agency stations under state authority and should continue to do so. The Railroad counters by declaring preemption of § 23-12-611 has been effected by passage of the 1995 ICC Termination Act, and submits such preemption was accomplished in the three ways the Supreme Court sanctioned in *English v. General Electric Co.*, 496 U.S. 72, 78-79 (1990). There, the Court held preemption may occur as follows: (1) express preemption, where Congress defines explicitly the extent to which its enactments preempt state law; (2) field preemption, where Congress's regulation of a field is so pervasive or the federal interest so dominant that an intent to occupy the entire field can be inferred, and (3) conflict preemption, where state law stands as an obstacle

to the accomplishment of the full purposes and objectives of a federal statute.

In any preemption analysis, the overriding principle which must guide our review is whether Congress intended to preempt state law. *Id.*; *see also Medtronic, Inc. v. Lohr*, 116 S.Ct. 2240 (1996). This analysis depends primarily on statutory and not constitutional interpretation. *Philadelphia v. New Jersey*, 430 U.S. 141 (1977); *see also* 16 AM. JUR. 2d, *Constitutional Law* § 291 at p. 795. Here, Congress's intent is discerned from the act, itself. Section 10501(b)(1) establishes the parameters of the Surface Transportation Board's jurisdiction as follows:

> (1) *transportation by rail carriers, and the remedies* provided in this part (*with respect to*) rates, classifications, rules . . . practices, routes, *services, and facilities* of such carriers; and
>
> (2) the construction, acquisition, operation, abandonment, or *discontinuance of* spur, industrial team, switching, or side tracks, or *facilities*, even if the tracks are located, or intended to be located, entirely in one State, *is exclusive*. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law. (Emphasis added.)

Clearly, the act covers "transportation by rail carriers" and the discontinuation of their carriers' related facilities.

The next logical question is whether the station agencies are related "facilities" within the meaning of the federal act. Three recent cases from other jurisdictions addressing this issue have answered this question, yes. The Nebraska Supreme Court, in *In re Application of Burlington Northern R. Co. v. Page Grain Co.*, 545 N.W.2d 749 (Neb. 1996), held that the states no longer have jurisdiction over services and facilities of interstate rail carriers, and further decided that the regulation and remedies relevant to rail service agencies are under the exclusive jurisdiction of the federal government. In *CSX Transportation, Inc. v. Georgia Public Service Commission*, 944 F. Supp. 1573 (N.D. Ga. 1996), a United States District Court case came to the same conclusion, holding that the ICC Termination Act preempted the state regulation of railroad agency closings. Finally, the United States District Court in Montana determined that, by the federal act, Congress

expressly preempted state law on railroad agency discontinuations, and further held that state law was preempted by virtue of both field and conflict preemption. *See Burlington Northern Sante Fe Corp. v. Anderson*, 959 F. Supp. 1288 (D. Mont. 1997).

Given the broad language of the act itself, its statutory framework, and considering the recent decisions interpreting the act, we believe it is clear that Congress intended to preempt the states' authority to engage in economic regulation of rail carriers. The preemptive strike, we hold, includes regulation of agency station discontinuations. Accordingly, we conclude § 23-2-611, which gives the AHT Commission the authority to regulate such closings, is preempted by the ICC Termination Act of 1995.

In their second point of error, the residents maintain that the act violates the Commerce Clause of the United States Constitution. The residents argue that Congress has exceeded its authority by regulating closings of agency stations. This argument is without merit.

In 1981, the Supreme Court held that Congress may regulate (1) the use of channels of interstate commerce, (2) the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities, and (3) activities having a substantial relation to interstate commerce. *Hodel v. Virginia Surface Mining & Recl. Assn., Inc.*, 452 U.S. 264, 276-77 (1981). Congress's authority to regulate extends even to intrastate aspects of the operation of railroads. The law is well settled that Congress has the power to regulate railroad boxcars traveling exclusively intrastate because of their inherent mobility and connection to interstate commerce. *See Southern Ry. Co. v. United States*, 222 U.S. 20 (1911).

Contrary to the residents' argument, Congress's authority to regulate even intrastate aspects of railroads under the Commerce Clause is not undercut by recent United States Supreme Court decisions. *See United States v. Lopez*, 514 U.S. 549 (1995). When complete regulation of interstate commerce requires incidental regulation of intrastate commerce, the Commerce Clause authorizes such regulation. *Id.*; *see also CSX Transp.*, 944 F.Supp. 1573. Congress's regulation of intrastate railroad

agencies under the act is part of a larger regulation of economic activity, in which the regulatory scheme would be undercut unless the intrastate activity were regulated. *Id.* Therefore, the preemptive effect of the act does not violate Congress's power to regulate railroad agency station discontinuations. The dismissal of the residents' petition by the Pulaski County Circuit Court for lack of jurisdiction due to preemption must be affirmed.

Affirmed.

SEECO, INC., et al. *v.* Allen HALES, et al.

96-1392 954 S.W.2d 234

Supreme Court of Arkansas
Opinion delivered October 30, 1997

Everett & Mars, by: *Thomas A. Mars*; *Kenneth S. Gould*; and *John J. Watkins*, for appellants.

Harper, Young, Smith & Maurras, PLC, by: *Don A. Smith* and *S. Walton Maurras*; *Marilyn J. Eickenhorst*; and *Gable Gotwals Mock Schwabe*, by: *James M. Sturdivant*, *M. Benjamin Singletary*, and *Timothy A. Carney*, for appellees.

ROBERT L. BROWN, Justice. Appellants SEECO, Inc. (SEECO), and Arkansas Western Gas Company (AWG) are wholly owned subsidiaries of appellant Southwestern Electric Company (Southwestern). Appellees Allen Hales, et al. (the royalty owners), are lessors under various oil and gas leases possessed by SEECO who brought a class action suit to claim royalties that were allegedly due but not paid. The trial court certified the royalty owners as a class after considering the criteria set out in Rule 23(a) and (b) of the Arkansas Rules of Civil Procedure. The class is estimated to consist of more than 3,000 members. SEECO, AWG, and Southwestern have appealed the class certification and specifically contest the trial court's findings that common questions of law and fact predominate over questions affecting individual class members. The appellants further reject the claim that the royalty owners' class action is the superior method for the fair and efficient adjudication of this controversy. As a corollary issue, the appellants contend that the constitutional right to trial by jury will be skewed by having bifurcated trials with one jury deciding common questions for the royalty owners and a second jury determining individual questions. We affirm.

In their complaint, the royalty owners claim that SEECO failed to enforce the provisions of a gas-sales contract, known as Contract 59, against AWG and further failed to pay the royalty owners the proper proceeds from the gas produced under the numerous SEECO leases affected by the contract. The complaint states that Contract 59 was entered into between SEECO and AWG on July 24, 1978. It alleges that under Contract 59 SEECO dedicated acreage in Franklin, Johnson, Washington, Crawford, and Logan Counties for oil and gas production, and that AWG obligated itself for 20 years to purchase volumes of gas under a "take-or-pay" arrangement at a guaranteed price. That arrangement provided that the purchaser (AWG, in this instance) would either buy a volume of gas at the contract price or pay a specified price without taking the gas. The royalty owners allege that throughout the term of Contract 59, SEECO did not require AWG to pay the guaranteed prices or take the required volumes of gas per the terms of the agreement.

The royalty owners further allege: (1) that SEECO allowed AWG to freeze gas prices below the contract price for the period between December 1984 and July 1, 1994; (2) that SEECO imprudently and arbitrarily released wells, acreage, and production from Contract 59 throughout the term of the contract, which resulted in the sale of gas for less than the contract price; (3) that SEECO failed to drill additional wells and fully develop a plan for increased production on the royalty owners' acreage; and (4) that SEECO continuously provided gas storage to AWG without compensation. Other misdeeds by SEECO were set out in the complaint which, according to the royalty owners, resulted in lower prices for gas and, thus, less proceeds for them.

The royalty owners also allege that SEECO fraudulently concealed its failures under Contract 59 by intentionally refusing to document the pricing and other deficiencies under Contract 59. They state that SEECO engaged in conduct favorable to AWG due to their relationship as affiliate companies wholly owned by Southwestern and that SEECO's course of conduct resulted in significant losses to the royalty owners.

The complaint specifically alleges that in 1987 SEECO solicited the purchase of mineral interests from the royalty owners and misrepresented the market price for natural gas. In that solicitation letter, SEECO noted that gas prices had been declining in recent years, but, according to the allegation, SEECO failed to disclose that under Contract 59 AWG was obligated to make minimal volume purchases of gas and to pay for that gas at a certain price. The complaint also asserts that in a 1983 letter SEECO advised the royalty owners that it had entered into a gas-sales contract with Natural Gas Pipeline (NGP) which would result in reduced royalties. The royalty owners claim that SEECO failed to disclose that the same gas dedicated under the NGP contract was already dedicated under Contract 59, with its take-or-pay provision, at a significantly higher purchase price.

The royalty owners seek compensatory damages in excess of $58,450,000 and punitive damages against appellants, jointly and severally, on the legal theories of: (1) fraud and constructive fraud; (2) breach of the oil and gas leases; (3) breach of the duty to mar-

ket the gas reasonably; (4) breach of the duty of good faith and fair dealing; (5) violation of Ark. Code Ann. §§ 15-74-601 & -602 (Repl. 1994), which govern penalties for fraudulently withholding oil and lease payments; (6) unjust enrichment; (7) tortious interference with contractual relations; (8) civil conspiracy; and (9) violation of Ark. Code Ann. § 15-72-305 (Repl. 1994), which requires calculation of royalties on a weighted-average price. The royalty owners also asked for certification of a class pursuant to Rule 23 of the Arkansas Rules of Civil Procedure.

At the class-certification hearing, Dr. David Taylor testified that he was a named plaintiff seeking to become a class representative because of his royalty interests in eleven oil and gas leases dedicated under Contract 59. He testified that his claims concerned the lack of enforcement of Contract 59 regarding the price of gas sold by SEECO to AWG as well as the volume of gas to be purchased. On cross-examination, Dr. Taylor stated that SEECO had voluntarily converted the leases from fixed-price leases to proceeds leases based on its performance over the last number of years. He also contended that the terms of the leases should not control because SEECO and AWG were affiliates which were not dealing at arms' length; therefore, the royalty-price determination should be dictated by the terms of Contract 59, as opposed to his leases. Dr. Taylor further contended that there was fraud in connection with the 1983 letter and the 1987 solicitation letter sent out by SEECO because neither letter made reference to Contract 59 and AWG's take-or-pay obligation under that contract.

In rebuttal, SEECO attacked Dr. Taylor's assertion of fraudulent concealment and showed that Contract 59 had been on file with the Arkansas Public Service Commission (PSC) since 1978 or 1979. SEECO also offered several newspaper articles with information that, it argued, should have put royalty owners on notice about pricing. One was a January 21, 1991 article entitled "Purchasing Practices Defended by Company," from the *Ozark Spectator*, which documented challenges from the PSC and the Attorney General's Office regarding high prices paid by AWG, which were passed on to ratepayers under Contract 59. A second article was a January 15, 1993 story entitled "Gas Company Left Prices High, PSC Told" from the *Arkansas Democrat-Gazette*,

which also indicated that AWG was paying too much under Contract 59. Finally, a November 1, 1994 article entitled "Settlement Reached After 3 Years" in the *Northwest Arkansas Times* documented a settlement between the Attorney General's Office, PSC staff, SEECO, and AWG, causing a reduction for AWG ratepayers because Contract 59 violated Arkansas's least-cost purchasing law. Dr. Taylor testified that he was unaware of these articles.

Allen Franklin Hales, another named plaintiff and potential class representative, testified that he was asking for certification as a royalty owner under two leases with SEECO which were dedicated to Contract 59. In his deposition, Hales echoed Dr. Taylor's concerns about the fact that the 1983 and 1987 letters were silent about Contract 59. Dr. Robert Gordon Jeffers also testified by deposition that SEECO should have enforced Contract 59.

Brooks Clower, an attorney employed by Southwestern, testified that he perused the oil and gas leases of Dr. Taylor, Dr. Jeffers, and Mr. Hales, and concluded that some leases contained a fixed-price royalty and a disclaimer of implied covenants, while other leases provided for royalties to be paid on a proceeds basis and did not contain a disclaimer clause. He also testified that the various leases differed with respect to government-regulation clauses, which would make some leases subject to certain defenses that would be unavailable in connection with other leases. The leases also differed in form, with Dr. Taylor, for example, having three different types of leases. Clower testified that the leases may or may not be subject to pooling agreements made for the purpose of forming a drilling unit, which would also vary the terms of the lease agreements.

The trial court entered an order certifying the class of royalty owners affected by the alleged acts and omissions of SEECO, AWG, and Southwestern. Two subclasses were created based on whether the subclass leases were leased to SEECO and dedicated under Contract 59, or leased to third parties and affected by Contract 59. The trial court's order found that the following common and predominating issues existed:

> The evidence produced by the plaintiffs indicates: an alleged overall scheme and course of conduct by the defendants designed

to defraud the members of the proposed class as a group irrespective of the type of oil and gas lease or the volume of production from the leases; that SEECO in deference to Arkansas Western Gas Company's interest allegedly failed to enforce the take, price and other provisions of Contract 59 almost since the contract's inception and actively concealed such conduct from the proposed class; that the defendants failed to state material facts in correspondence which appears to have been sent to members of the potential class including citizens and residents of this judicial district; the defendants intentionally failed to keep documentary records of the deficiencies under Contract 59 for fear of discovery of such deficiencies by the members of the proposed class; and the defendants allegedly engaged in actions before the Arkansas Public Service Commission designed to conceal their actions from the members of the proposed class.

I. Predominance

The appellants urge that the trial court erred in its predominance finding. We observe initially that trial courts are given broad discretion in matters of class certification. *Direct Gen. Ins. Co. v. Lane*, 328 Ark. 476, 944 S.W.2d 528 (1997); *Union Nat'l Bank v. Barnhart*, 308 Ark. 190, 823 S.W.2d 878 (1992); *First Nat'l Bank v. Mercantile Bank*, 304 Ark. 196, 801 S.W.2d 38 (1990). Appellants claim, however, that the following issues, which can only be resolved individually, illustrate that the trial court abused its discretion in certifying the class: (1) differences in the leases with respect to their form, (2) differing bases for determining royalties, (3) the presence or absence of waivers of implied covenants, (4) the presence or absence of government-regulation clauses; (5) the effect of pooling agreements on the leases; (6) the difficulty of determining damages, especially with respect to Subclass II, which involves contracts between third-party producers or operators and purchasers affected by Contract 59; (7) proof of reliance in support of the claims for fraud; and (8) proof of reasonable diligence with respect to claims of fraudulent concealment. The royalty owners respond with the argument that the one issue that permeates every claim is appellants' fraudulent and wrongful course of action taken against the royalty owners in light of Contract 59.

Five cases provide a compendium of this court's recent statements and holdings on predominance. In *Arkansas La. Gas Co. v. Morris*, 294 Ark. 496, 744 S.W.2d 709 (1988), the trial court certified a class action brought by fixed-price lessors owning mineral tracts in the Cecil Field against the appellants, collectively referred to as ArkLa. The class sought royalties on a proceeds basis under ten different theories with respect to new wells that were drilled, including estoppel, waiver, and reformation. ArkLa challenged the class under the requirements of Rule 23(b) of the Arkansas Rules of Civil Procedure and asserted that the case would require individual proof of detrimental reliance for each class member under the estoppel theory and also either proof of mutual or unilateral mistake or proof of fraud or inequitable conduct for success on the reformation theory. We affirmed the trial court and noted that even if ArkLa's arguments were correct, the class presented alternative theories for recovery that presented common questions. We stated that a common question existed as to whether appellants' course of conduct, which included ignoring the fixed prices contained in the leases, gave rise to a cause of action in favor of the fixed-price lessors. We then concluded that if the trial court found that the evidence presented individual questions of reliance or mistake, it could defer those individual questions until after it disposed of the questions common to the class. Accordingly, this court established a procedure of handling the common issues first, recognizing that the trial court, in its discretion, could later resolve the individual questions.

This approach was embraced in *International Union of Elec., Radio & Mach. Workers v. Hudson*, 295 Ark. 107, 747 S.W.2d 81 (1988). There, the trial court certified a class of non-union salaried and hourly employees who sued a labor union and its local chapter for loss of wages, personal injury, and property damage that occurred during a three-day period while the class attempted to work through a strike. Specifically, the trial court certified two subclasses: one containing those appellees who were deprived of the opportunity to work over the three-day period; and those appellees who suffered personal or motor-vehicle damages or both while attempting to cross the picket line.

In affirming the trial court's decision, this court determined that the common question of the unions' liability for the actions of their members predominated. We again advocated an approach of deciding the merits of the common issue first:

> The central question of the unions' liability will be the focus of the class action. That can be decided with respect to the subclasses even though the alleged mass action was not an instantaneous event. Again, if they are held liable in general, the unions will be able to present any defenses they may have as the claims of the individual class members are presented thereafter, the only effect of the decision being that the individual class members will not have to prove, and the court will not have to decide, the general question of liability in each case.

International Union of Elec., Radio & Mach. Workers v. Hudson, 295 Ark. at 120, 747 S.W.2d at 88.

To the same effect was this court's decision in *Lemarco, Inc. v. Wood*, 305 Ark. 1, 804 S.W.2d 724 (1991). In *Lemarco*, a class was certified which consisted of persons who entered into retail installment membership contracts with Lemarco, a private buyers club. We estimated the potential size of the class at about 800 members. Appellees asserted that Lemarco defrauded them of membership fees by promising free gifts for attending sales presentations and misrepresenting the value of membership. This court affirmed the trial court's decision on the basis that predominance was satisfied because there were common issues of fact arising out of Lemarco's sales training, solicitation mailing, sales presentations, installment contracts, and its intentions with regard to all of them. We concluded by discussing the predominance and superiority questions in tandem. We followed *Hudson* and held that common issues should be resolved first to attain real efficiency. We then stated:

> Even if the trial court eventually determines that the cases have to splinter with respect to some individual claims, efficiency would still have been achieved by resolving those common questions which predominate over individual questions. Finally, pursuing this case as a class action is fair to both sides. Lemarco can offer evidence concerning its sales training, solicitation mailings, sales presentations, installment contracts, and its intentions regarding all of them. It can also present individual defenses to the claims

> of individual class members, if necessary, once the common questions have been determined. A class action approach is also fair to the class members in that they probably would not sue if they could not do so as a class since it would not be economically feasible to do so.

Lemarco, Inc. v. Wood, 305 Ark. at 4, 804 S.W.2d at 726.

This rationale continued to hold sway in *Summons v. Missouri Pac. R.R.*, 306 Ark. 116, 813 S.W.2d 240 (1991). In that case, the trial court refused to certify a class of about 5,000 North Little Rock residents and business people who were forced to evacuate the area when a railroad accident caused a chemical tank car to overturn. The residents sought a recovery against the railroad and Union Carbide under theories of negligence and strict liability for expenditures on food, clothing, shelter, medical treatment, and damages for pain and mental anguish. This court determined that the trial court abused its discretion in not certifying the class because the questions regarding liability for negligence and strict liability predominated over any individual issues, and because a class action was a superior method for handling the numerous claims. We concluded that the repeated litigation of the liability question and the possibility of inconsistent results outweighed the fact that each claimant would have different damage evidence. We reversed the trial court and approved the class certification even though this court recognized that each claimant would have the burden of proving that the railroad's conduct was the proximate cause of his damages.

The case of *Arthur v. Zearley*, 320 Ark. 273, 895 S.W.2d 928 (1995) followed. In that case, this court determined that the trial court abused its discretion in certifying a class of plaintiffs who brought claims for medical negligence, battery, fraud, outrage, strict liability, and breach of warranty arising out of the implantation of Orthoblock into their spines. Appellants, who were the manufacturer of Orthoblock and the doctors and medical facilities responsible for the surgical procedures, argued that the issue of informed consent was a predicate to the individual claims and could not be tried on a class basis. This court agreed, as it was clear that each plaintiff would be required to testify about oral communications with his physician and that the issue of informed

consent was woven throughout the claims for negligence, battery, outrage, and fraud or fraudulent concealment. This court also concluded that the issue of causation would require focus on individual claims, as each person who received the Orthoblock treatment would be required to place his or her medical condition into evidence. Although this court acknowledged the presence of common issues, it determined that the large number of individual questions rendered individual actions the superior means for obtaining efficiency and fairness.

SEECO now asserts in the present appeal that *Arthur v. Zearley, supra,* essentially changed our caselaw on class actions because we renounced the certification of a class of plaintiffs with individual claims as opposed to upholding certification to resolve common issues and deferring individual issues until later in the proceeding. We disagree with that characterization of the *Zearley* decision. What is alleged in the case at hand is a single course of fraudulent conduct perpetrated by the appellants and directed at the royalty owners, with each plaintiff depending on the same facts and legal arguments for recovery. The issue of a fraudulent scheme is central to the instant case and a common starting point for all class members. *Arthur v. Zearley, supra,* simply had no common issue, and we recognized in that case that individual issues of informed consent and causation were the essence of the claims of each separate plaintiff.

In support of their argument that individual issues predominate, SEECO, AWG, and Southwestern point to the fact that the royalty owners seek recovery based on a fraud theory that requires proof of reliance by each plaintiff. The appellants are correct that to prove actual fraud, evidence of justifiable reliance must be offered. *Sexton Law Firm, P.A. v. Milligan*, 329 Ark. 285, 948 S.W.2d 388 (1997); *Calandro v. Parkerson*, 327 Ark. 131, 936 S.W.2d 755 (1997); *Clark v. Ridgeway*, 326 Ark. 378, 914 S.W.2d 745 (1996). Moreover, under Arkansas law, fraud is never presumed, and clear and convincing testimony must exist to prove its elements. *Nicholson v. Simmons First Nat'l Corp.*, 312 Ark. 291, 849 S.W.2d 483 (1993); *Interstate Freeway Serv., Inc. v. Houser*, 310 Ark. 302, 835 S.W.2d 872 (1992). In the same vein, appellants assert that there are individual issues with respect to the assertion

of fraudulent concealment, particularly surrounding the requirement that the royalty owners exercise reasonable diligence to discover any fraudulent concealment. *See Milam v. Bank of Cabot*, 327 Ark. 256, 937 S.W.2d 653 (1997); *Norris v. Baker*, 320 Ark. 629, 899 S.W.2d 70 (1995); *First Pyramid Life Ins. Co. v. Stoltz*, 311 Ark. 313, 843 S.W.2d 842 (1992).

It is clear from our caselaw that individual questions relating to a class member's reliance for an estoppel claim (*Arkansas La. Gas Co. v. Morris, supra*) or reliance for a misrepresentation claim (*Lemarco, Inc. v. Wood, supra*) will not defeat class certification. Moreover, one distinguished treatise, NEWBERG ON CLASS ACTIONS, supports this position:

> Challenges based on the statute of limitations, fraudulent concealment, releases, causation, or reliance have usually been rejected and will not bar predominance satisfaction because those issues go to the right of a class member to recover, in contrast to underlying common issues of the defendant's liability.

1 Herbert B. Newberg, NEWBERG ON CLASS ACTIONS § 4.26, at 4-104 (3d ed. 1992).

Other courts have reached the same conclusion in common-law fraud claims despite the reliance requirement. *See, e.g., Walco Investments, Inc. v. Thenen*, 168 F.R.D. 315 (S.D. Fla. 1996)(certifying global class of investors who brought several claims, including common-law fraud, against promoters allegedly involved in a Ponzi scheme; numerous common questions of law and fact connected to the fraud allegations predominated over individual issues); *Murray v. Sevier*, 156 F.R.D. 235 (D. Kan. 1994)(stating that common issues are found under a common-law fraud claim that involves written misrepresentations and/or omissions; reliance might be shown by proving that the misrepresentations were material to a person who would have read it); *Smith v. MCI Telecommunications Corp*, 124 F.R.D. 665 (D. Kan. 1989)(certifying a claim for common-law fraud arising from misrepresentations relative to the payment of commissions; reliance on the terms of written documents given to all salespersons could be established by proving their employment with MCI); *Alexander v. Centrafarm Group, N.V.*, 124 F.R.D. 178 (N.D. Ill. 1988)(allowing pendent

common-law fraud claim in a securities action; holding there was no indication that reliance would create significant individual issues because the alleged misrepresentations were contained in a proxy statement uniform to all class members). *But see, e.g., Kelley v. Mid-America Racing Stables, Inc.*, 139 F.R.D. 405 (W.D. Okl. 1990)(denying certification for pendent common-law fraud claim in a securities action; stating that every member of the proposed class would have to testify as to his reliance on the prospectus).

As to appellants' contention of lack of reasonable diligence in discovering fraudulent concealment, the majority view appears to be that this lapse does not operate as a bar to a finding of predominance in the common issue. *See, e.g., In Re Indus. Diamonds Antitrust Litigation*, 167 F.R.D. 374 (S.D. N.Y. 1996); *In Re Catfish Antitrust Litigation*, 826 F. Supp. 1019 (N.D. Miss. 1993); *Town of New Castle v. Yonkers Contracting Co.*, 131 F.R.D. 38 (S.D. N.Y. 1990).

We hold that although the fact that lack of reliance and diligence may be arguments raised by the appellants, these challenges will not override the common question relating to the allegation of a scheme perpetrated by the appellants. The overarching issue which must be the starting point in the resolution of this matter relates to the existence of the alleged scheme. There was no abuse of discretion by the trial court.

Appellants also raise a challenge to the constitutionality of bifurcated trials under Article 2, section 7, of the Arkansas Constitution. They assert that a bifurcated procedure could infringe upon their jury-trial right, if the matter began with one jury deciding common issues but concluded with a second jury determining individual issues. We do not know at this juncture whether the trial court will use multiple juries. Thus, any opinion on the subject would be advisory in nature. *See, e.g., Baker Car & Truck Rental, Inc. v. City of Little Rock*, 325 Ark. 357, 925 S.W.2d 780 (1996). We decline to address this issue.

II. Superiority

Rule 23(b) further requires that a class action be superior to other available methods for the fair and efficient adjudica-

tion of the controversy. As noted, this court has held repeatedly that real efficiency can be had if common, predominating questions of law or fact are first decided, with cases then splintering for the trial of individual issues, if necessary. *See, e.g., Farm Bureau Mutual Ins. Co. v. Farm Bureau Policy Holders*, 323 Ark. 706, 918 S.W.2d 129 (1996); *Summons v. Missouri Pac. R.R., supra*; *Lemarco, Inc. v. Wood, supra; International Union of Elec., Radio & Mach. Workers v. Hudson, supra.*

Moreover, to repeat in part what we said in *Lemarco, Inc. v. Wood, supra*, a class action is fair to both sides. The appellants can present evidence of fair dealing with the royalty owners and may prevail on this core issue. They can also present individual defenses subsequently, should this prove to be necessary. This procedure is fair to the royalty owners because to sue as individuals may not be economically feasible. We hold that a class action is the superior method for adjudicating this controversy. Again, there was no abuse of discretion by the trial court in certifying the class.

Affirmed.

THORNTON, J., dissents.

RAY THORNTON, Justice, dissenting. I would reverse because I do not find that either the trial court's order or the record reflects the type of rigorous analysis that I believe is required under Rule 23 to determine the reasons why the common questions predominate over the individual questions and why a class action is superior to other methods of trying the issues. Therefore, I respectfully dissent for the reasons stated in the dissenting opinion in *Mega Life & Health Ins. Co. v. Jacola*, 330 Ark. 261, 954 S.W.2d 898 (1997).

Patrick MAJESTY *v.* STATE of Arkansas

97-411 954 S.W.2d 245

Supreme Court of Arkansas
Opinion delivered October 30, 1997

Christopher Carter, Marion County Public Defender, for appellant.

Winston Bryant, Att'y Gen., by: *Kelly Terry*, Asst. Att'y Gen., for appellee.

ANNABELLE CLINTON IMBER, Justice. The appellant, Patrick Majesty, appeals the trial court's denial of his motion to transfer to juvenile court. Because we cannot say that the trial court was clearly erroneous, we affirm.

On August 5, 1996, Majesty was charged with commercial burglary, a class C felony, and theft of property, a class B felony, in Marion County Circuit Court. These crimes were allegedly perpetrated on August 2, 1996, during the burglary of a pawn shop. According to the information, the value of the stolen property was estimated at $5,000. On August 9, 1996, Majesty filed a motion to transfer the charges to juvenile court. He was seventeen years of age at the time of the offenses; his date of birth was October 13, 1978. In his transfer motion, Majesty claimed that his only prior connection with the criminal justice system, adult or juvenile, was a theft of property charge brought against him in Louisiana when he was fourteen years old.

The trial court held a hearing on the motion on December 16, 1996. The State conceded that it had no prior juvenile history concerning Majesty. However, given that Majesty turned eighteen shortly after the crimes, the State took the position that transfer should be denied because "there is nothing we can do with him in juvenile court." While defense counsel announced his intentions to call Majesty and his father as witnesses, the trial court responded, "Well, for what — I mean, it doesn't sound to the Court, if he's already turned 18, I don't find that a very viable option of putting him in juvenile court if there is nothing juvenile court can do, really." Accordingly, the trial court denied the motion to transfer to juvenile court because Majesty was over the age of eighteen, the crime charged was a serious offense involving substantial restitution, and "under the circumstances, I just don't feel like juvenile court could adequately deal with the resolution of this case." Majesty brings this interlocutory appeal from the denial of his motion to transfer.

On appeal, Majesty argues that the trial court erred in denying the transfer because it only considered his age and the nature

of the crimes charged. He in turn asserts that "[t]he court did not give a careful consideration in this matter and certainly did not make a finding by clear and convincing evidence."

■■ While the trial court's decision to try a juvenile as an adult must be supported by clear and convincing evidence, Ark. Code Ann. § 9-27-318(f) (Supp. 1995), the court is not required to give equal weight to the statutory factors found in Ark. Code Ann. § 9-27-318(e) (Supp. 1995). *Brooks v. State*, 326 Ark. 201, 929 S.W.2d 160 (1996); *Ring v. State*, 320 Ark. 128, 894 S.W.2d 944 (1995). We will not reverse the trial court's determination unless it was clearly erroneous. *Kindle v. State*, 326 Ark. 282, 931 S.W.2d 117 (1996); *McGaughy v. State*, 321 Ark. 537, 906 S.W.2d 671 (1995).

■■ It is true that seriousness alone is not a sufficient basis to deny a transfer to juvenile court. *See Green v. State*, 323 Ark. 635, 916 S.W.2d 756 (1996). However, in reviewing transfer motions this court has also emphasized the importance of evaluating the juvenile's prospects for rehabilitation within the Division of Youth Services in cases where the juvenile has already turned eighteen. *See, e.g., Jensen v. State*, 328 Ark. 349, 944 S.W.2d 820 (1997); *Brooks v. State*, 326 Ark. 201, 929 S.W.2d 160 (1996); *Maddox v. State*, 326 Ark. 515, 931 S.W.2d 438 (1996); *Hansen v. State*, 323 Ark. 407, 914 S.W.2d 737 (1996). When a juvenile beyond the age of eighteen may not be committed at youth services, *see* Ark. Code Ann. § 9-27-331(a)(1) (Supp. 1995) *and* Ark. Code Ann. § 9-28-208(d) (Supp. 1995), we have characterized the juvenile's chances for rehabilitation there as "nonexistent." *See Jensen, supra*; *Brooks, supra*; *Hansen, supra*.

In *Oglesby v. State*, 329 Ark. 127, 946 S.W.2d 693 (1997), this court recently considered the juxtaposition of a serious property offense with an eighteen year old's prospects for rehabilitation in the context of juvenile transfer. Among other things, Oglesby was charged in circuit court with residential burglary, a class B felony. At the time of his arrest on the charge, Oglesby was seventeen years old, and he turned eighteen shortly before the hearing on his motion to transfer. The trial court denied Oglesby's motion to transfer to juvenile court. While conceding that the

offense charged was a serious one, Oglesby argued on appeal that the lack of violence in the crime charged warranted a transfer. This court rejected his argument and affirmed, emphasizing that Oglesby had reached eighteen years of age and was no longer eligible for juvenile rehabilitative services. "Based upon the seriousness of a Class B felony and the fact that Oglesby is now eighteen years old, we cannot say that the denial of transfer was clearly erroneous." *Id.*; *see also Smith v. State*, 328 Ark. 736, 946 S.W.2d 667 (1997) (affirming the denial of transfer where the defendant was charged with numerous property crimes and nineteen years old at the time of the opinion).[1]

In the present case, Majesty is charged with serious offenses — theft of property, in this case a class B felony, and commercial burglary, a class C felony. At the time of this writing, Majesty is now nineteen years old; thus, he has virtually no juvenile services available to him. *See* Ark. Code Ann. § 9-28-208(d); *Oglesby*, *supra*; *Smith*, *supra*. In light of these two factors, the trial court was not clearly erroneous in denying the motion to transfer to juvenile court.

Affirmed.

[1] In *Smith*, various witnesses testified on the defendant's behalf, while the defendant in *Oglesby* offered no evidence to show that transfer was warranted. Although the point is quite vague, Majesty arguably asserts in his brief that the trial court erred in ruling on the transfer motion "without testimony of defendant or his father which was requested by the defense." To the extent that this is argued as an independent ground for reversal, we agree with the State that this point was waived by Majesty's failure to present any objection to the trial court concerning its failure to take witness testimony. Moreover, Majesty failed to proffer the substance of the testimony.

Sharon Harris COLE *v.* Olen D. HARRIS

97-421 953 S.W.2d 586

Supreme Court of Arkansas
Opinion delivered October 30, 1997

William F. Cavenaugh, for appellant.

Harrell & Lindsey, P.A., by: *Searcy W. Harrell, Jr.*, for appellee.

RAY THORNTON, Justice. The issue in this case is whether the statute of limitations bars the action for child-support arrearages brought by appellant Sharon Harris Cole on behalf of her child, Brian Lynn Harris. Brian was born on July 11, 1972. On July 9, 1974, the chancery court granted appellant a divorce from appellee Olen Dale Harris and awarded her weekly child support of $15.00.

Eleven months after Brian turned twenty-three years of age, appellant filed a notice of income withholding for child support. Appellee petitioned to terminate the child-support collections, claiming that appellant's action was barred by the statute of limitations, which had run at Brian's twenty-third birthday. The trial court granted the petition, and appellant brings this appeal. Appellant contends that the trial court committed reversible error in applying the wrong statute of limitations. We find no error and affirm.

We have recently addressed the question of what statute of limitations applies in actions to collect child-support arrearages. *Branch v. Carter*, 326 Ark. 748, 933 S.W.2d 806 (1996). We interpreted Act 870 of 1991, codified at Ark. Code Ann. section 9-14-236 (Supp. 1995), as follows: "The statute of limitations for child support thus now commences with an initial order of support and extends until the child reaches the age of twenty-three." *Branch*, 326 Ark. at 751, 933 S.W.2d at 807.

Appellant contends that the trial court erred in applying Ark. Code Ann. section 9-14-236 in this case. She argues that the 1987 legislative enactment of Ark. Code Ann. section 9-14-234 (Supp. 1995), stating that accrued child-support arrearages are enforceable as final judgments, makes Ark. Code Ann. section 16-56-114 (1987), a ten-year limitation period for general collection of civil judgments, applicable to actions to collect child-support arrearages. This is a novel argument, and we proceed with our review of the legislative actions and judicial principles that guide our analysis.

The general limitation for filing actions on all judgments and decrees, enacted in 1844, provides the following: "Actions on all judgments and decrees shall be commenced within ten (10) years after [the] cause of action shall accrue, and not afterward." Ark. Code Ann. § 16-56-114. In *Brun v. Rembert*, 227 Ark. 241, 297 S.W.2d 940 (1957), we determined that this ten-year statute of limitations did not apply to child-support payments since the order for child support is not a final decree. Instead, we held that a general five-year statute of limitations applied. *Id.* at 243, 297 S.W.2d at 943 (applying Ark. Stat. Ann § 37-213, later replaced by Ark. Code Ann. § 16-56-115 (1987)).

In 1987, the legislature adopted the following language concerning child-support payments:

> Any decree, judgment, or order which contains a provision for the payment of money for the support and care of any child or children through the registry of the court *shall be final judgment* as to any installment or payment of money which has accrued until the time either party moves through proper motion filed with the court and served on the other party to set aside, alter, or modify the decree, judgment, or order.

1987 Ark. Acts 1057 (codified at Ark. Code Ann. § 9-12-314(b); readopted in 1989 at § 9-14-234(a)) (emphasis added). This Act was adopted to ensure that child-support programs of the State of Arkansas would qualify for future federal funding. *Sullivan v. Edens*, 304 Ark. 133, 137, 801 S.W.2d 32, 34 (1990). We note, however, that there was no expression of any legislative intent to

contemporaneously revive the ancient, general ten-year provision that appellant urges us to adopt now.

The legislature then enacted "AN ACT to Set a Ten-Year Statute of Limitations on Collection of Child Support Arrearages; and for Other Purposes." 1989 Ark. Acts 525, *repealed by* 1991 Ark. Acts 870 and 1995 Ark. Acts 1184, § 30. The legislature had never before specifically provided a limitation on child-support actions, and Act 525 provided the following, in pertinent part:

> In all cases where the support of any child or children is involved, an action for the enforcement of child support or for judgment of arrearages shall be limited to ten (10) years prior to the filing of the action.

Id. § 1 (codified at Ark. Code Ann. §§ 9-56-129 and 9-14-236). This Act would have been redundant if the 1987 statute had revived the effectiveness of the ten-year general statute of limitations under Ark. Code Ann. section 16-56-114.

In *Sullivan v. Edens*, we stated that although the legislature had clearly extended the statute of limitations to ten years prospectively, the Act did not operate retroactively to extend the five-year limit on actions that were already barred because it did not repeal the former statute of limitations provision. *Sullivan,* 304 Ark. at 135, 801 S.W.2d at 33. Of course, if the 1844 limitation had been revived, there would have been no issue of retroactive effect. Because of the issue of retroactivity, we held that the general five-year statute of limitations at Ark. Code Ann. section 16-56-115 was applicable to causes that had already accrued as of the date that the new statute was enacted. *Id.*

After *Sullivan*, the legislature enacted provisions repealing the ten-year statute of limitations and providing that child support actions can be "brought at any time up to and including five (5) years beyond the date the child for whose benefit the initial support order was entered reaches the age of eighteen (18) years." 1991 Ark. Acts 870, §§ 1 and 2 (current version at Ark. Code Ann. §§ 9-14-105 and 9-14-236). Furthermore, the Act repealed all laws in conflict with its provisions and included a clause for the changes to apply retroactively to all child-support orders existing

as of March 29, 1991. *Id.* §§ 1, 2, and 5. This expanded statute of limitations remains in effect.

It is clear to us that the legislative intent was not to revive the ten-year limitation under the 1844 general limitation statute. The rules of statutory construction give a result that is harmonious with this legislative history. The following rule of statutory construction is instructive on this point:

> When two or more statutes of limitation deal with the same subject matter, *the statute which is more recent and specific will prevail over the older and more general one.* In fact it has been held that where two constructions concerning the limitation period are possible, the courts prefer the one that allows the longer period.

3A NORMAN J. SINGER, SUTHERLAND STAT. CONST. § 70.03 (5th ed. 1992) (emphasis added).

By specifically repealing the ten-year statute of limitations that was previously enacted under Act 525 of 1989, the legislature made clear its intention that a ten-year statute of limitations should not apply to actions for child-support arrearages. The effect of the legislature's action in adopting Act 870 of 1991 was to expand the time in which a cause of action could be maintained, thereby affording a greater opportunity for a parent or child to collect child-support payments than the ten-year statute that it repealed. *Branch*, 326 Ark. at 752, 933 S.W.2d at 808. We hold that the limitation period found at Ark. Code Ann. section 9-14-236 applies to the action before the court.

Appellant also contended before the trial court that her use of the 1844 general ten-year statute of limitations to collect payments eleven months after Brian turned twenty-three tolled the ten-year statute of limitations with respect to all other arrearages. Because we have determined that the ten-year statute, section 16-56-114, does not apply to actions for child-support arrearages, we do not reach this argument.

We conclude that the Chancellor applied the correct statute of limitations and that because appellant brought this cause of action after her child turned twenty-three, the decision of the chancery court was not in error.

Affirmed.

Albert Curtis HUTCHINS *v.* Karen Ruth HUTCHINS

CA 97-429 954 S.W.2d 249

Supreme Court of Arkansas
Opinion delivered October 30, 1997

Laurie A. Bridewell, for appellant.

Karen Ruth Hutchins, pro se.

PER CURIAM. ■ This appeal was filed in the Arkansas Court of Appeals. The appellee, Karen Ruth Hutchins, moved to dismiss the appeal on the ground that there was no final, appealable order. The appellant, Albert Curtis Hutchins, responded to the effect that the orders being appealed are contempt orders which are final. In his response, Mr. Hutchins stated that he had filed a federal bankruptcy petition and that Ms. Hutchins had petitioned the federal Bankruptcy Court for relief from the automatic stay of proceedings required by 11 U.S.C. § 362(a)(1). Ms. Hutchins's petition for relief from the stay was pending when the response to this motion was filed. Mr. Hutchins also asked for additional time to file his abstract and brief. The Court of Appeals certified the motion to this Court because this Court has not determined the effect of the "automatic stay" provision of 11 U.S.C. § 362(a)(1) upon contempt proceedings. We hold that the contempt orders are final and appealable. Some of them are merely coercive and thus civil in nature. Those orders are stayed by the federal law. One of the orders is a criminal contempt citation. It is not stayed by the federal bankruptcy law. Further consideration of the case will remain with the Court of Appeals.

■ Mr. Hutchins was held in "willful contempt" on a number of grounds having to do with his failure to comply with previous court orders concerning custody of the Hutchinses' son, Joseph. The sanctions imposed were, however, in all but one instance prospective and coercive in nature. Those were civil contempt citations which were entered for the purpose of compelling obedience to orders and decrees made for the benefit of the parties. *Bates v. McNeil*, 318 Ark. 764, 888 S.W.2d 642 (1994); *Fitzhugh v. State*, 296 Ark. 137, 752 S.W.2d 275 (1988).

■ One of the Chancery Court's orders was, however, a criminal contempt order. It fined Mr. Hutchins $50 outright for having written on the child's underwear a message to Ms. Hutchins having to do with his allegation that Ms. Hutchins had sexually abused the child. That obviously final order was entered to punish Mr. Hutchins for disobedience to its previous order not to do or say anything that would lead the child to believe he was unsafe in the custody of either parent. As it was punitive in nature, that order was a criminal contempt citation. *Fitzhugh v. State, supra.*

All actions with respect to the civil contempt orders are stayed in the Chancery Court and in the Court of Appeals until such time as the automatic stay provided for in 11 U.S.C. § 362(a)(1) has been lifted by the Bankruptcy Court. The criminal contempt order is not stayed. *See In re Allison*, 182 B.R. 881 (N.D. Ala. 1995); *In re Kearns*, 168 B.R. 423 (D. Kan. 1994); *Stovall v. Stovall*, 126 B.R. 814 (N.D. Ga. 1990); *In re Roussin*, 97 B.R. 130 (D.N.H. 1989).

Don MALLETT *v.* STATE of Arkansas

CR 97-930 954 S.W.2d 247

Supreme Court of Arkansas
Opinion delivered October 30, 1997

Petitioner, pro se.

No response.

PER CURIAM. On August 26, 1996, judgment was entered reflecting that Don Mallett had been found guilty by a jury of theft of property by deception. A sentence of fifteen years' imprisonment with three years suspended was imposed.

Mallett's retained attorney, Andrew Clark, filed a notice of appeal; but because it was filed *before* the judgment was entered, it was of no effect. *Hicks v. State* , 324 Ark. 450, 921 S.W.2d 604 (1996). Now before us is Mallett's *pro se* motion seeking to proceed with a belated appeal of the judgment pursuant to Rule 2(e) of the Rules of Appellate Procedure—Criminal, which permits a belated appeal in a criminal case in some instances.

It is the practice of this court when a *pro se* motion for belated appeal is filed alleging that counsel was ineffective for failure to perfect an appeal to request an affidavit from the trial attorney in response to the allegations in the motion. Mr. Clark expresses in his affidavit the erroneous assumption that the notice of appeal was timely.[1] He avers that he did not perfect the appeal because Mallett did not produce the $1,600.00 necessary to pay the court reporter to begin work on the transcript.

Rule 16 of the Rules of Appellate Procedure—Criminal provides in pertinent part:

> Trial counsel, whether retained or court appointed, shall continue to represent a convicted defendant throughout any appeal to the Arkansas Supreme Court, unless permitted by the trial court or the Arkansas Supreme Court to withdraw in the interest of justice or for other sufficient cause.

The record does not reflect, and attorney Clark does not contend, that he was relieved as counsel by the trial court, and it is clear from the filing of the untimely notice of appeal that Clark knew that Mallett desired an appeal. *See Miller v. State*, 299 Ark. 548, 775 S.W.2d 79 (1989). As a result, Clark was obligated to file a

[1] If there was a second timely notice of appeal filed with the circuit clerk, it does not appear in the partial record lodged here.

timely notice of appeal and, if Mallett was unable to pay the cost of the appeal, lodge a partial record in the appellate court to preserve the appeal. Upon lodging the partial record, counsel would then have been in a position to file a motion in the appellate court for his client to proceed as an indigent and to be appointed counsel or, if Mallett was not indeed indigent at that time, to file a motion to be relieved as counsel. Under no circumstances may an attorney who has not been relieved by the trial court abandon an appeal where he is aware with the thirty days allowed to file a notice of appeal that the convicted defendant desires to appeal simply because defendant has not paid for the transcript. *Miller, supra.*

The motion for belated appeal is granted. A convicted criminal defendant is entitled to effective assistance of counsel on appeal. The direct appeal of a conviction is a matter of right, and a state cannot penalize a criminal defendant by declining to consider his first appeal when his counsel has failed to follow mandatory appellate rules. *Franklin v. State*, 317 Ark. 42, 875 S.W.2d 836 (1994); see *Evitts v. Lucey*, 469 U.S. 387 (1985). To cut off a defendant's right to appeal because of his attorney's failure to follow rules would violate the Sixth Amendment right to effective assistance of counsel. *Evitts v. Lucey, supra.* See also *Pennsylvania v. Finley*, 481 U.S. 551 (1987).

Mallett has appended to the motion for belated appeal an affidavit asserting his indigency. As the State has not contested that assertion, he will be permitted to proceed *in forma pauperis* on appeal. Mr. Clark remains attorney-of-record and is appointed to represent the appellant. Our clerk will lodge the record, and counsel is directed to file within thirty days a petition for writ of certiorari to bring up the record, or that portion of it, necessary for the appeal.

A copy of this opinion shall be forwarded to the Arkansas Supreme Court Committee on Professional Conduct.

Motion granted.

Joseph RAMEY *v.* STATE of Arkansas

CR 97-1205 952 S.W.2d 677

Supreme Court of Arkansas
Opinion delivered October 30, 1997

Ben Seay, for appellant.

No response.

PER CURIAM. Joseph Ramey, by his attorney, has filed a motion for rule on the clerk. His attorney, Ben Seay, requests that the clerk accept the late record, and he admits in his motion that the record was tendered late due to a mistake on his part.

We hold that an error causing delay in submission of the transcript of the trial record on appeal, admittedly made by the attorney for a criminal defendant, is good cause to grant the motion to allow acceptance of the belated record. *See In re Belated Appeals in Criminal Cases*, 265 Ark. 964 (1979) (per curiam). Because Mr. Seay admits mistake in this motion, appellant's motion for rule on the clerk to accept the belated record is therefore granted.

The present motion for rule on the clerk is granted. A copy of this opinion shall be forwarded to the Committee on Professional Conduct.

William Wesley SKIVER *v.* STATE of Arkansas

CR 96-527 954 S.W.2d 913

Supreme Court of Arkansas
Opinion delivered October 30, 1997

Jon A. Williams, for appellant.

Winston Bryant, Att'y Gen., by: *Vada Berger*, Asst. Att'y Gen., for appellee.

PER CURIAM. The appellant, William Wesley Skiver, was convicted of aggravated robbery and was sentenced as a habitual offender to life in prison. Pursuant to *Anders v. California*, 386 U.S. 738 (1967), his attorney filed a motion to withdraw and a brief stating there is no merit to the appeal. Last term, we wrote an opinion ordering Skiver's attorney to rebrief the case because the abstract and argument portions of the brief did not comply with the requirements of *Anders*, *supra*, and Ark. Sup. Ct. R. 4-3(h) and 4-3(j). *Skiver v. State*, 326 Ark. 914, 935 S.W.2d 248 (1996). Counsel filed a substituted brief, and Skiver was given thirty days to file a *pro se* brief raising any additional arguments. Skiver did not file a brief. The State agrees that there is no merit to the appeal and recommends that Skiver's conviction be affirmed. We find that the substituted no-merit brief, like its predecessor, is not in compliance with *Anders* and Rule 4-3(j). Accordingly, we must again order rebriefing.

The facts surrounding Skiver's conviction and sentence were set forth in our previous opinion. *Skiver v. State*, *supra*. In that opinion, we noted that although the record did not contain a written or oral motion to suppress Skiver's custodial statement, a

Denno hearing was held on the day of trial. At the conclusion of that hearing, the Trial Court made the following ruling regarding Skiver's statement:

> The Court will find that the defendant knowingly, voluntarily, and intelligently waived his rights to remain silent and gave a knowing, voluntary statement to the officer.

This ruling is not discussed in the argument section of the substituted brief. Once again, counsel has failed to comply with Rule 4-3(j), which provides:

> A request to withdraw on the ground that the appeal is wholly without merit shall be accompanied by a brief including an abstract. The brief shall contain an argument section that consists of a list of all rulings adverse to the defendant made by the trial court on all objections, motions, and requests made by either party with an explanation as to why each adverse ruling is not a meritorious ground for reversal. The abstract section of the brief shall contain, in addition to the other material parts of the record, all rulings adverse to the defendant made by the trial court.

We simply cannot affirm Skiver's conviction without any discussion as to why an issue concerning the Trial Court's ruling concerning his statement would not be a meritorious ground for reversal. Accordingly, we direct Skiver's counsel to submit another brief containing an abstract of the motion to suppress and a discussion of the merit of any issue that can be raised concerning that ruling. If the motion was written, we direct that the record be supplemented with a certified copy of that motion. If the motion was oral, we direct that there be entered a stipulation as to its existence and contents.

Furthermore, we noted in our previous opinion that "while the denial of Skiver's motion for a directed verdict is mentioned, the sufficiency of the evidence is not fully discussed." The substituted brief still fails to fully discuss the sufficiency of the evidence issue. Counsel fails to set forth the State's evidence and explain its sufficiency for a conviction for the crimes charged. Accordingly, we direct counsel to reargue the sufficiency of the evidence.

Skiver's counsel is directed to file a new brief on or before December 30, 1997. In accordance with Rule 4-3(j)(2),

Skiver will have thirty days from that date to raise any additional arguments.

Rebriefing ordered.

Dennis Cornell TUCKER *v.* STATE of Arkansas

CR 97-1213 952 S.W.2d 677

Supreme Court of Arkansas
Opinion delivered October 30, 1997

G. B. "Bing" Colvin, III, for appellant.

No response.

PER CURIAM. Appellant, Dennis Cornell Tucker, by his attorney, G.B."Bing" Colvin, III, has filed a motion for rule on the clerk. His attorney admits that the transcript was tendered late due to an error on his part.

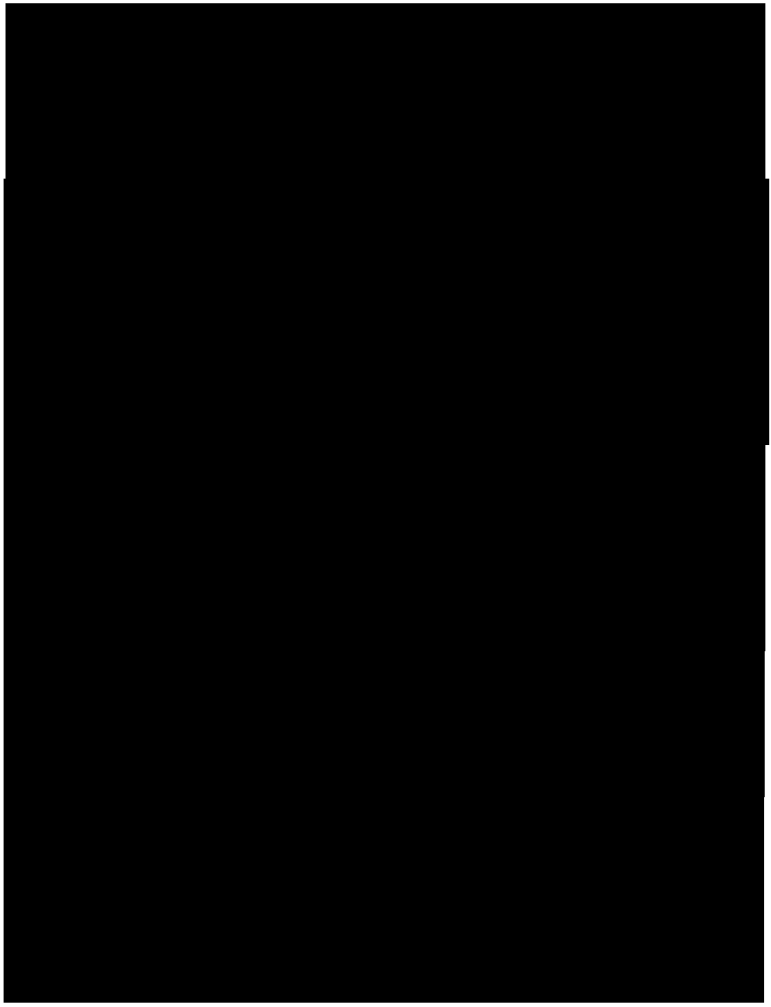
We find that such error, admittedly made by the attorney for a criminal defendant, is good cause to grant the motion. See per curiam order dated February 5, 1979. *In re: Belated Appeals in Criminal Cases*, 265 Ark. 964; *Terry v. State*, 272 Ark. 243, 613 S.W.2d 90 (1981).

A copy of this opinion will be forwarded to the Committee on Professional Conduct.

Larry Douglass BROWN *v.* Jim Guy TUCKER

96-1379 954 S.W.2d 262

Supreme Court of Arkansas
Opinion delivered November 6, 1997



Tona M. DeMers, for appellant.

Winston Bryant, Att'y Gen., by: *Kay J. Jackson DeMailly*, Asst. Att'y Gen., for appellee.

DONALD L. CORBIN, Justice. Appellant Larry Douglass Brown appeals the order of the Pulaski County Circuit Court dismissing his complaint against Appellee Jim Guy Tucker for slander, tortious interference with employment expectancy, and outrage. Our jurisdiction of this appeal is pursuant to Ark. Sup. Ct. R. 1-2(a)(15), as it presents issues involving the law of torts. Appellant argues on appeal that the trial court erred in dismissing his complaint. We find no error and affirm.

From what little facts we have been provided, it appears that Appellant filed suit against Appellee as a result of Appellant's being removed from his position as an investigator with the Arkansas State Police, and being reassigned to the position of patrol officer. In his motion to dismiss filed below, Appellee raised the issues of sovereign immunity, individual immunity, and the complaint's failure to state facts upon which relief could be granted as provided in ARCP Rule 12(b)(6). The order of the trial court, however, reflects only that Appellee's motion to dismiss was granted; there is no indication as to why the case was dismissed, nor are there any factual findings or conclusions. We affirm the trial court's ruling on the basis that Appellant failed to state sufficient facts in his complaint.

In reviewing the denial of a dismissal granted pursuant to Rule 12(b)(6), we treat the facts alleged in the complaint as true and view them in the light most favorable to the party who filed the complaint. *Malone v. Trans-States Lines, Inc.*, 325 Ark. 383, 926 S.W.2d 659 (1996). When the trial court decides Rule

12(b)(6) motions, it must look only to the complaint. *Id.* This court has summarized the requirements for pleading facts as follows:

> Arkansas has adopted a clear standard to require fact pleading: "a pleading which sets forth a claim for relief . . . shall contain (1) a statement in ordinary and concise language of facts showing that the pleader is entitled to relief . . ." ARCP Rule 8(a)(1). Rule 12(b)(6) provides for the dismissal of a complaint for "failure to state facts upon which relief can be granted." This court has stated that these two rules must be read together in testing the sufficiency of the complaint; facts, not mere conclusions, must be alleged. *Rabalaias v. Barnett*, 284 Ark. 527, 683 S.W.2d 919 (1985). In testing the sufficiency of the complaint on a motion to dismiss, all reasonable inferences must be resolved in favor of the complaint, and pleadings are to be liberally construed. *Id.*; ARCP Rule 8(f).

Malone, 325 Ark. at 385-86, 926 S.W.2d at 661 (quoting *Hollingsworth v. First Nat'l Bank & Trust Co.*, 311 Ark. 637, 639, 846 S.W.2d 176, 178 (1993)). Where the complaint states only conclusions without facts, we will affirm the trial court's decision to dismiss the complaint pursuant to Rule 12(b)(6). *Id.*

Appellant's abstract lends little support to his argument that the trial court erred in dismissing his complaint. The complaint itself, which contains mostly legal conclusions, is abstracted as follows:

> Filed February 6, 1996. Plaintiff alleges slander, tortious interference with employment expectancy, and tort of outrage.
>
> Plaintiff was an investigator with the Arkansas State Police who was assigned to investigate the school funding formula. Plaintiff alleges tortious interference with business expectancy. Plaintiff also alleges that defendant slandered him by referring to him as incompetent and unable to function in his position. Plaintiff alleges that defendant forced Col[.] Tommy Goodwin to demote plaintiff with the hopeful end result of forcing plaintiff to resign. Plaintiff alleges that defendant's actions exceeded all bounds of common decency, amounting to tort of outrage for plaintiff's emotional distress.

This summation tells us virtually nothing of the facts and circumstances that form the bases of each of the three causes of action alleged by Appellant.

Our rules require the abstracting of such material parts of the pleadings, proceedings, facts, documents, and other matters in the record as are necessary to an understanding of each issue presented to this court for review. Ark. Sup. Ct. R. 4-2(a)(6); *National Enters., Inc. v. Rea*, 329 Ark. 332, 947 S.W.2d 378 (1997); *Kingsbury v. Robertson*, 325 Ark. 12, 923 S.W.2d 273 (1996). It is Appellant's burden to demonstrate reversible error and to present a record evidencing such error. *Qualls v. Ferritor*, 329 Ark. 235, 947 S.W.2d 10 (1997). Moreover, it is fundamental that the record on appeal is confined to that which is abstracted and cannot be contradicted or supplemented by statements made in the argument portions of the brief. *National Enters.*, 329 Ark. 332, 947 S.W.2d 378. Here, Appellant states in his argument that the trial court erred in dismissing the case because the complaint was "more than adequate in that it contained nine pages of facts supporting appellant's claims, which were presented in chronological order with dates and times." Appellant then offers a citation to the place in the record where all the factual allegations can be found. Such reference to the record is not an adequate substitute for a complete abstract. *See Boren v. Worthen Nat'l Bank*, 324 Ark. 416, 921 S.W.2d 934 (1996). We have stated on occasions too numerous to count that it is impractical to require all seven members of this court to examine one transcript in order to decide an issue on appeal. *See, e.g., National Enters.*, 329 Ark. 332, 947 S.W.2d 378; *Duque v. Oshman's Sporting Goods Servs., Inc.*, 327 Ark. 224, 937 S.W.2d 179 (1997); *Kingsbury*, 325 Ark. 12, 923 S.W.2d 273. In short, Appellant has failed to produce a record demonstrating reversible error. By way of illustration, we discuss below some of the numerous factual deficiencies.

In the first instance, Appellant claims that Appellee tortiously interfered with a business expectancy. The elements of tortious interference which must be proved are: (1) the existence of a valid contractual relationship or a business expectancy; (2) knowledge of the relationship or expectancy on the part of the interfering party; (3) intentional interference inducing or causing a

breach or termination of the relationship or expectancy; and (4) resultant damage to the party whose relationship or expectancy has been disrupted. *Cross v. Arkansas Livestock & Poultry Comm'n*, 328 Ark. 255, 943 S.W.2d 230 (1997); *United Bilt Homes, Inc. v. Sampson*, 310 Ark. 47, 832 S.W.2d 502 (1992). The only facts alleged in the complaint pertaining to this claim are that Appellee forced Colonel Goodwin to demote Appellant with the hopeful end result of forcing him to resign. There are no facts demonstrating that Appellant had a valid contractual relationship or business expectancy in his job, or that he was damaged by Appellee's alleged actions. To the contrary, Appellee contends that Appellant was merely reassigned to another position with the state police; he was not demoted from his rank of corporal, nor was his pay reduced as a result of his new job assignment.

In the second instance, Appellant claims that Appellee slandered him. The following elements must be proven to support a claim of defamation, whether it be by the spoken word (slander) or the written word (libel): (1) the defamatory nature of the statement of fact; (2) that statement's identification of or reference to the plaintiff; (3) publication of the statement by the defendant; (4) the defendant's fault in the publication; (5) the statement's falsity; and (6) damages. *Minor v. Failla*, 329 Ark. 274, 946 S.W.2d 954 (1997) (citing *Mitchell v. Globe Int'l Pub., Inc.*, 773 F. Supp. 1235 (W.D. Ark. 1991)). The only information offered in the complaint on this cause of action is that Appellee slandered Appellant by referring to him as "incompetent and unable to function in his position." The defamatory nature of those particular words is not evident, especially if Appellant was, in fact, not competent to function in his position. Nor is it evident that the statement implies an assertion of an objective verifiable fact. In order to determine whether a statement may be viewed as implying an assertion of fact, the following factors must be weighed: (1) whether the author used figurative or hyperbolic language that would negate the impression that he or she was seriously maintaining implied fact; (2) whether the general tenor of the publication negates this impression; and (3) whether the published assertion is susceptible of being proved true or false. *Dodson v. Dicker*, 306 Ark. 108, 812 S.W.2d 97 (1991) (citing *Unelko*

Corp. v. Rooney, 912 F.2d 1049 (9th Cir. 1990)). The words allegedly used by Appellee clearly possess the general tenor of an opinion, as opposed to a verifiable statement of fact. Furthermore, as with the first claim, Appellant has offered no factual assertion that he was damaged by the alleged slanderous remarks.

In the third instance, Appellant claims that Appellee's "actions exceeded all bounds of common decency, amounting to tort of outrage for plaintiff's emotional distress." In order to establish an outrage claim, it must be shown: (1) the actor intended to inflict emotional distress or knew or should have known that emotional distress was the likely result of his conduct; (2) the conduct was "extreme and outrageous," was "beyond all possible bounds of decency," and was "utterly intolerable in a civilized community"; (3) the actions of the defendant were the cause of the plaintiff's distress; and (4) the emotional distress sustained by the plaintiff was so severe that no reasonable man could be expected to endure it. *Angle v. Alexander*, 328 Ark. 714, 945 S.W.2d 933 (1997) (citing *Deitsch v. Tillery*, 309 Ark. 401, 833 S.W.2d 760 (1992)). Appellant's complaint contains nothing more than bare legal conclusions that Appellee's actions were extreme and exceeded all bounds of common decency.

In sum, even construing the complaint liberally, Appellant has failed to state sufficient facts upon which any relief can be granted. Accordingly, we conclude that the trial court did not err in dismissing the complaint pursuant to Rule 12(b)(6). We further modify the trial court's ruling to be a dismissal with prejudice, as Appellant has indicated that a prior suit was brought by him against Appellee and that the action was voluntarily nonsuited by him. *See Bakker v. Ralston*, 326 Ark. 575, 932 S.W.2d 325 (1996). Because we affirm the trial court's ruling under Rule 12(b)(6), we need not address the remaining issues pertaining to immunity.

Affirmed as modified.

Special Justices WILLIAM RANDALL WRIGHT, MICHELE HARRINGTON, and RICHARD LUSBY join in this opinion.

BROWN, IMBER, and THORNTON, JJ., not participating.

Nathaniel THOMAS *v.* STATE of Arkansas

CR 96-803 954 S.W.2d 255

Supreme Court of Arkansas
Opinion delivered November 6, 1997

Wallace, Hamner & Hendry, by: *Phillip M. Hendry*, for appellant.

Winston Bryant, Att'y Gen., by: *Brad Newman*, Asst. Att'y Gen., for appellee.

DONALD L. CORBIN, Justice. Appellant Nathaniel Thomas appeals the denial of relief under Arkansas Rule of Criminal Procedure 37 from the Pulaski County Circuit Court. Appellant asserts that the trial court erred in denying the Rule 37 petition because his attorney was ineffective by failing to timely renew the motion for directed verdict at the conclusion of Appellant's case, thus barring a challenge to the sufficiency of the evidence on appeal. Our jurisdiction is pursuant to Ark. Sup. Ct. R. 1-2(a)(4). We affirm.

Appellant was charged along with three other men, James Ellison, Lawrence Butler, and Clayton Phillips, with three counts of capital murder in the shooting deaths of Cyrus Lee, Sabrina Earl, and Marcus Johnson at an apartment in Little Rock on February 19, 1992. He was tried before a jury on December 9 and 10, 1992, and found guilty of the capital murder of Cyrus Lee, and the first-degree murders of Sabrina Earl and Marcus Johnson. Appellant received respective sentences of life imprisonment without parole and two terms of forty years' imprisonment to run concurrently together, but consecutive to the life term.

On appeal to this court, Appellant raised two points for reversal, one regarding the sufficiency of the evidence and the second concerning the admissibility of custodial statements. Neither argument had merit, and we affirmed the judgment of the trial court. *Thomas v. State,* 315 Ark. 504, 868 S.W.2d 483 (1994). The record of the trial demonstrated that Appellant's counsel did not attempt to renew the directed-verdict motion until the jury had begun its deliberations, after being prompted by the trial court. This court held that Appellant's sufficiency argument was

thus not preserved for appeal, because he failed to timely renew his motion for directed verdict after he had presented evidence in his defense. A defendant who goes forward with the production of additional evidence after a directed-verdict motion is overruled waives any further reliance upon the former motion. *Crawford v. State*, 309 Ark. 54, 827 S.W.2d 134 (1992); *Rudd v. State*, 308 Ark. 401, 825 S.W.2d 565 (1992).

Following our affirmance of the direct appeal, Appellant filed in the trial court a petition for postconviction relief pursuant to Rule 37, which was subsequently denied. Appellant then appealed that ruling, and this court reversed and remanded so that the trial court could address Appellant's allegation that his trial counsel was ineffective for failing to properly preserve his challenge to the sufficiency of the evidence. *Thomas v. State,* 322 Ark. 670, 911 S.W.2d 259 (1995). In that opinion, this court prospectively overruled the holdings in *Philyaw v. State*, 292 Ark. 24, 728 S.W.2d 150 (1987), and *Mobbs v. State*, 307 Ark. 505, 821 S.W.2d 769 (1991), that an allegation of ineffective assistance of counsel based on counsel's failure to move for a directed verdict was not cognizable under Rule 37.

On remand, the trial court again denied the requested relief under Rule 37, after having reviewed the evidence regarding Appellant's allegation that counsel had been ineffective in the representation of Appellant for failing to timely renew the motion for directed verdict. The trial court found in its order:

> As the record from the trial reflects, at the end of the State's case, Petitioner's counsel made a detailed and thorough motion for a directed verdict. The Court overruled the motion, explaining that the State had provided sufficient evidence for the case to be presented to the jury. The fact that Petitioner's counsel did not renew the directed verdict after the defense rested does not alter the sufficiency of the evidence presented by the State, which in the Court's view, had already reached the amount necessary to proceed to the jury. *It cannot be said that but for counsel's failure to renew the motion, the factfinder, in this case the jury, would have reached a different conclusion on the guilt or innocence of Petitioner, since the Court had already determined that the State could proceed with its case.* [Emphasis added.]

The question before us now is what standard of review should we apply in determining whether the trial court erred in reviewing its own previous decision to deny Appellant's motion for directed verdict. We conclude that the appropriate standard of review for this issue is whether the trial court's decision was clearly erroneous or clearly against the preponderance of the evidence presented at trial and during the hearing on the Rule 37 petition. For reasons set out below, we conclude that the trial court was not clearly erroneous in denying Appellant's requested relief under Rule 37.

The criteria for assessing the effectiveness of counsel were enunciated by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). *Strickland* provides that when a convicted defendant complains of ineffective assistance of counsel, he must show that counsel's representation fell below an objective standard of reasonableness and that counsel's deficient performance prejudiced his defense. Judicial review of counsel's performance must be highly deferential, and a fair assessment of counsel's performance under *Strickland* requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's conduct, and to evaluate the conduct from counsel's perspective at the time. *Missildine v. State*, 314 Ark. 500, 863 S.W.2d 813 (1993). A reviewing court must indulge a strong presumption that the conduct falls within the wide range of reasonable professional assistance. *Id.*

To prevail on any claim of ineffective assistance of counsel, the petitioner must show first that counsel's performance was deficient. *Thomas*, 322 Ark. 670, 911 S.W.2d 259. This requires a showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the petitioner by the Sixth Amendment. *Id.* Secondly, the petitioner must show that the deficient performance prejudiced the defense, which requires a showing that counsel's errors were so serious as to deprive the petitioner of a fair trial. *Id.* Unless a petitioner makes both showings, it cannot be said that the conviction resulted from a breakdown in the adversarial process that renders the result unreliable. *Id.* In reviewing the denial of relief under Rule 37, this court must indulge in a strong presumption that counsel's conduct

falls within the wide range of reasonable professional assistance. *Id.* The petitioner must show that there is a reasonable probability that, but for counsel's errors, the factfinder would have had a reasonable doubt respecting guilt in that the decision reached would have been different absent the errors. *Id; Huls v. State*, 301 Ark. 572, 785 S.W.2d 467 (1990). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Strickland,* 466 U.S. 668; *Thomas*, 322 Ark. 670, 911 S.W.2d 259.

Ineffective assistance of counsel cannot be established merely by showing that an error was made by counsel or by revealing that a failure to object prevented an issue from being addressed on appeal. *Huls*, 301 Ark. 572, 785 S.W.2d 467. In *Huls*, this court found that even if a timely objection at trial could have prevented the jury from hearing a witness's testimony, the testimony, when taken with the entire evidence presented at trial, did not lead to a conclusion that there was a reasonable probability that the jury would have acquitted petitioner if the witness had not testified. In making a determination on a claim of counsel's ineffectiveness, we must consider the totality of the evidence presented to the judge or jury. *Id.*

Normally, to prevail on a claim of counsel's ineffectiveness, the appellant must demonstrate that but for counsel's errors, the jury would have reached a different conclusion. In the present case, that cannot be the focus of our inquiry because if the directed-verdict motion had been timely renewed and granted, the matter would not have gone to the jury. The trial court in this case seemed to be puzzled because the case was remanded for a determination of whether counsel was ineffective due to the failure to renew the directed-verdict motion. The trial judge remarked that he had already decided that the State's case was sufficient to go to the jury.

The duty of the trial court upon remand was to determine whether anything that happened between the time the motion was denied at the conclusion of the State's case and the conclusion of all the evidence would have caused him to grant the motion upon renewal. An example of such an event might be the

defense's presentation of a witness who had previously testified for the prosecution, but wished to change or recant his or her testimony. Once the trial court determines that no such event occurred, and thus no prejudice resulted from the failure to renew the motion, an appeal of that decision would have to result ultimately in our review of whether the evidence was or was not sufficient for presentation to the jury. Upon reviewing the totality of the evidence, we conclude that there was sufficient evidence for presentation of the case to the jury.

The motion made at the end of the State's case-in-chief was based on the assertion that the State had failed to prove that Appellant was an accomplice to the murders. The trial court denied the motion based on the fact that the jury might accept the statements that Appellant had given to the police. Arkansas Code Annotated § 5-2-403(a) (Repl. 1993) provides that a person is an accomplice of another person in the commission of an offense if, with the requisite intent, he aids, agrees to aid, or attempts to aid the other person in the commission of the offense. *Passley v. State*, 323 Ark. 301, 915 S.W.2d 248 (1996). Under the accomplice liability statute, a defendant may properly be found guilty not only for his own conduct, but also for that conduct of his accomplice. *Id.* When two or more persons assist one another in the commission of a crime, each is an accomplice and criminally liable for the conduct of both. *Id.* There is no distinction between principals on the one hand and accomplices on the other, insofar as criminal liability is concerned. *Id.* In a case based upon circumstantial evidence, relevant circumstances include the presence of an accused in proximity to the crime, opportunity, association with persons involved in a manner suggesting joint participation, and possession of instruments used in the commission of the offense. *Cassell v. State*, 273 Ark. 59, 616 S.W.2d 485 (1981). The mere presence of a person at the scene of a crime is not proof of his guilt. *Green v. State*, 265 Ark. 179, 577 S.W.2d 586 (1979).

From the record provided, we can discern the substance of Appellant's statements as follows. Appellant told the police that one of the victims, Cyrus Lee, owed money for drugs to James Ellison, Lawrence Butler, and Clayton Phillips. After these three men gathered their guns, Appellant agreed to go with them to go

get their money. Appellant asserted that the three men pushed their way into the apartment and stayed inside for thirty to forty-five minutes. Apparently, when they came outside with blood on their clothes, they told Appellant that the victim would not give them their money, so they made him pay another way. Ellison told Appellant that he should burn the bloodstained clothes. Appellant asserted that instead, he put the bloody clothes in a paper sack and left them in a trash dump behind Ellison's house. Appellant declared that he remained outside while the murders were occurring inside the apartment. Notwithstanding that claim, the State asserts that he provided details of what occurred inside the apartment in his statement to police.

In sum, the totality of the evidence demonstrates that Appellant was not prejudiced by counsel's failure to timely renew the directed-verdict motion. Appellant stated that he knew that the three men were going to the apartment to collect drug money and that they were armed with guns. He went with them to the apartment. He knew details about what happened inside the apartment, including the timing and location of the killings. He identified one of the murder weapons. In a taped statement, he stated that he could not see the victim that walked up later and entered the apartment, but he later made a photo identification of this victim. A bloody jacket was found in the house, near the trash dump where he claimed to have disposed of the other clothing, which he was supposed to dispose of by setting them on fire. He stated that he worked with the three codefendants making the drugs during this time period, and that he had continued to work with them after the murders. This evidence is sufficient to show that Appellant possessed the requisite knowledge and intent and was an accomplice in the three murders.

Based on the foregoing, Appellant did not demonstrate that he was prejudiced by counsel's error in failing to renew the directed-verdict motion. While the Appellant was not able to directly appeal any challenge to the sufficiency of the evidence, there was substantial evidence to support the verdict. Appellant did not prove the second prong of the *Strickland* test and was thus not denied the right to a fair trial. We will not reverse for a mere

potential of prejudice. *Gardner v. State*, 296 Ark. 41, 754 S.W.2d 518 (1988).

Affirmed.

Michael BURCHAM *v.* CITY OF VAN BUREN, Civil Service Commission of the City of Van Buren, and Chief of Police Mason Childers In His Official Capacity

97-410 954 S.W.2d 266

Supreme Court of Arkansas
Opinion delivered November 6, 1997

Pryor, Barry, Smith, Karber & Alford, PLC, by: *Gregory T. Karber*, for appellant.

Steven G. Peer, for appellees.

ROBERT L. BROWN, Justice. Appellant Michael Burcham, a patrolman in the Van Buren Police Department, was passed over for promotion to corporal during the one-year span from March 1995 and to March 1996. He filed a complaint against appellees City of Van Buren, the Civil Service Commission for the City (Commission), and Chief of Police Mason Childers and alleged that he was entitled to be promoted in 1995 and 1996 because he was on the three-person eligibility list for promotion certified by the Commission to the Police Chief for this period. He further alleged that he ranked second on the three-person eligibility list during this time frame and that three patrolmen other than himself were promoted to corporal. Burcham also asserted, as a separate

count, that the appellees failed to advertise the competitive examination for promotion to corporal in August 1996. The 1996 competitive examination determined the eligibility list for the next year which ultimately was the list used for promotions. He contended that state law requires publication in a local newspaper that the examination relating to promotions is to take place. Because of the Department's failure to advertise, he contended that he was foreclosed from taking the examination. Thus, he contended that the 1996 eligibility list should be declared invalid which presumably would invalidate all promotions made based on that eligibility list. Burcham prayed for back pay from the date he was not promoted, any other lost benefits, and attorneys fees, interest, and costs.

The appellees moved for summary judgment on both claims, and the trial court granted summary judgment. On appeal, Burcham urges that the trial court erred. We affirm.

I. Eligibility List

Burcham's first point of appeal brings into play the civil service statute governing how police officers and firefighters are selected for promotion within their departments. *See* Ark. Code Ann. § 14-51-301 (Supp. 1995). That statute requires that cities adopt rules governing the departments and continues in pertinent part as follows:

(b) These rules shall provide for:

. . . .

(4)(A)(i) The creation and maintenance of current eligibles lists for each rank of employment in the departments, in which shall be entered the names of the successful candidates in the order of their standing in the examination. However, for ranks in each department where there may not be openings during an annual period, the board may establish rules to create the eligibles list on an as-needed basis.

. . . .

(B)(i) All lists for appointments or promotions as certified by the board shall be and remain in force and effect for the period of one (1) year from date thereof.

. . . .

(6) Certification to the department head of the three (3) standing highest on the eligibility list for that rank of service, and for the department head to select for appointment or promotion one (1) of the three (3) certified to him and notify the commission thereof;

Ark. Code Ann. § 14-51-301(b)(4)(A)(i), (B)(i), (6) (Supp. 1995).

Burcham argues that it is a mathematical impossibility for three promotions to be made in one year without all three people who were originally named as the three standing highest being selected. He claims that the one-year duration for "lists" in § 14-51-301(b)(4)(B)(i) also applies to the certified names by the Commission of the three standing highest. Under his interpretation, the second time a position became available, only two names would be submitted, and the third time, only the third name would be submitted. This would assure that the third person would be selected for the position. As a consequence, he concludes that he should been selected for one of the three positions that became available between March of 1995 and March of 1996.

The appellees, on the other hand, read § 14-51-301 to require the Commission to adopt the following procedure. The Commission creates and maintains a list of eligible applicants for promotion for each rank of employment within the Department. The eligibility lists remain in effect for one year from the time the Commission certifies them. Each time a position becomes available within a Police Department, for example, the Commission certifies and submits to the Department head (here, the police chief) the three most qualified applicants based on their examination scores. This short list is referred to as the "three standing highest." The Police Chief then selects one of the three for promotion. If another position for promotion becomes available within that same year, the eligibility list is examined and the Commission certifies the names of the three standing highest at that time and submits those names to the Police Chief. This second time, the three names would include the two that were on the

previous list of three standing highest as well as one new name from the eligibility list based on examination scores. If a third position comes open in that year, the same procedure for selection from the names of the three standing highest is followed. We subscribe to the appellees' reading of the statute.

In support of his interpretation, Burcham cites this court to three cases. *Cross v. Bruce*, 284 Ark. 230, 681 S.W.2d 339 (1984); *Orrell & Abernathy v. City of Hot Springs*, 265 Ark. 267, 578 S.W.2d 18 (1979); *Smith v. Little Rock Civil Serv. Comm.*, 214 Ark. 765, 218 S.W.2d 366 (1949). Prior to 1987, the civil service statute contained language suggesting that promotion be afforded to the one standing highest on the eligibility list. Ark. Stat. Ann. § 19-1603 (1980). That language was amended in 1987 to provide that the department head would select for appointment or promotion from the certified list of the three standing highest. *See* Act 657 of 1987, now codified at Ark. Code Ann. § 14-51-301(b)(6) (Supp. 1995). These cases decided prior to the change in the statute have little or no precedential value.

In interpreting a statute, this court will give the words in the statute their ordinary meaning and common usage. *Rush v. State*, 324 Ark. 147, 919 S.W.2d. 933 (1996); *McCoy v. Walker*, 317 Ark. 86, 876 S.W.2d 252 (1994). If the language of the statute is plain and unambiguous, the analysis need go no farther. *State v. Johnson*, 317 Ark. 226, 876 S.W.2d 577 (1994). It is clear from the structure of § 14-51-301 that the one-year requirement concerning the list certified by the Commission applies to the eligibility list *in toto* and not just to the names of the three standing highest which are certified by the Commission to the department head. We conclude that the statute states as much. But, in addition, the process for promotions would not work under Burcham's reading. Subsection (b)(6) makes it clear that when the names of the three standing highest are submitted, the department head is to *choose one of the three*. To limit the Police Chief to one name in making his selection would run counter to the express language of the statute. In fact, in 1987, the General Assembly deleted language in § 14-51-301(b)(6), requiring promotion of the one standing highest on the eligibility list. *See* Act 657 of 1987.

We hold that the appellees have correctly interpreted the statute. Each time a position becomes available within the Van Buren Police Department, the Commission is required to submit the names of the three applicants with the highest examination scores to the Police Chief. Because one of the three will be selected, it stands to reason that the next time a position becomes available the three names submitted will have changed. To read the statute otherwise would eventually deprive department heads of any discretion in choosing the best candidate. This is clearly not what the General Assembly intended.

II. Advertisement for Promotions

Burcham next contends that the Commission violated Ark. Code Ann. § 14-51-301(b)(3)(A), by not advertising in the local paper the next promotional examination held on August 12, 1996, and, thus, the resulting eligibility list, and presumably all promotions, are invalid. The statute provides as follows:

> (b) These rules shall provide for:
>
> (1)(A) The qualifications of each applicant for *appointment* to any position on the police or fire department;
>
> (B)(i) No person shall be eligible for *appointment* to any position on the fire department who has not arrived at the age of twenty-one (21) years;
>
> (ii) No person shall be eligible for *appointment* on the police department affected by this chapter who has not arrived at the age of twenty-one (21) years;
>
> (2) Open competitive examination to test the relative fitness of applicants for the positions;
>
> (3)(A) Public advertisement of all examinations by publication of notice in some newspaper having a bona fide circulation in the city and by posting of notice at the city hall at least ten (10) days before the date of the examinations.
>
> (3)(B) The examinations may be held on the first Monday in April or the first Monday in October, or both, and more often, if necessary, under such rules and regulations as may be prescribed by the board;

Ark. Code Ann. § 14-51-301(b)(1), (2), and (3) (Supp. 1995) (emphasis added).

City of Van Buren Ordinance No. 28 of 1995 specifies that newspaper notice of examinations will be done for appointments for police and firefighter positions, but the ordinance does not include advertisement for promotions within the ranks. In granting summary judgment in favor of the City, the trial judge found that the publication requirements as set out in subsection (b)(3)(A) only apply to appointments and not to promotions. We agree with this interpretation.

Burcham focuses on the words "all examinations" in § 14-51-301(b)(3), in arguing his case, but in doing so, he disregards the preceding subsections which refer only to applicants for appointment as opposed to applicants for promotion. In determining legislative intent, our rules for guidance have been often stated:

> In interpreting a statute and attempting to construe legislative intent, the appellate court looks to the language of the statute, the subject matter, the object to be accomplished, the purpose to be served, the remedy provided, legislative history, and other appropriate means that throw light on the subject. *McCoy, supra; Gritts v. State*, 315 Ark. 1, 864 S.W.2d 859 (1993).

Henson v. Fleet Mortgage Co., 319 Ark. 491, 495, 892 S.W.2d 250, 252 (1995).

We conclude that the more reasonable interpretation in the instant case is to look to the context of the statute and to the fact that in subsections (b)(1)(A), (b)(1)(B)(i), and (b)(1)(B)(ii) of § 14-51-301, the sole focus is on appointments. The publication requirement then follows in subsection (b)(3)(B). Precise reference in the statute to advancement within the ranks or promotions is not made until subsection (b)(4)(A), which is after the publication requirement. At that point, the statute shifts its focus from appointments to requirements for promotions.

Moreover, the purpose of the statutory requirement for publication of examination dates is to ensure that all potential applicants are notified. If the only pool of potential applicants are

those already on the police force, it is entirely reasonable to post test dates on the troop bulletin board at the Department. There is little need to advertise to the public at large through a local newspaper when the purpose of the examination is only to decide promotion of current police officers to a higher rank. Indeed, it would be wasteful to do so. We will not give a statute an interpretation which is at odds with common sense. *Stephens v. State*, 328 Ark. 570, 944 S.W.2d 836 (1997); *Sanders v. State*, 310 Ark. 630, 839 S.W.2d 518 (1992).

Affirmed.

Willie Leon GREEN *v.* STATE of Arkansas

CR 97-59 956 S.W.2d 849

Supreme Court of Arkansas
Opinion delivered November 6, 1997
[Petition for rehearing denied December 11, 1997.]

John Wesley Hall, Jr., for appellant.

Winston Bryant, Att'y Gen., by: *David R. Raupp*, Sr. Asst. Att'y Gen., and *Kent G. Holt*, Asst. Att'y Gen., for appellee.

ROBERT L. BROWN, Justice. Appellant Willie Leon Green was charged with capital murder in connection with the shooting

death of Little Rock Police Department Detective Joseph Fisher and attempted capital murder for the shooting of Little Rock Police Department Detective Frederick Lee. He was tried by jury and convicted of first-degree murder and attempted capital murder. He was subsequently sentenced to consecutive terms of life imprisonment and thirty years' imprisonment. On appeal, he raises six points for reversal. We affirm.

At trial, Detective James Stephens of the Little Rock Police Department testified that he was in charge of executing a search warrant at Green's apartment at approximately 7:55 p.m. on February 7, 1995. He testified that the plan was for Detectives Frederick Lee and Joseph Fisher to operate a battering ram for a forced entry into Green's apartment along with other police officers. Detective Stephens testified that he had established a position securing the rear of the apartment building when he heard his entry team yell, "Police, search warrant, police," followed by what he believed to be the battering ram striking the front door and a number of gunshots. He rushed to the front of the apartment building and found Detective Lee staggering out the door with a gunshot wound to the head. He saw Detective Fisher lying on the kitchen floor, where two police officers were attempting first aid. Police officers were also handcuffing Green and a woman named Donna Finney, who was on the couch near two children, one of whom was in a playpen. On cross-examination, Detective Stephens stated that he made the decision to execute the search warrant even though he knew that Green had been robbed the preceding month. He testified that some of his police officers wore police markings on their back and some wore vests with reflective tape that displayed "police" on the front.

Detective John Gravett confirmed that prior to breaching the door, he shouted, "Police, search warrant," at least two times. He testified that the door was breached between the first and second yell. As he followed Detective David Smith to the front door, he heard gunshots, and the first thing he saw was Detective Lee with blood on his face. He said shots were still being fired at the time when Detective Fisher shouted out that he had been hit. He testified that Detective Smith yelled, "Get your hands up or I'll shoot," or words to that effect, at which time Detective Gravett

saw Green squatting in the corner of the room with a gun at his feet. Detective Gravett admitted that it was common knowledge that Green's apartment had been the subject of a recent robbery.

Detective Donnie Bakalekos testified that he was standing behind Detectives Lee and Fisher when he shouted, "Police. Search warrant. Little Rock Police," prior to the door being rammed. He stated that he believed the entire squad yelled the same warning. He testified that he and Detective Ralph Breshears were assigned to secure the upstairs portion of the apartment. He explained that once the door was breached, he made it halfway up the stairs before he heard gunshots. He testified that Detective Breshears stood immediately below him on the stairs and fired his weapon.

Officer David Smith testified that he entered the apartment with a 12-gauge shotgun immediately behind Detective Fisher. He explained that he followed Detective Fisher until the time when Detective Fisher was shot. Once Detective Fisher fell to the floor, Officer Smith fired one round at Green, who attempted to hide behind some furniture. Officer Smith testified that the police officers' ability to maneuver inside the apartment was hampered by a child's playpen that appeared to be in the middle of the apartment. He testified that he fired his shotgun a second time when Green began firing from behind the furniture. Officer Smith testified that he yelled to Green to drop his gun and surrender, which Green did after Donna Finney shouted: "It's the police. Drop your gun."

Four other police officers confirmed that they heard their fellow police officers yell, "Police, search warrant." Norma Allen, a resident of Green's apartment complex, testified that she heard some people talking "loud" outside her apartment between 7:45 and 8:00 p.m. on the night of the killing, but she could not determine what they were saying. She testified that this was followed by a "boom" sound and then gunshots. She testified that she also heard screaming and a person yell, "Someone's down."

A Taurus .38 special revolver, which had been used by Green, was removed at the scene and contained five spent hulls. Cash in the amount of $505.39 was recovered from a purse located

in the apartment. In the kitchen, a hat containing a .38 round, a wallet, a pager, and $1,643.37 was found by police officers. Two plastic bags with green, vegetable matter were also recovered. Upstairs in Green's apartment, a Rossi .38 special revolver containing five live rounds was found in the master bedroom.

Donna Finney, Green's girlfriend and the mother of his two children, was called by the prosecutor as a witness. At the time of the slaying, she was seven months pregnant. She testified that she never saw the word "Police," written on any of the officers' vests. She also told the jury that the previous home robbery on January 7, 1995, caused Green and her to lose $2,000 in cash, along with a ring and a check. She stated that the robbers were black, wore ski masks, and broke into the apartment after midnight on a Friday night. She admitted that the police officers in this case were white and wore vests. She testified that they did not yell anything to identify themselves.

Former Detective Mark Sims testified that he and a confidential informant named John Cron were involved in four crack cocaine buys at Green's residence before the shooting. On February 7, 1995, there was a plan for Detective Sims and Cron to both be present during a hand-to-hand purchase of crack cocaine from Green. At the same time, Detectives Fisher and Lee were to watch from the outside. Sims, however, contacted the two detectives and told them that the plan had changed and that Cron was going to make the buy alone. After Cron's buy, Sims and Detective Fisher went to the Little Rock Municipal Judge to obtain the search warrant.

Dr. Charles Kokes, associate medical examiner, testified that he found gunshot entry and exit wounds on Detective Fisher's body. He testified that the bullet entered the area in front of his right shoulder, missing the bulletproof vest, passed through the right lung and severed a branch of the aorta, and exited through his upper left back. He opined that this gunshot wound was the cause of death. Ronald Andrejack, a firearms and toolmark examiner, testified that the fatal bullet was fired from the Taurus .38 special revolver. However, his test results with respect to the bul-

let retrieved from Detective Lee's head were inconclusive because the bullet was severely damaged.

Donna Finney also testified for the defense and stated that she was upstairs with her children on January 7, 1995, the date of the previous robbery. She heard a loud boom from downstairs. Green then came upstairs at gunpoint with a man behind him wearing a mask and demanding money. Finney next testified that on February 7, 1995, she was in the living room with Green and the two children when she heard a loud boom and the door "came in." She testified that she was aware that Green was firing his gun but told him to stop doing so when she realized it was the police. On cross-examination, she claimed that she was not selling drugs; that some of the money found by the police officers was her rapid-return federal tax money; and that she did not hear anything prior to the door being broken down.

Green testified in his own defense. He stated that he was home on January 7, 1995, with Donna Finney, the two children, and two friends when three armed men broke through the door and entered the living room. The men wore masks and demanded money. Green testified that he had recently received a check from a lawsuit that had settled and that he had just been paid from his job at St. Vincent Infirmary. He testified that he gave the men his money at gunpoint. After that robbery, he testified that he kept two loaded guns in the house for protection. He admitted that he began selling crack cocaine about that time to recoup the money that was lost. He also testified that he recognized Detective Sims from a previous job at University Hospital and that he never sold him drugs. He stated that he sold John Cron two rocks of crack cocaine on February 7, 1995. Later, he, Donna Finney, and the two children were in the living room when he heard a loud noise and saw men coming through the front door. Green stated that he thought it was another break-in and grabbed his pistol. He testified that he fired toward the door and not at any particular person and that he hoped to scare the intruders off. He explained that his biggest concern was for the safety of his child, who was in the playpen between himself and the front door. He testified that he was firing from an awkward position behind a piece of furniture and that he could only recall firing three times. He testified that

after those shots, he threw down his weapon to surrender when he was hit in the leg with a shotgun blast. He testified that he did not know that the police were coming that night and that he had no idea it was police detectives who were on the receiving end of his volley.

On cross-examination, Green stated that he was unaware that any of the officers were injured and maintained that he did not intentionally kill anyone. He stated that he only shot three times, but he could not explain how the pistol was out of bullets when he surrendered. He explained that he thought he shot first but that he was not certain.

In contrast to February 7, 1995, Green testified that the January 7, 1995 robbery was accomplished by three black males who were wearing ski masks. He testified that these men wore blue, which was a color associated with the Crips gang, but he denied that he was associated with the Park Street Pirus, a Bloods affiliate.

I. Insufficiency of the Evidence

At trial, defense counsel's motion for directed verdict focused on the lack of premeditation and deliberation on Green's part because of the forced entry which was a complete surprise. The motion was denied.

The standard of review for motions for directed verdict has been stated often by this court:

> Motions for directed verdict are treated as challenges to the sufficiency of the evidence. *Johnson v. State*, 326 Ark. 3, 929 S.W.2d 707 (1996); *Penn v. State*, 319 Ark. 739, 894 S.W.2d 597 (1995). When a defendant challenges the sufficiency of the evidence convicting him, the evidence is viewed in the light most favorable to the state. *Dixon v. State*, 310 Ark. 460, 470, 839 S.W.2d 173 (1992). Evidence is sufficient to support a conviction if the trier of fact can reach a conclusion without having to resort to speculation or conjecture. *Id.* Substantial evidence is that which is forceful enough to compel reasonable minds to reach a conclusion one way or the other. *Id.* Only evidence supporting the verdict will be considered. *Moore v. State*, 315 Ark. 131, 864 S.W.2d 863 (1993).

McGehee v. State, 328 Ark. 404, 410, 943 S.W.2d 585, 588 (1997).

With respect to Green's conviction for attempted capital murder, there was substantial evidence that he acted with premeditation and deliberation in the shooting of Detective Lee. A criminal defendant's intent or state of mind is rarely capable of proof by direct evidence and must usually be inferred from the circumstances of the crime. *Williams v. State*, 325 Ark. 432, 930 S.W.2d 297 (1996); *Carter v. State*, 324 Ark. 249, 921 S.W.2d 583 (1996); *Walker v. State*, 324 Ark. 106, 918 S.W.2d 172 (1996). The necessary premeditation is not required to exist for a particular length of time and may be formed in an instant. *Key v. State*, 325 Ark. 73, 923 S.W.2d 865 (1996); *Ward v. State*, 298 Ark. 448, 770 S.W.2d 109 (1989). Premeditation and deliberation may be inferred from the type and character of the weapon used, the manner in which the weapon was used, the nature, extent, and location of the wounds inflicted, and the conduct of the accused. *Key v. State, supra; Kemp v. State*, 324 Ark. 178, 919 S.W.2d 943 (1996), *cert. denied*, 117 S. Ct. 436 (1996).

In this case, viewing the evidence in the light most favorable to the State, there was substantial evidence that Green was guilty of attempted capital murder with respect to the shooting of Detective Lee. There was evidence that the police officers announced their presence outside of Green's apartment prior to breaking down the door. Once the door was knocked down, the first two men through, Detectives Fisher and Lee, were both shot. Fisher was shot with a bullet from Green's Taurus .38 special revolver. The jury could have inferred that Detective Lee was shot with a bullet from the same weapon. The revolver that was recovered at the scene contained five spent hulls. Detective Lee was also shot in the head, while wearing his police gear and after an announcement that they were police officers executing a search warrant. We conclude that this constitutes substantial evidence that Green was guilty of attempted capital murder with regard to Detective Lee.

Green makes two additional arguments on appeal with respect to lack of substantial evidence relating to his first-degree murder conviction for the shooting death of Detective Fisher.

Neither point should be considered, as neither was raised as part of Green's motion for directed verdict before the trial court. This court does not address arguments, even constitutional arguments, that are raised for the first time on appeal. *See, e.g., Travis v. State*, 328 Ark. 442, 944 S.W.2d 96 (1997); *Dulaney v. State*, 327 Ark. 30, 937 S.W.2d 162 (1997). The first argument appears to be that Green's conviction for first-degree murder was prejudiced by the submission of capital murder to the jury. His second point raised for the first time on appeal relates to self-defense. Both arguments are procedurally barred. We conclude that there is no basis for reversal on the first point.

II. Comment on the Evidence

During its case-in-chief, the prosecutor called Donna Finney to testify. She was questioned at length about Green's involvement with selling drugs, and she proved to be hostile to the State on the subject. The prosecutor impeached her testimony with her prior statement given to police detectives. On cross-examination, defense counsel wanted to explore other topics contained in her statement, at which time the prosecutor objected on the ground that such questions were beyond the scope of direct examination. After the trial court overruled the objection, thus providing leeway to defense counsel, the following occurred:

> THE COURT: . . . But Ms. Finney, are you aware of what perjury is?
> MS. FINNEY: Huh-uh.
> THE COURT: Perjury is lying in an official proceeding, which this is. Not telling the truth. The consequences of that are that if you're convicted of it, you can be sent to the penitentiary from three to ten years and fined up to $10,000.
> You are now under oath and you are sworn to tell the truth. Do you understand that?
> MS. FINNEY: Yes, sir.
> THE COURT: All right. You may proceed.

[redacted] Green argues that the trial court's admonition in the jury's presence was an unauthorized comment on the evidence in violation of Ark. Const. art. 7, § 23. There is no doubt that the

trial court intimated that it found the testimony of Ms. Finney not to be believable. We have held in the past that an insinuation by the trial court that a witness is committing perjury is an impermissible comment on the evidence by the trial court. *See, e.g., West v. State*, 255 Ark. 668, 671, 501 S.W.2d 771, 773 (1973)(holding the following to be an unconstitutional comment: "How much were you paid to come up with this information?"); *Watkins v. State*, 222 Ark. 444, 448, 261 S.W.2d 274, 277 (1953)(holding the following to be an unconstitutional comment: "Let me warn you whatever you said then they have it down word for word and you were under oath then and are under oath now, but if you tell the same things two different ways you are going to be guilty of perjury. You get yourself straight[.]"). Green admits that this error was not raised to the trial court but asserts that the argument is not barred because (1) this court searches the record for reversible error in life cases under Ark. Sup. Ct. R. 4-3(h), and (2) Ark. R. Evid. 103(d) provides that nothing in the rules precludes taking notice of errors affecting substantial rights though they were not brought to the attention of the trial court.

■ In interpreting Rule 4-3(h), this court has continually maintained its position that the language of Rule 4-3(h) does not mandate plain-error review. *See, e.g., Wright v. State*, 327 Ark. 558, 940 S.W.2d 432 (1997); *Webb v. State*, 327 Ark. 51, 938 Ark. 806 (1997); *Echols v. State*, 326 Ark. 917, 936 S.W.2d 509 (1996), *cert. denied*, 117 S. Ct. 1853 (1997); *Childress v. State*, 322 Ark. 127, 907 S.W.2d 718 (1995); *Aaron v. State*, 319 Ark. 320, 891 S.W.2d 364 (1995). We have been constant in requiring an objection by counsel to preserve an issue for our review under Rule 4-3(h). The acknowledged exceptions to this rule are (1) death penalty cases involving an error in a matter essential to the jury's consideration of the death penalty itself; (2) cases where the trial judge made an error of which the appellant had no knowledge; (3) cases where the trial judge neglected his or her duty to intervene; and (4) cases involving evidentiary errors which affected the appellant's substantial rights. *Camargo v. State*, 327 Ark. 631, 640, 940 S.W.2d 464, 469 (1997), *citing Wicks v. State*, 270 Ark. 781, 606 S.W.2d 366 (1980). Green does not attempt to fit his situation into one of the four *Wicks* exceptions.

In addition, Green's argument cannot be salvaged by the language of Rule 103(d) of the Rules of Evidence. This court has previously held that this language does not authorize review of plain error. *See, e.g., Lovelady v. State*, 326 Ark. 196, 931 S.W.2d 430 (1996). This issue is barred from our review.

III. Batson Challenge

The procedure for a challenge under *Batson v. Kentucky*, 476 U.S. 79 (1986), is well settled:

> First, the defendant must make a prima facie case that racial discrimination is the basis of a juror challenge. In the event the defendant makes a prima facie case, the State has the burden of showing that the challenge was not based upon race. Only if the defendant makes a prima facie case and the State fails to give a racially neutral reason for the challenge is the court required to conduct a sensitive inquiry.

Wooten v. State, 325 Ark. 510, 514, 931 S.W.2d 408, 410 (1996), *cert. denied*, 117 S. Ct. 979 (1997), *quoting Prowell v. State*, 324 Ark. 335, 344, 921 S.W.2d 585, 591 (1996). *See Mitchell v. State*, 323 Ark. 116, 913 S.W.2d 264 (1996); *Heard v. State*, 322 Ark. 553, 910 S.W.2d 663 (1995).

A *prima facie* case may be established by: (1) showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose, (2) demonstrating total or seriously disproportionate exclusion of blacks from the jury, or (3) showing a pattern of strikes, questions, or statements by a prosecuting attorney during *voir dire*. *Sonny v. Balch Motor Co.*, 328 Ark. 321, 944 S.W.2d 87 (1997); *Wooten v. State, supra*. The standard of review for reversal of a trial court's *Batson* ruling is whether the trial court's findings are clearly against the preponderance of the evidence. *Id.* We have observed in this regard that "the trial court [is] in a good position to determine whether th[e] reason was genuine or pretextual." *Sonny v. Balch Motor Co.*, 328 Ark. at 330, 944 S.W.2d at 92, *quoting Hernandez v. New York*, 500 U.S. 352, 365 (1991).

At trial, Green objected to the State's use of peremptory strikes against two potential African-American jurors. One of

these jurors was Ruthie Hadley, whom the State sought to strike because she appeared to sleep 75 percent of the time through one previous trial and 98 percent of the time in another. Both of these trials were before the same trial court. The prosecutor offered to the trial court that he did not want a person with this history to sit on a capital-murder case. The court overruled the *Batson* objection and stated: "And I recall that that's one of the problems with this particular juror and I also recall that this juror was late both days of court and appears to have very little interest in the process."

The second potential juror was Frank McFadden, whom the State initially sought to strike because he had philosophical objections to the death penalty and stated that he was predisposed to sentencing a criminal defendant to life without parole. The trial court overruled the motion to strike for cause and determined that McFadden intimated that he could consider the death penalty under certain circumstances despite his philosophical opposition. When the State exercised its peremptory strike, a *Batson* objection was raised, and the prosecutor stated as his race-neutral explanation the same arguments made in support of his motion to strike. The trial court ruled that the explanation was sufficient.

We have held that there is no need for the prosecutor to give an explanation sufficient to strike a juror for cause. *Prowell v. State, supra.* Under these facts, we are not convinced that the trial court's rulings were clearly against the preponderance of the evidence. *Sonny v. Balch Motor Co., supra.* This point with respect to both jurors has no merit.

IV. Misdemeanor Weapon Conviction

At trial, Green testified on cross-examination by the prosecutor that before January 7, 1995, he owned a handgun but did not carry it outside the house. The prosecutor sought to impeach his credibility with a certified copy of a 1992 misdemeanor judgment of conviction for possession of a weapon. Green's only objection was that the misdemeanor conviction was irrelevant. The prosecutor answered that the evidence was in response to Green's statement that he kept loaded guns in his house only to defend his

home. Green's objection was overruled, and Green denied knowledge of the misdemeanor conviction.

On appeal, Green argues that the prior misdemeanor conviction should not have been allowed into evidence under Rule 609 of the Arkansas Rules of Evidence. He admits that the only argument raised against its admission at trial was to relevance but urges now that "[the objection] was not well put, but it sufficiently apprised the trial court of what the complaint with the evidence was."

Arkansas law is clear that an appellant may not change arguments on appeal. *See, e.g., Foreman v. State*, 328 Ark. 583, 945 S.W.2d 926 (1997); *Stephens v. State*, 328 Ark. 81, 941 S.W.2d 411 (1997); *Brown v. State*, 326 Ark. 56, 931 S.W.2d 80 (1996). We conclude that that is what has occurred in relation to the misdemeanor conviction. Consideration of this point is procedurally barred.

V. Identification of Police Officers

During Green's direct testimony, he testified that he did not hear officers shout their identity prior to breaking down the door. He was then asked by defense counsel: "If you'd have heard it, what would you have done?" The prosecutor objected for the reason that an answer would have called for speculation. The trial court sustained the objection. Green did not proffer a response into the record, and his argument on appeal is that the trial court violated his Fourteenth Amendment due-process rights because he was prevented from fully presenting his case.

The State argues failure to proffer the response as rebuttal to Green's point. In order to challenge a ruling on excluded evidence, an appellant must proffer the excluded evidence so that the decision can be reviewed unless the substance of the evidence is apparent from the context. *Tauber v. State*, 324 Ark. 47, 919 S.W.2d 196 (1996); *Davis v. State*, 319 Ark. 460, 892 S.W.2d 472 (1995). We believe that here the content of Green's response can be gleaned from the defense he offered at trial — he would not have shot the men had he known they were police officers. Indeed, Green testified on direct examination that he had

no idea he was shooting at police officers. We decline to decide this point on failure to proffer a response.

This court, however, does not reverse a judgment of conviction absent prejudicial error. *See, e.g., Jefferson v. State*, 328 Ark. 23, 941 S.W.2d 404 (1997). We fail to discern reversible error under these circumstances when Green had already made it clear that he did not know the men were police officers and did not intend to kill anyone. This point is without merit.

VI. Second-Degree Murder Instruction

At the jury-instruction conference, the trial court was faced with the issue of which version of AMCI 2d 1003 to give to the jury on the lesser-included offense of second-degree murder. The prosecutor sought and received the version of the second-degree murder instruction requiring proof that appellant "knowingly caused the death of Detective Joseph Tucker Fisher under circumstances manifesting extreme indifference to the value of human life." Green, however, asked for the alternative language in the second-degree murder instruction that Green "with the purpose of causing serious physical injury to another person, caused the death of Joseph Tucker Fisher." Green's requested instruction was denied, and he proffered it into the record. Both instructions contain correct statements of the law.

At the conference, the following colloquy occurred surrounding the two instructions:

THE COURT:	Which one's correct?
PROSECUTOR:	I would submit that the one that we submitted. The one that says, knowingly caused the death, et cetera, under circumstances manifesting, et cetera, et cetera, is the correct one because under the submitted one by defense counsel it says, with the purpose of causing serious physical injury to another person. The testimony by the defendant is that he was not trying to shoot anybody, I don't see how he

	could form the purpose of hurting that one individual —
DEFENSE COUNSEL:	Well, that's —
THE COURT:	I think he's right on that.

The trial court noted that Green's defense was that he was only shooting in the direction of the door as opposed to shooting at a particular person.

Green's testimony was that he had been robbed the previous month; that he maintained a loaded gun for protection; that he believed he was again being robbed when the police burst in; and that he did not intend to shoot anyone and only hoped to scare away the intruders. On appeal, the State again submits that Green's denial of an intent to shoot anyone negates the possibility that he had the purpose of causing serious physical injury to another person, and that the instruction Green requested was not required to be given. In support of its position, the State cites *Vickers v. State,* 313 Ark. 64, 852 S.W.2d 787 (1993), a case that stands for the well-established principle that a party cannot assert a complete denial of the offense and at the same time insist that a rational basis exists for instructing on a lesser-included offense.

This is not a case, though, where the issue is whether a rational basis exists to give an instruction on a lesser offense. *See, e.g., Brown v. State*, 325 Ark. 504, 929 S.W.2d 146 (1996); *Vickers v. State*, 313 Ark. 64, 852 S.W.2d 787 (1993); *Fladung v. State*, 292 Ark. 510, 730 S.W.2d 901 (1987). An instruction on the lesser offense of second-degree murder was given. Rather, this is a case involving which alternative paragraph of AMCI 2d 1003, the second-degree murder instruction, should have been given. This appears to be a case of first impression for this court.

We conclude that the trial court did not err in instructing the jury as it did. There is first the fact that it does seem inherently inconsistent for Green to testify that he did not shoot at anyone and then request an instruction that "with the purpose of causing serious physical injury to another person," he caused the death of Detective Fisher. Moreover, evidence was presented supporting the instruction that Green killed the police

officer under circumstances manifesting extreme indifference to the value of human life. For example, Green shot five times and hit two police officers. We are further mindful of the fact that the jury returned a verdict of guilty for first-degree murder, which included purposeful murder of Detective Fisher as an element of the offense. Under these circumstances, we cannot say that it was reversible error for the trial court to instruct the jury as it did.

The record has been examined under Ark. Sup. Ct. R. 4-3(h) for reversible error, and none has been found.

Affirmed.

NEWBERN, CORBIN, and IMBER, JJ., dissent.

DONALD L. CORBIN, Justice, dissenting. I respectfully dissent because I believe that the trial court committed reversible error in failing to give the requested jury instruction on second-degree murder. I am concerned that the majority is establishing a new test for determining whether an instruction on a lesser-included offense is warranted without bothering to explain why the old "rational basis" test is not applicable.

The majority has concluded that when instructing on lesser-included offenses, a trial court must choose between alternate versions of an offense, even though, arguably, each version may be applicable to the facts in evidence. To my knowledge, that has never been the law in this State. The long-established test for instructing on lesser-included offenses is provided in Ark. Code Ann. § 5-1-110(c) (Supp. 1995):

> The court shall not be obligated to charge the jury with respect to an included offense *unless* there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense. [Emphasis added.]

This court has repeatedly held that it is reversible error to refuse to give an instruction on a lesser-included offense *when the instruction is supported by even the slightest evidence*. *Spann v. State*, 328 Ark. 509, 944 S.W.2d 537 (1997); *Brown v. State*, 325 Ark. 504, 929 S.W.2d 146 (1996); *Rainey v. State*, 310 Ark. 419, 837 S.W.2d 453 (1992). This court will affirm a trial court's decision to exclude an instruction on a lesser-included offense *only if* there

is no rational basis for giving the instruction. *Spann*, 328 Ark. 509, 944 S.W.2d 537. Stated another way, where a rational basis for a verdict of acquittal on the greater offense and conviction on the lesser offense exists, the trial court should instruct on the lesser offense, and it is reversible error not to do so. *Brown*, 325 Ark. 504, 929 S.W.2d 146. Notwithstanding the fact that the defendant claims to have acted in self-defense, the decision to give an instruction on a lesser offense still turns on a determination of whether there is a rational basis for the instruction. *Vickers v. State*, 313 Ark. 64, 852 S.W.2d 787 (1993).

The majority attempts to distinguish this case by analyzing the issue in terms of *which* alternative paragraph of the second-degree-murder instruction should have been given. Why should the trial court have to make such a choice? I can see no reason why we are not reviewing this issue in terms of whether there was a rational basis for giving the proffered instruction. Clearly, there are situations in which more than one alternative version of a lesser-included offense is supported by the facts in evidence. In other words, a rational basis may exist for instructing on more than one version of an offense. This is one of those cases. Applying the "rational basis" test to the facts of this case, I cannot escape the conclusion that the trial court committed reversible error in refusing to give the proffered instruction.

Appellant contended below that the evidence warranted an instruction on second-degree murder on the theory that Appellant acted with the purpose of causing serious physical injury to another person in causing the death of Officer Fisher. The trial court rejected that instruction, electing instead to instruct the jury that in order to convict Appellant of second-degree murder, the State must prove beyond a reasonable doubt that Appellant knowingly caused the officer's death under circumstances manifesting extreme indifference to the value of human life. Appellant argues that it was reversible error for the trial court to refuse the proffered instruction. I agree.

The State argues that there was no rational basis for giving the proffered instruction on second-degree murder because Appellant denied any intent in firing at the officers. That argu-

ment is inconsistent with the fact that Appellant was convicted of the first-degree murder of Officer Fisher, on a theory that he had acted with the purpose of causing the death of another person. Clearly, if there was a rational basis for instructing the jury on Appellant's *purpose in causing the death of another person*, then there was an equally rational basis for instructing the jury on Appellant's *purpose in causing serious physical injury to another person.* The State cannot contend on the one hand that the proof will not support a finding that Appellant acted with the purpose of seriously injuring someone and, on the other hand, assert that the proof supports the *greater* finding that Appellant acted with the purpose of killing someone.

In accordance with the State's argument, the majority states that it is inherently inconsistent for Appellant to testify that he did not shoot at anyone and then request the instruction that with the purpose of causing serious physical injury to another person, he caused the death of Officer Fisher. That, however, is not the correct test. Since when has the determination of whether the proof supports a particular jury instruction depended upon only that evidence produced or claimed by the defendant? The proof either warrants the instruction or it does not. In *State v. Jones*, 321 Ark. 451, 903 S.W.2d 170 (1995), the State appealed the trial court's refusal to instruct on the lesser-included offenses of second-degree murder and manslaughter, based on the trial court's rationale that if the defendant wanted to gamble between being convicted of the offense charged or being acquitted outright, it was his choice. This court declared error, holding that section 5-1-110(c) does not delegate the decision regarding the propriety of a lesser-included-offense instruction to the defendant, but, requires the trial court to determine whether the proffered instruction concerns a lesser-included offense and, if so, whether a rational basis exists for a verdict acquitting the defendant of the greater offense and convicting him of the lesser. Thus, the majority's reasoning that the evidence presented *by the defense* did not support the giving of the proffered instruction is flawed, because it is not for the defense to determine whether there exists a rational basis for an instruction on a lesser-included offense.

Here, the proof presented by both parties would have supported the jury's conclusion that Appellant acted with the purpose of causing serious physical injury to the persons entering his home. This is evident from the testimony by Appellant and his girlfriend, as well as some of the State's witnesses, that Appellant had been robbed one month earlier by a group of persons wearing dark clothing, who broke down his door and proceeded to rob him and his guests at gunpoint; that Appellant believed that the officers, who were wearing dark clothing instead of police uniforms, were the same or similar persons who had robbed him one month ago; that Appellant grabbed his gun and began firing in the direction of the door when he heard the door being broken down; that Appellant fired until his gun was empty; and that one officer was dead and another wounded by Appellant's actions in firing the gun. From that evidence, the jury could reasonably have concluded that Appellant was shooting at the intruders, believing them to be robbers, in an attempt to injure them.

Because I believe that there was evidence presented by both sides from which the jury could have determined that Appellant killed Officer Fisher having the intent to cause serious physical injury to another person, I would reverse the conviction and remand for a new trial.

NEWBERN and IMBER, JJ., join in this dissent.

Larry Joe KIDD *v.* STATE of Arkansas

CR 97-586 955 S.W.2d 505

Supreme Court of Arkansas
Opinion delivered November 6, 1997

Madison P. Aydelott, III, for appellant.

Winston Bryant, Att'y Gen., by: *Sandy Moll*, Asst. Att'y Gen., for appellee.

ROBERT L. BROWN, Justice. Appellant Larry Joe Kidd was convicted of raping a fourteen-year-old girl and sentenced to forty years in prison. He appeals on two grounds: (1) trial court error in allowing into evidence Kidd's comments which were unduly prejudicial and concerned other bad acts; and (2) trial court error in permitting privileged confidential communications between Kidd and his wife into evidence. The two points are meritless, and we affirm.

The facts in this case are assembled from trial testimony. The fourteen-year-old victim testified that the events occurred in her mobile home in Searcy. On April 28, 1996, she went to bed at about 11:00 p.m. During the night, she heard a person enter her room but assumed it was her mother. A man wearing a ski mask put a pillow over her face and told her to keep quiet. She fought and scratched at the man's face underneath the mask. The man began to choke her and told her that if she fought any more, he would cut her ear off. He bound her wrists and covered her mouth with duct tape. After doing that, he removed the bottoms of her pajamas and underwear and had sexual intercourse with her against her will. She testified that during the rape, the man raised the mask over his eyes, which allowed her to see that he had a fairly close-cut beard. She also testified that the man wore surgical

gloves and removed one of them so he could scrape underneath her fingernails with his fingernail. He said at the time: "I got to get this out from under you so they don't know who I am." The victim said that she struggled with the man throughout the rape.

Once the man left, the victim removed the duct tape from her mouth and called 911 for police assistance though her hands were still bound. The call was forwarded to Deputy Sheriff Randy Still at 3:43 a.m. on the morning of April 29, 1996. The victim waited in the living room of her mobile home until Deputy Still arrived. According to Deputy Still, the victim's hands were bound in front, and she was bleeding from the vaginal area. He first checked on the condition of the victim's mother, who had not been harmed. The victim later told the deputy sheriff that her attacker was a heavy-set man with a close-cropped beard who had bad body odor. She added that he was wearing work boots, a pair of dark pants, and a black ski mask.

The victim was taken to the White County Medical Center for a sexual-assault examination. Dr. Christopher Melton, who performed the examination, testified that there were signs of trauma to the victim's neck and that the presence and location of blood were consistent with the victim's hymen being torn. In his opinion, she had been subjected to a sexual assault.

After the victim returned from the hospital but on the same day, Kidd, who was a neighbor, came to the front door of the mobile home and told the mother of the victim that he was "all doped up" and that he needed medical attention because he had just fallen through a window. Although she could not see Kidd standing outside of her mobile home, the victim testified that she recognized his voice as that of the man who had raped her.

At the crime scene, Deputy Still found tool marks on the front door of the mobile home, indicating that it had been pried open. He further found a footprint outside of the victim's window. Later that day, Detectives Curtis Goodrich and Bill Lindsey of the White County Sheriff's Department went to Kidd's home, where they found him leaving his garage. He had scratches on his face. Kidd agreed to go to the sheriff's department to answer questions, and he did so, accompanied by his wife, Paula Kidd.

Once there, he waived his right to counsel and gave a statement. He also gave the detectives permission to search his residence and allowed them to take samples of his hair, blood, and saliva.

In the first statement Kidd gave on April 29, 1996, he denied any culpability for the rape. He told the detectives that he was taking Prozac and Buzbar for an anxiety condition and was under the care of a physician. He stated: "About two years ago, I was having problems. I hated women, and I thought about rape." Upon searching Kidd's home, the detectives discovered a broken window, which Kidd said caused the scratches on his face because he slammed his head through it that morning. Detective Goodrich testified that he saw no evidence of blood on the broken glass. The detectives later were given dark work pants and work boots by Paula Kidd. A black ski mask was subsequently recovered from Kidd's residence.

On June 19, 1996, Detective Goodrich and Detective Lindsey questioned Kidd a second time. Kidd again denied having raped the victim and stated that he hardly knew her. When told by Detective Goodrich that the victim had said her attacker had a bad problem with body odor, he admitted that he had such a problem. Detective Goodrich then related to the jury: "I asked him while he was standing by the victim's bed, did he have an erection or did he have to have foreplay to get an erection, and he stated he couldn't remember." When asked by the detective whether he told anybody about raping the girl, Kidd said that he had told his preacher that he could have done it. He also stated that he thought about rape and killing in the past and that he had followed people home after work. He added that he had previously been accused of rape in the 1980s on a North Dakota Indian Reservation. He stated that he had had sexual relations with the girl on the reservation but later found out that she was a prostitute and wanted nothing further to do with her. According to Kidd, she accused him of rape as a result. He stated that he was arrested and questioned by police officers but later released.

Edward Valman, chief forensic serologist at the Arkansas State Crime Laboratory, testified that he received the victim's rape kit and found semen, but not sperm, on the vaginal swab. Kermit

Channell, section chief of the State's DNA Laboratory, stated that he tested the vaginal swab but found only DNA consistent with the victim because there were no sperm cells. He testified that the finding of semen without the presence of sperm cells was consistent with the semen's having been deposited by a person who had had a vasectomy.

Paula Kidd, Kidd's former wife, testified that Kidd had had a vasectomy soon after they were married approximately seven years earlier. She further testified that during the early morning hours of April 29, 1996, she was awakened at about 1:30 a.m. by a storm. Kidd was in bed at that time. She said that she woke up again at 3:00 a.m. but noticed that he was not in bed and was nowhere in the house.[1] At 5:00 a.m., Kidd had returned to bed, when she received a telephone call from her sister. Her sister, who was also a neighbor, told her about the rape. Hours later, she noticed that Kidd's face had several scratches that were not there at 1:30 a.m. She also testified that Kidd took a shower that day at 6:00 a.m., which was very unusual because he typically did not get out of bed until 10:00 a.m. She stated that she found his blue work pants and work shirt and a wash cloth in the clothes washer, which was unusual, too, because she normally did the laundry and because he had plenty of clean clothes to wear to work.

I. Prejudicial Statements

Kidd first contends that the trial court erred in denying his motion for declaration of a mistrial because certain portions of his two statements to the detectives were highly prejudicial, irrelevant, and constituted proof of prior bad acts, all of which violated Rules 402, 403, and 404(b) of the Arkansas Rules of Evidence. Specifically, he refers to the assertion taken from his April 29, 1996 statement: "About two years ago, I was having problems. I hated women and I thought about rape." In addition, he contests two references in his June 19, 1996 statement: (1) that he had thought about rape and killing in the past and followed people home from

[1] She admitted that she previously told detectives that Kidd was in bed at 3:00 a.m. in order to protect her husband, who she assumed was innocent at the time. They divorced on October 3, 1996, and she recanted her previous statement.

work; and (2) that he had been accused of rape on a North Dakota Indian Reservation during the 1980s.

The procedural history of Kidd's objections and motions in the trial court in regard to these comments is necessary to decide this first point. Although the abstract of the mistrial motion makes only a cryptic reference to the fact that Kidd's counsel had previously made an objection on this point, the record discloses that immediately prior to trial, Kidd objected to any statements he made about having thoughts of rape and killing and of following people home from work. The basis for defense counsel's objection was that these comments were more prejudicial than relevant under Rule 403 of the Arkansas Rules of Evidence. The trial court overruled the objection.

At trial, the trial court took a recess at the end of the first day of testimony after the conclusion of Detective Goodrich's direct examination, which included testimony about Kidd's two statements given on April 29, 1996, and June 19, 1996. The following day before cross-examination began, defense counsel moved for a declaration of a mistrial because the comments by Kidd in the two statements which are contested in this appeal were admitted into evidence in violation of Rules 402 and 403 of the Arkansas Rules of Evidence. The trial court ruled that the comments were made by Kidd after a valid waiver of his rights and should not be deleted from his statements under Rule 402 or Rule 403.

■ We first conclude that Kidd made no argument to the trial court that his comments in his two statements in contention in this appeal constituted proof of prior bad acts under Rule 404(b). That argument, accordingly, is procedurally barred. *Henderson v. State*, 329 Ark. 526, 953 S.W.2d 26 (1997); *Evans v. State*, 326 Ark. 279, 931 S.W.2d 136 (1996); *Campbell v. State*, 319 Ark. 332, 891 S.W.2d 55 (1995).

■ Next, we address whether Kidd's motion for declaration of a mistrial the following day after Detective Goodrich's direct examination was timely. We do not think that it was because the motion was not made at the first opportunity to do so. *See Smallwood v. State*, 326 Ark. 813, 935 S.W.2d 350 (1996). *See also Whitney v. State*, 326 Ark. 206, 930 S.W.2d 343 (1996); *Jones*

v. State, 326 Ark. 61, 931 S.W.2d 83 (1996). Had defense counsel objected or made the motion for declaration of a mistrial at the first opportunity during Detective Goodrich's direct examination, steps might have been taken by the trial court to admonish the jury or strike the testimony. We hold that defense counsel simply failed to move in timely fashion for a remedy and, therefore, ran afoul of our rule requiring objections or motions to be made at the time the objectionable matter is brought to the jury's attention. *See, e.g., Smallwood v. State, supra.* The failure to object at the first opportunity disposes of the allegedly prejudicial comments made in Kidd's April 29, 1996 statement and the rape allegation on the Indian reservation contained in his June 19, 1996 statement.

This leaves the question of Kidd's comments about his having thoughts of rape and killing, and following people home from work, which were also contained in his June 19, 1996 statement and which formed the basis for his Rule 403 objection just prior to trial. Before trial, the trial court overruled his objection. Because the objection was in the nature of a motion *in limine*, we deem the issue to be preserved for our review. *See Neal v. State*, 320 Ark. 489, 898 S.W.2d 440 (1995); *Massengale v. State*, 319 Ark. 743, 894 S.W.2d 594 (1995).

Again, Kidd's abstract only makes a glancing reference to the fact that this issue had been previously raised to the trial court. Nevertheless, we choose to address it. On the merits Kidd cannot prevail on this point. Even assuming that these comments were not relevant and were unduly prejudicial under Rule 403, the evidence presented of Kidd's guilt at trial, albeit circumstantial, was overwhelming. This court has stated in the past that when the evidence of guilt is overwhelming, slight errors in the introduction of evidence do not constitute reversible error. *Hicks v. State*, 327 Ark. 652, 941 S.W.2d 387 (1997); *Abernathy v. State*, 325 Ark. 61, 925 S.W.2d 380 (1996); *Rockett v. State*, 318 Ark. 831, 890 S.W.2d 235 (1994); *Greene v. State*, 317 Ark. 350, 878 S.W.2d 384 (1994).

Here, the evidence of Kidd's guilt is significant enough to render any error harmless. There was the victim's physical

description of her attacker as a large man with a close-cropped beard and with pronounced body odor. There was the victim's identification of Kidd's voice. There were the scratches on Kidd's face that had not been there at 1:30 a.m., according to his former wife, but were there later that same day. There were the work boots, dark pants, and ski mask which the attacker wore and which belonged to Kidd. There was the footprint outside the victim's window which matched Kidd's work boot. There was the absence of sperm in the vaginal swab which corresponded with Kidd's vasectomy. And there was Kidd's unusual behavior during the early morning hours of April 29, 1996, when he showered and washed his clothes.

We conclude that there was no reversible error on this point.

II. Confidential Communications

During the investigation which led to Kidd's arrest and subsequent prosecution, his then wife, Paula Kidd, cooperated extensively with the sheriff's detectives. All told, she gave five statements to the detectives that included communications between her husband and her, such as his revelation that he had been having dreams about doing "bad things" to women. Paula Kidd provided the detectives with a significant amount of evidence, including the black ski mask and his dark pants and work boots, that tended to prove her former husband's guilt. In the words of Detective Goodrich, the assistance provided by Paula Kidd was "instrumental."

Prior to trial, Kidd made several motions regarding marital privilege in connection with Paula Kidd's statements to the detectives. The trial court denied the motions. On appeal, Kidd's argument does not focus on Paula Kidd's testimony at trial because she did not testify as to any confidential communications with him. Rather, his argument is premised on the fact that Detective Goodrich succeeded in having him admit to having had thoughts of rape and killing because Paula Kidd told Detective Goodrich that he had been having these disturbing dreams. Otherwise, the detective would not have known to broach this subject to him, according to Kidd's theory. In sum, Kidd con-

tends that Detective Goodrich testified that Kidd told him certain things due to information gleaned from Paula Kidd when she herself could not have testified at trial.

This issue is resolved by Rule 504(b) of the Arkansas Rules of Evidence, which provides that "[a]n accused in a criminal proceeding has a privilege to prevent his spouse from testifying as to any confidential communication between the accused and the spouse." As this court stated in *Halfacre v. State*, 292 Ark. 331, 334, 731 S.W.2d 179, 180 (1987), "Rule 504 is a rule of evidence providing a *testimonial* privilege to an *accused* in a *criminal proceeding*." *Id.* (emphasis in original). In *Halfacre*, which involved the appellant's conviction for aggravated robbery, we held that the marital privilege did not render the appellant's arrest illegal, when his wife contacted police officers and told them that the appellant had just stated to her that he robbed a local hotel. This court noted that the protections of Rule 504 did not attach because the criminal proceedings had not begun when the wife reported her husband's statement to police officers and because she did not testify at trial regarding the confidential communication. *Id.*

In the instant case, as in *Halfacre*, Paula Kidd did not testify at trial about any confidential communications made by Kidd. Thus, Rule 504(b), on its face, does not apply.

Affirmed.

Lynn TOLIVER *v.* STATE of Arkansas

97-693 953 S.W.2d 887

Supreme Court of Arkansas
Opinion delivered November 6, 1997

Jerry Larkowski, for appellant.

Winston Bryant, Att'y Gen., by: *Sandy Moll*, Asst. Att'y Gen., for appellee.

ANNABELLE CLINTON IMBER, Justice. This is a juvenile-transfer case. We affirm the trial court's denial of the appellant's motion to transfer to juvenile court.

On February 6, 1997, Lynn Toliver was charged in Pulaski County Circuit Court with aggravated robbery, kidnapping, and

theft of property.[1] Toliver was sixteen years of age at the time of the alleged offenses, and moved to transfer the charges to juvenile court. At the transfer hearing, Toliver testified that his mother had contacted his high school, which would allow him back in if his case was transferred to juvenile court. Toliver added that if his case was transferred, he was willing to work with the people in juvenile court to rehabilitate himself and turn his life around. When asked why he wanted his case transferred, Toliver answered, "Because I don't think I could handle it. . . I don't think I can handle the adults going down there to the big place." On cross-examination, Toliver explained that he had been "involved in juvenile court" in 1992 and 1993 on a theft of property charge, which resulted in his placement on probation.

The State's only witness was Jim Potter, a homicide detective with the Pulaski County Sheriff's office who investigated an aggravated robbery perpetrated against a cab driver named Elton White on November 27, 1996. Potter stated that on that date, White was called to pick up a fare when three males entered his cab with firearms, told him to drive to a dead-end street, and robbed him of his money at gunpoint. At the time White had a friend in the front-passenger seat, Amanda Beasley. According to Potter, Beasley said that one of the persons in the back seat held a gun on White, while another held a gun on her. When they arrived at the dead-end street, around $40 and other items were removed from the cab, including its radio. White and Beasley were then forced out of the cab and to the ground at gunpoint, and Beasley was kicked several times.

Potter developed Toliver, Djuane Thompson, and Ytun Butler as suspects, and determined that Toliver and Butler had held guns on the victims. Toliver eventually gave a statement to Potter where he admitted to his presence in the cab with a handgun, but

[1] Count two of the information filed against Toliver shows that he was charged with misdemeanor theft of property under Arkansas Code Annotated § 5-36-103 (Supp. 1995). Neither party addresses the jurisdictional issue implicated when a sixteen-year-old juvenile is charged with a misdemeanor in circuit court. *See* Ark. Code Ann. § 9-27-318(b)(1) (Supp. 1995). However, an April 25, 1997, docket-sheet entry shows that "Misdemeanor Count 2" was dismissed. Thus, we treat this case as an appeal from the denial of transfer on the aggravated robbery and kidnapping charges.

denied that he produced the gun. Instead, Toliver stated that he rolled his jacket sleeve over his hand and made gestures toward Beasley as if he had a handgun. Toliver added that the victims were taken to a dead-end street, money was taken, and he witnessed another person kick Beasley.

Following the presentation of this evidence, without objection, and argument from counsel, the trial court denied the motion to transfer. Toliver brings this interlocutory appeal from the denial of his transfer motion. For his only point on appeal, Toliver argues that no clear and convincing evidence existed warranting that he be tried as an adult in circuit court. Toliver primarily relies on cases such as *Green v. State*, 323 Ark. 635, 916 S.W.2d 756 (1996), *Blevins v. State*, 308 Ark. 613, 826 S.W.2d 265 (1992), and *Pennington v. State*, 305 Ark. 312, 807 S.W.2d 660 (1991), which generally hold that seriousness alone is not a sufficient basis for the denial of a transfer motion. Toliver in turn reasons that the State failed to come forward with "countervailing evidence" to reflect negatively on the second and third statutory factors found in Ark. Code Ann. § 9-27-318(e) (Supp. 1995) concerning his history and prospects for rehabilitation. Toliver's reliance on these cases is misplaced, and his argument reflects a misunderstanding of this court's interpretation of the juvenile code and our applicable standard of review.

We have repeatedly stated that the trial court does not have to give equal weight to the statutory factors found in Ark. Code Ann. § 9-27-318(e) in ruling on a transfer motion. *McClure v. State*, 328 Ark. 35, 942 S.W.2d 243 (1997); *Maddox v. State*, 326 Ark. 515, 931 S.W.2d 438 (1996). Moreover, the State is not required to present proof as to each statutory factor. *McClure, supra*; *Lammers v. State*, 324 Ark. 222, 920 S.W.2d 7 (1996). On appellate review, we will not overturn the trial court's determination unless it was clearly erroneous. *Brooks v. State*, 326 Ark. 201, 929 S.W.2d 160 (1996); *Carroll v. State*, 326 Ark. 602, 932 S.W.2d 339 (1996).

In the present case, Toliver's argument fails because it ignores the serious nature of the crimes charged, and the evidence

of the use of violence in the commission of these serious offenses.[2] Given the presence of these two factors, this court has often declined to find that a trial court was clearly erroneous in denying transfer. *See, e.g., Kindle v. State*, 326 Ark. 282, 931 S.W.2d 117 (1996) (affirming denial of transfer where the victim testified that the appellant held a loaded pistol to his head and attempted to pull the trigger); *Guy v. State*, 323 Ark. 649, 916 S.W.2d 760 (1996) ("It is of no consequence that appellant may or may not have personally used a weapon, as his association with the use of a weapon in the course of the crimes is sufficient to satisfy the violence criterion."); *Cole v. State*, 323 Ark. 8, 913 S.W.2d 255 (1996) (affirming denial of transfer of aggravated assault and possession of handgun on school property charges where appellant threatened the victim with a gun). In the present case, Detective Potter presented evidence that at least two of the perpetrators produced firearms. While at gunpoint, the victims were forced to drive to a dead-end street, money was taken from White, and both victims were forced to the ground where Beasley was kicked. Potter determined that Toliver and Butler were the "gun-holding suspects." According to Potter, Toliver admitted to his presence in the vehicle, with a handgun, while the offenses occurred. Given the serious nature of the crimes charged, and the evidence supporting the employment of violence during the commission of these offenses, the trial court was not clearly erroneous in denying the transfer motion.[3]

Affirmed.

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[2] Toliver appears to take the position that the trial court's failure to make a specific finding that the offenses were "serious and violence was employed" precludes reliance on the first statutory factor, Arkansas Code Annotated § 9-27-318(e)(1). However, specific findings of fact from the trial court in juvenile-transfer cases, while helpful for our review, are not required. *Lammers v. State*, 324 Ark. 222, 920 S.W.2d 7 (1996); *Booker v. State*, 324 Ark. 468, 922 S.W.2d 337 (1996).

[3] While Toliver makes reference to this court's caveat in *Sanders v. State*, 326 Ark. 415, 932 S.W.2d 315 (1996), against mere reliance on the criminal information in juvenile-transfer cases, the present case is notably different because the State presented evidence supporting the charges.

George HANKINS *v.* DEPARTMENT of FINANCE and ADMINISTRATION; and Lawyers Surety Corporation

96-1465 954 S.W.2d 259

Supreme Court of Arkansas
Opinion delivered November 6, 1997
[Petition for rehearing denied December 11, 1997.]

Diana M. Maulding, for appellant.

Brandon Lee Clark and *Daniel Scott Smith*, for appellee DF&A.

Joel Taylor, for appellee Lawyers Surety Corp.

RAY THORNTON, Justice. This is a second review of this controversy. In 1991, George Hankins, appellant, obtained a default judgment against Larry McElroy for $25,869, on the basis of losses sustained from unpaid promissory notes together with losses of $1,000 relating to the sale of a Camaro and $1150 relating to the sale of a GMC truck. In an attempt to recover the McElroy judgment, Hankins sought a declaratory judgment against Lawyers Security Company, the surety, for a $25,000 bond required for McElroy as a motor-vehicle dealer. Lawyers offered to settle the claim by paying Hankins $2115 pursuant to Ark. R. Civ. P. 68. Hankins did not accept the offer. The trial court in its declaratory judgment ruled against Hankins, finding that the bond could not be used to satisfy appellant's judgment.

On appeal, we reversed and dismissed without prejudice because Hankins had not exhausted available administrative remedies. We held that the appropriate remedy was to seek payment under the bond by presenting the default judgment to the Depart-

ment of Finance & Administration (DF&A) pursuant to Ark. Code Ann. § 23-112-603 (Supp. 1995). *Hankins v. McElroy*, 313 Ark. 394, 855 S.W.2d 310 (1993) (*Hankins I*).

Hankins renewed his efforts to collect his default judgment by seeking administrative relief from DF&A and a hearing was held on September 7, 1994, before an administrative law judge. Hankins argued that Lawyers was liable on the bond because McElroy's actions in incurring the debts were sufficient to warrant the suspension or revocation of his car dealer's license under the provisions of Ark. Code Ann. § 23-112-302, which provides for recovery of such bonds. The ALJ found that the transactions between McElroy and Hankins were personal debts between businessmen and not sufficient reason to cause suspension or revocation of the license.

Hankins appealed the adverse decision to the circuit court, which sustained the agency decision. The court granted DF&A's motion to be reimbursed for costs of producing the transcript pursuant to Ark. Code Ann. § 25-15-212(d)(2) (Repl. 1996). On August 13, 1996, Lawyers' attorney moved to recover costs pursuant to Ark. R. Civ. P. 68, which allows recovery of costs by an offeror of judgment "[i]f the judgment exclusive of interest from the date of offer finally obtained by the offeree is not more favorable than the offer . . . . " The court denied the motion.

While Hankins's attorney was abstracting the record for review by this court, it was discovered that portions of it were missing. On March 3, 1997, the circuit judge issued an order settling the record and the ALJ's order was added. The circuit judge noted in a cover letter that the transcript of the administrative hearing did not contain all of the testimony and that the missing portions of the record of the administrative hearing were not in the material considered by the circuit court; therefore, the record could not be completed from the circuit court. Hankins did not seek to settle the record at the agency level.

Hankins argues on appeal that the circuit court erred: (1) in failing to consider the entire record of the administrative proceeding; (2) in upholding the ALJ's order; and (3) in granting DF&A judgment against him for costs in producing the transcript. Law-

yers cross-appeals the denial of costs. None of the arguments has merit, and we affirm.

We now proceed to review the issues before us in this appeal. Hankins argues that the circuit court erred in failing to consider the entire record of the administrative proceeding, and in upholding the ALJ's order. These arguments appear to be based upon the premise that we review the circuit court's decision in an appeal from a proceeding by an administrative agency. This premise is incorrect. In an appeal from an administrative order, our review is directed to the agency's decision, not the circuit court's. *Brimer v. Arkansas Contractors Lic. Bd.*, 312 Ark. 401, 849 S.W.2d 948 (1993). However, we cannot review the agency's decision in this case because we do not have the complete record before us. It is incumbent upon an appellant to bring up a record sufficient to show error. *Winters v. Elders*, 324 Ark. 246, 920 S.W.2d 833 (1996). Our rules of appellate procedure provide a remedy for settling an incomplete or inaccurate record. Rule 6 of the Arkansas Rules of Appellate Procedure provides in pertinent part as follows, "If any difference arises as to whether the record truly discloses what occurred in the trial court, the difference shall be submitted to and settled by that court and the record made to conform to the truth." Hankins did not avail himself of this remedy.

The portion of the record that we have before us indicates that there were exhibits and testimony that are missing. Hankins bases much of his argument for reversal of the agency's decision upon these missing exhibits and testimony. It was his obligation to ensure that the record be made complete so that we could reach his arguments. Because he did not do so, he has not met his burden of producing a record sufficient for our review, *Grinning v. City of Pine Bluff*, 322 Ark. 43, 907 S.W.2d 690 (1995); therefore, we summarily affirm the agency's decision.

We next address Hankins's contention that the trial court erred in ordering him to pay the costs of the record. He argues that, although DF&A was the prevailing party, it did not transmit the entire record to circuit court. Arkansas Code Annotated § 25-15-212 provides in pertinent part:

> (d)(1) Within thirty (30) days after service of the petition or within such further time as the court may allow, but not exceeding an aggregate of ninety (90) days, the agency shall transmit to the reviewing court the original or a certified copy of the entire record of the proceeding under review.
>
> (2) The cost of the preparation of the record shall be borne by the agency. However, the cost of the record shall be recovered from the appealing party if the agency is the prevailing party.

Id. § 25-12-212(d)(1)-(2) (Repl. 1996). The record shows that DF&A ordered and paid for a transcript of the entire record. Again, it was incumbent upon Hankins to ensure that a complete record was available for our review. The deficiency in the record was not called to DF&A's attention before the circuit court had assessed costs, and DF&A's offer to supplement the record, made after the decision of the circuit court, was not accepted. Because DF&A paid for a transcript and was the prevailing party, the circuit court did not err in ordering Hankins to reimburse the agency.

Lawyers argues on cross-appeal that the circuit court erred when it denied its motion for costs on an offer of judgment that it made during the first trial on this matter. The trial court stated that it was without jurisdiction to hear the motion because it was made during the first trial. Lawyers points out that our holding in *Transit Homes, Inc. v. Bellamy*, 287 Ark. 487, 701 S.W.2d 126 (1985), provides that such a motion could survive a previously dismissed action under Ark. R. Civ. P. 41(d). However, we affirm the trial court because we conclude that Lawyers reversed its position during the second trial and that the offer of judgment was effectively withdrawn.

On January 30, 1992, during the first trial, Lawyers made an offer of judgment in the sum of $2,115.00 to Hankins in full settlement of the claim. This sum represented the sale of the Camaro and the GMC truck. Hankins did not reply or accept the offer. The portion of the record that is before us reveals that at the administrative hearing on September 7, 1994, Hankins testified that he allowed Mr. McElroy to draft upon a line of Hankins's credit to purchase these vehicles. During oral argument before this court, Lawyers' attorney stated that after this testimony came

out in the hearing before DF&A it reversed its position and took the stance that the sale of the vehicles was not covered by the bond, but was also merely a debtor-creditor issue.

We recognize that Ark. R. Civ. P. 68 requires the trial judge to order an offeree to pay the authorized costs after the making of a bona fide offer, if the judgment, exclusive of interest, is not more favorable than the offer. *See Darraugh Poultry & Livestock Equip. Co. v. Piney Creek Sales, Inc.*, 294 Ark. 427, 743 S.W.2d 804 (1988). However, the trial court is not required to award costs to a prevailing party when no offer of judgment is made. *Id.* It appears that Lawyers did not continue the offer of judgment made during the first trial, and no specific offer of judgment was made in the case on retrial. We uphold the trial court's denial of costs.

We summarily affirm the agency's order in favor of Lawyers because the record was not complete enough to allow us to evaluate it. We affirm the circuit court's order requiring Hankins to pay DF&A for the costs of producing the transcript and affirm on cross-appeal its denial of costs to Lawyers.

Norma and Larry BROWN *v.* ARKANSAS DEPARTMENT OF HUMAN SERVICES

96-1367 954 S.W.2d 270

Supreme Court of Arkansas
Opinion delivered November 13, 1997

David B. Fuller, for appellant.

No response.

W.H. "DUB" ARNOLD, Chief Justice. This is a termination-of-parental-rights case. Appellants Norma and Larry Brown are the parents of a daughter who was born in 1992. They appeal an order of the Benton County Chancery Court terminating their parental rights with respect to their daughter. Their attorney, David B. Fuller, filed a no-merit brief in the Arkansas Court of Appeals, which certified the case to this court to answer the question of whether the provisions of *Anders v. California,* 386 U.S. 738 (1967), which protect a criminal appellant's right to counsel on appeal, apply to cases involving the termination of parental rights.

The issue of whether *Anders* applies to these cases is not addressed in appellants' brief. Nor has the Department addressed this issue, and it has not submitted a brief in this case. The certificate of service contained at the close of the brief filed by appellants' attorney indicates that he mailed a copy of the brief by first class mail, with restricted delivery to appellants. Though appellants received notice that their attorney had filed a no-merit brief, they have not filed a response. Under these circumstances, we treat this no-merit appeal as a motion to dismiss and grant the motion.

Appeal dismissed.

NEWBERN, BROWN, and IMBER, JJ., dissent.

ROBERT L. BROWN, Justice, dissenting. Termination of a parent's rights in a child is a drastic remedy that requires that a parent be afforded full protection under the law. The United

States Supreme Court has afforded due-process protection to parents in certain involuntary termination proceedings and described a parent's interest in the accuracy and justice of the decision to terminate his or her interest in a child as a *commanding one. See Lassiter v. Dep't of Social Servs.*, 452 U.S. 18, 27 (1981). I must respectfully dissent from the majority opinion because I do not believe that the procedure affirmed by the majority in this case adequately protects parents when (1) their rights in a child have been involuntarily terminated, and (2) their attorney abandons the appeal before this court.

In 1989, the Arkansas General Assembly adopted the view that counsel shall be provided for indigent parents in termination cases "at all stages of the proceedings." 1989 Ark. Acts 273 § 15, now codified at Ark. Code Ann. § 9-27-316(h)(1) (Supp. 1997). *See Briscoe v. State*, 323 Ark. 4, 912 S.W.2d 425 (1996). With the public policy of this state now carved in stone, this court is faced for the first time with deciding what procedure to follow when the parents' counsel overtly abandons his clients' appeal. Should this court assure that the parents whose rights to an appeal are forfeited are fully cognizant of what has occurred? Or should this court adopt a procedure comparable to that afforded indigent criminal defendants when their counsel advises this court that the appeal has no merit? *See Anders v. California*, 386 U.S. 738 (1967). *See also* Ark. Sup. Ct. R. 4-3(j). In the criminal context under Rule 4-3(j) when an attorney files a no-merit brief, that attorney is required to list all rulings adverse to the client and all objections and motions as well with an explanation as to why the adverse ruling is not a meritorious ground for reversal. The criminal defendant is then notified of the attorney's actions and given 30 days to raise any points he chooses to raise in support of the appeal.

Other jurisdictions, while not extending the full panoply of *Anders* protections, have sanctioned dismissal of an appeal only after parents were instructed explicitly that their appeal had been abandoned and they had thirty days to file a supplemental brief. *See, e.g., In Re Sade C.*, 920 P.2d 716 (Cal. 1996); *In Re J.A.*, 693 So.2d 723 (Fla. App. 5 Dist. 1997); *Jimenez v. Dept. of Health & Rehab.*, 669 So.2d 340 (Fla. App. 3 Dist. 1996); *Ostrum v. Dept. of*

Health & Rehab. of Fla., 663 So.2d 1359 (Fla. App. 4 Dist. 1995). Still other courts faced with this exact question have required that the attorney file an advocate's brief establishing why the parent's case has no merit, as is done in *Anders* appeals. *See, e.g., In Re V.E.*, 611 A.2d 1267, 1275 (Pa. Super. 1992)("An indigent parent faced with the permanent loss of his or her child, like the indigent defendant described in *Anders*, is entitled to . . . an attorney who will support the appeal to the best of his or her ability."), *citing Meyer v. Nebraska*, 262 U.S. 390 (1923).

In the instant case, the certificate of service on counsel's brief states that the parents were mailed a copy of the brief, but there was no instruction that the parents had the right to file a brief on their own within thirty days. As the United States Supreme Court has recognized:

> The parents [involved in these cases] are likely to be people with little education, who have had uncommon difficulty in dealing with life, and who are . . . thrust into a distressing and disorienting situation. That these factors may combine to overwhelm an uncounseled parent is evident from the findings some courts have made.

Lassiter v. Dep't of Social Servs., 452 U.S. at 30 (citations omitted).

I would not require full *Anders* protection to be afforded in this case. But I would certainly give the parents an opportunity to file a supplemental brief within thirty days, should they so desire. It may well be that the parents are fully aware of what their counsel has done. But what if they are not? In my opinion, it is the responsibility of the judicial system to assure that the parents know their appeal has been dismissed and that they are given a separate opportunity to advance their cause.

Finally, the majority points to the fact that the *Anders* issue has not been briefed by the parties and cites that as a reason not to address it. But who has an interest in raising the *Anders* question? Not the attorney for the parents who wants to withdraw from the case. Not the State which wants the appeal dismissed. The parents, of course, have not been given an independent voice. Under such circumstances, the *Anders* issue in termination cases will

never be brought before this court unless we decide to address the issue.

For these reasons, I respectfully dissent.

NEWBERN and IMBER, JJ., join.

Jeffrey DAVIS *v.* STATE of Arkansas

CR 97-251 956 S.W.2d 163

Supreme Court of Arkansas
Opinion delivered November 13, 1997

Robert E. Irwin and *John R. Irwin*, for appellant.

Winston Bryant, Att'y Gen., by: *Sandy Moll*, Asst. Att'y Gen., for appellee.

W.H."DUB" ARNOLD, Chief Justice. The appellant, Jeffrey Davis, was sentenced to concurrent life sentences for three counts of rape and ten years' imprisonment for first-degree sexual abuse, for which he was also fined $10,000.00. He raises seven issues on appeal, none of which has merit. We affirm.

The State alleged that the appellant thrice raped his seven-year-old daughter by engaging in oral sex with her, by penetrating her vagina with his penis, and by penetrating her vagina with a foreign object. It was also alleged that appellant engaged in sexual contact with his daughter. A fifth charge, endangering the welfare of a minor, was dismissed at trial.

During the appellant's jury trial, the victim testified that, on several occasions, her father "took his private part and stuck it in

my private part," but "it wouldn't fit in all the way." When the appellant was "through," "white stuff would come out" on the victim's leg that she described as "gooey." According to the victim, the appellant also "made me put his private part in my mouth and suck on it." He touched her "private" with his tongue and stuck the tip of a lotion bottle and a vibrator into her "private part." The victim further described how she would rub on the appellant's "private." It was the victim's testimony that the appellant kept ladies' slips and "all kinds of stuff" under his bed. He would tie the slips in a knot to keep them from falling down because they were too big for the victim. The appellant would also make the victim look at dirty magazines and watch pornographic movies. According to the victim, these acts occurred in her parents' bedroom while her mother was gone. On cross-examination, the victim admitted to recanting the allegations to her foster parent, Ms. Ward, because, according to her, "it wasn't her business," and she "wouldn't leave me alone."

In addition to the victim's testimony, the State also offered the testimony of Tammy Coney, a family service worker for the Arkansas Department of Human Services, who testified that it was not unusual for child sexual-abuse victims to recant their allegations. The victim's elementary school counselor, Melissa Cox, related that the victim had emotional problems at school. Nurse Paula McAlister and Dr. George Richison saw the victim at St. Mary's Hospital on January 5, 1996. While Dr. Richison testified that the victim's exam was normal, he also stated that the victim's account would be consistent with her hymenal ring being intact. Officer Bryce Davenport testified that suggestive pictures and pornographic magazines and movies were found at the appellant's residence. According to the officer, a bag containing white lace material and a small night shirt was located under the appellant's bed.

The appellant testified in his own defense and denied the charges. His wife and the victim's mother, Tracy Davis, testified on her husband's behalf that the victim "always acted like a grown up" and had emotional problems with adjusting to a new school that caused her to make the allegations. At the close of all the evidence, the jury found the appellant guilty as charged.

1. *Sufficiency of the evidence*

At the close of the State's case in chief, the appellant moved for a directed verdict as follows:

> Your Honor, at the end of the State's testimony the defendant, Jeff Davis, moves for a directed verdict on all the remaining counts of the information.

After the trial court denied this motion, appellant presented his case to the jury. At the close of all the evidence, the appellant made the following motion:

> At the conclusion of all the evidence, the defense evidence and the State's evidence, the defendant renews his motion for directed verdict on the ground that there is insufficient evidence to make a prima facie case.

The trial court again denied the motion. On appeal, the appellant complains that the only evidence to support the State's charges of rape against him was the testimony of the child-victim, who had earlier recanted her allegations.

A directed-verdict motion is a challenge to the sufficiency of the evidence and requires the movant to apprise the trial court of the specific basis on which the motion is made. *Stewart v. State*, 320 Ark. 75, 894 S.W.2d 930 (1995). Arguments not raised at trial will not be addressed for the first time on appeal, and parties are bound on appeal by the scope and nature of the objections and arguments they presented at trial. *Id.* In the present case, the appellant's directed-verdict motion was not specific. Under these circumstances, we will not address the merits of appellant's argument. In any event, even if we were to address the merits of his argument, it would fail. We have held many times that the uncorroborated testimony of a rape victim is sufficient to support a conviction. *Rains v. State*, 329 Ark. 607, 953 S.W.2d 48 (1997).

2. *Prosecutorial misconduct*

In his opening statement to the jury, the prosecutor remarked that the case involved "a man who delights and takes pleasure in the sexual perversion of children." When appellant

objected to this statement and requested that the trial court admonish the jury, the trial court agreed and issued the admonishment. Later, during the appellant's case-in-chief, he testified as follows:

> I can't stop being her father, not for her — not only for her but for me; and if everything goes, I'm not quitting. I feel like I've got a problem that needs to be solved; and if permitted, I want to fix it. Whatever it is; and I'll say it again, the first I . . .

During his initial cross-examination of the appellant, the prosecutor stated, then asked, "You've got a problem that needs to be fixed. How long have you been a pervert?" Before the appellant could respond, his attorney objected to the question. The trial court sustained the objection and agreed to the appellant's request to admonish the jury. The appellant made a motion for mistrial, which the trial court denied. After the jury returned a guilty verdict, the appellant renewed his motion for mistrial and asked the trial court to set aside the verdict on the ground that the prosecutor's comment during opening statement, when taken together with his improper question asked during cross-examination, amounted to prosecutorial misconduct. The trial court again denied the motion.

A mistrial is a drastic remedy that is granted only where the error is so prejudicial that justice cannot be served by continuing the trial or where the fundamental fairness of the trial itself has been manifestly affected. *Williams v. State*, 329 Ark. 8, 946 S.W.2d 678 (1997). The trial court is afforded broad discretion in making its ruling, and a mistrial will not be declared when the prejudice can be removed by an admonition to the jury. *Id.*

It is obvious to us that the prosecutor's object in the present case was to label the appellant as a "pervert." While we may not approve of this trial tactic, we cannot say that the prosecutor's conduct was so drastic as to warrant a mistrial. *See Sullinger v. State*, 310 Ark. 690, 840 S.W.2d 797 (1992); *Burkhart v. State*, 301 Ark. 543, 785 S.W.2d 460 (1990). When viewing the strong admonitions the trial court issued at the time the prosecutor's remarks were made, we hold that any potential prejudice was

cured and that the trial court did not abuse its wide discretion in denying the motion for mistrial.

3. *Testimony of Tammy Coney*

Next, the appellant contends that the trial court erred in allowing Tammy Coney, a family service worker for the Arkansas Department of Human Services, to offer expert testimony that it was not unusual for child sexual abuse victims to recant their allegations.

We recently summarized the law regarding the qualifications of an expert witness in *Smith v. State*, 330 Ark. 50, 55-56, 953 S.W.2d 870 (1997):

> Whether a witness qualifies as an expert in a particular field is a matter within the trial court's discretion, and we will not reverse such a decision absent an abuse of that discretion. *Mace v. State*, 328 Ark. 536, 944 S.W.2d 830 (1997). If some reasonable basis exists demonstrating that the witness has knowledge of the subject beyond that of ordinary knowledge, the evidence is admissible as expert testimony. *Id.* The general test of admissibility of expert testimony is whether it will assist the trier of fact in understanding the evidence presented or determining a fact in issue. A.R.E. Rule 702; *Matthews v. State*, 327 Ark. 70, 938 S.W.2d 545 (1997); *Stout v. State*, 320 Ark. 552, 898 S.W.2d 457 (1995). In addition, expert testimony must be relevant and not misleading or confusing to the jury. *Stewart v. State*, 316 Ark. 153, 870 S.W.2d 752 (1994). In determining the relevance of the testimony, the proponent must show that the evidence is reliable and sufficiently related to the facts of the case to aid the trier of fact in resolving the dispute. *Prater v. State*, 307 Ark. 180, 820 S.W.2d 429 (1991).

In the case at bar, Ms. Coney testified that she had been involved in investigating child-abuse cases for six and one-half years and had received eight weeks of new-worker training that covered different aspects of abuse, neglect, and family dynamics. Three years prior to trial, Ms. Coney had received one hundred-fifty hours of additional training. In view of Ms. Coney's training and experience, we cannot say that the trial court abused its discretion in qualifying Ms. Coney as an expert and allowing her testimony, as it is appar-

ent that she had knowledge of child-abuse cases beyond that of an ordinary person. *See Poyner v. State*, 288 Ark. 402, 705 S.W.2d 882 (1986).

The appellant also complains that the trial court should not have permitted Ms. Coney's testimony because "there was no strong record before the court which indicated that a child abuse case was before the court and that there was no need for the testimony of Tammy Coney to be made at that time." This specific objection was not made at trial and is thus not preserved for our review. *See Stewart v. State, supra.*

4. Juror Lindsey — Motion for mistrial

After the jury returned a guilty verdict on three counts of rape and one count of sexual abuse, it recessed for the evening. The next morning, the bailiff approached the trial court with information that juror Jonathan Lindsey was having a "problem" with the guilty verdict.

When questioned outside the presence of the other jurors, juror Lindsey advised the trial court that he had never been a juror before and that he felt that he should have "stood up and stayed strong . . . instead of giving in to everybody else (on the jury)." He related that he became troubled during his drive home from the courthouse and "had just this real bad feeling in me that I had made a bad decision." The colloquy between the trial court and juror Lindsey continued as follows:

> TRIAL COURT: Now, yesterday when the jury returned to the courtroom and I asked you if you had reached your verdict and then I read off your verdicts, then I asked if this was the jury's verdicts.
>
> JUROR: And, I agreed with everybody, yes, sir.
>
> TRIAL COURT: And, at that time did you have some reservations that you needed to advise the court of?
>
> JUROR: Not really because we had just walked out of the jury room and I'm not saying that they intimidated me. I'm not saying that I felt intimidated by the other jurors or anything; and I'm not saying that the decision I made was because of their decision, really; but I mean it's just that I didn't feel like I should lay down

a guilty verdict; but after sitting there talking to them and, you know, they were all telling me all the reasons why I should say he was guilty and all the reasons why they felt he was guilty, and it was just more than —

TRIAL COURT: At the time you heard all that how did you feel?

JUROR: At the time they were telling all that I thought, "Well, okay, then he's guilty of all this stuff"; and, you know, "If ya'll feel this way and this is why y'all feel this way, then I should feel this way, too"; but then after I left the courtroom, it was a totally different feeling so far as I was concerned and I didn't feel that way at all.

The attorneys were permitted to question juror Lindsey as follows:

ATTORNEY FOR APPELLANT: Your Honor, I think before we go any further that we ought to ask him this question. Did you have an abiding conviction — were you satisfied beyond a reasonable doubt that Jeff Davis was guilty?

JUROR: No.

ATTORNEY FOR APPELLANT: You did not have an abiding conviction of his guilt?

JUROR: No.

PROSECUTOR: Did you tell the court you did when he asked you?

JUROR: Yes, I did.

PROSECUTOR: I believe earlier you made the statement that at first you had doubts and then the other eleven jurors said to you to look at this and look at this and look at this, and then you —

JUROR: And, after looking at that I was in agreement; but later when I left I was thinking, "I don't like what I just did," and doubt started to creep in.

PROSECUTOR: On your way home?

JUROR: That's correct.

PROSECUTOR: But, after deliberating with the other eleven jurors and after the other eleven suggested to you that you look at "A," "B," "C," and "D," you began thinking that based upon

their life's experiences and what they've been through and what they are saying, "I can see that"?

JUROR: Right.

ATTORNEY FOR APPELLANT: At that point were you convinced beyond a reasonable doubt of the guilt of Jeff Davis?

JUROR: Beyond a reasonable doubt?

PROSECUTOR: At that point.

ATTORNEY FOR APPELLANT: At that point did you have an abiding conviction in the truth of the charge?

JUROR: Yes, I did at that point.

ATTORNEY FOR APPELLANT: All right.

After the questioning of juror Lindsey concluded, the appellant moved for a mistrial on the ground that the verdict was not the result of an impartial consideration and that the reason given by the juror as to how he reached his verdict was unfair in nature.

Before addressing the precise issue before us, we must emphasize that A.R.E. Rule 606(b) only permits inquiry into whether any external influence or information could have played a part in the jury's verdict. The purpose of this rule is to balance the freedom of secret jury deliberations with the ability to correct an irregularity in those deliberations. *Borden v. St. Louis Southwestern Ry. Co.*, 287 Ark. 316, 698 S.W.2d 795 (1985). While the appellant did not object to the testimony regarding juror Lindsey's mind and emotions, it is apparent when reviewing the excerpted colloquy above that the inquiry at times delved into the improper area of juror Lindsey's mind and emotions. However, for purposes of our reviewing the appellant's argument on appeal, it is clear from juror Lindsey's testimony that no other juror "intimidated" him and that no extraneous prejudicial information influenced his decision.

Arkansas Code Annotated section 16-89-130(3) (1987) provides that the trial court may grant a new trial when a verdict rendered against the defendant has been decided by "lot" or chance. We have held that a verdict reached by the jury through a compromise of their views is not a verdict by lot but is a fair expression of their views. *Blaylack v. State*, 236 Ark. 924, 370

S.W.2d 615 (1963). The reasoning of the Eighth Circuit Court of Appeals is particularly helpful on this point:

> Persuasion and compromise are the processes by which juries are intended to reach their decisions. Otherwise, jurors would be polled directly after the close of trial — not allowed to discuss the case among themselves to arrive at a verdict acceptable to them all.

Smith v. Lockhart, 946 F.2d 1392, 1395 (8th Cir. 1991).

When making its ruling on this issue, the trial court observed that juror Lindsey had stated that, at the time the verdict was returned, he had an abiding conviction of the truth of the charge. When considering all the circumstances, the trial court did not abuse its discretion in denying the motion for mistrial.

5. Juror Lindsey — new jury

The appellant also argues, with respect to juror Lindsey, that the trial court should have dismissed the jury and impaneled a new jury for sentencing. He did not obtain a ruling on this request and thus has not preserved this argument for appeal. *Foreman v. State*, 328 Ark. 583, 945 S.W.2d 926 (1997).

6. Witness Steve Brown

Next, the appellant asserts that the trial court erred in permitting Steve Brown, Coordinator of the Fifth Judicial District Drug Task Force, to offer opinion testimony during the sentencing phase that a substance he identified as Super Manitol, a Vitamin B supplement commonly used to increase the yield of methamphetamine and cocaine, along with what he believed to be methamphetamine, were found in appellant's home. Particularly, appellant disputes Brown's qualifications to offer this testimony.

We initially observe that appellant has offered no case law to support his argument. We do not consider arguments that are unsupported by authority or convincing argument. *Hicks v. State*, 327 S.W.2d 652, 941 S.W.2d 387 (1997). In any event, Officer Brown had five years with the task force and as coordinator, was responsible for initiating major crime and narcotics inves-

tigations, and coordinated these investigations with state, local, and federal agencies. In view of his experience, the trial court did not abuse its discretion in permitting the officer to testify as to what he believed to be methamphetamine, for it is apparent that he had knowledge in this area beyond that of an ordinary person. *See Poyner v. State, supra.*

7. Other crimes evidence

Finally, the appellant maintains that the trial court erred in allowing Officer Brown's testimony during the sentencing phase about the appellant's pending drug charges. At trial, the appellant argued that, if the State were permitted to offer this evidence, he would be "required to offer some response or evidence . . . or even testify in order to refute those allegations." He further claimed that this evidence would be "highly prejudicial." While the trial court overruled the appellant's objection and permitted the State to present this evidence, the appellant did not testify during the penalty phase. On appeal, he asserts in a conclusory manner that this evidence was not independently relevant and that its probative value was substantially outweighed by the danger of unfair prejudice. He does not state, however, *how* he was prejudiced by the admission of this evidence. We will not reverse the trial court's ruling on evidentiary matters absent a demonstration of prejudice. *Misskelley v. State,* 323 Ark. 449, 915 S.W.2d 702, *cert. denied,* 117 S.Ct. 246 (1996). In view of the graphic testimony offered by the appellant's seven-year-old daughter describing how he repeatedly raped her, we cannot say that the appellant was prejudiced by the admission of the testimony at issue.

8. Ark. Sup. Ct. R. 4-3(h)

We have reviewed the record in accordance with Ark. Sup. Ct. R. 4-3(h) for adverse rulings objected to by the appellant but not argued on appeal. We have found no such errors that would mandate reversal.

Affirmed.

Vonnie L. MOORE *v.* STATE of Arkansas

CR 97-598 954 S.W.2d 932

Supreme Court of Arkansas
Opinion delivered November 13, 1997

Chris Tarver, for appellant.

Winston Bryant, Att'y Gen., by: *Mac Golden*, Asst. Att'y Gen., for appellee.

DAVID NEWBERN, Justice. Vonnie L. Moore was alleged to have robbed cashiers at two grocery stores — one on February 26, 1996, and the other on February 27, 1996. He was charged with two counts of aggravated robbery and two counts of misdemeanor theft. The judgment and commitment order of record inaccu-

rately shows that Mr. Moore was convicted of two aggravated robberies, both occurring on February 27, 1996. The trial transcript shows that the jury found Mr. Moore guilty of aggravated robbery and theft with respect to the robbery that occurred on February 27, 1996 (Count 2). As to the February 26, 1996, event (Count 1), however, Mr. Moore was found guilty of the lesser-included offense of robbery and of misdemeanor theft.

Mr. Moore was sentenced as an habitual offender to serve consecutive terms of life imprisonment for aggravated robbery, forty years' imprisonment for robbery, and one year in the county jail for each of the misdemeanor thefts. He appeals only the forty-year sentence received for the robbery on Count 1 and asserts that the evidence was insufficient and should not have been allowed to go to the jury. We affirm the conviction because Mr. Moore's motion for directed verdict challenging the sufficiency of the evidence concerned only the charge of aggravated robbery of which he was not convicted. The sentence is modified, however, to limit the total sentence for the misdemeanor thefts to one year, which is to be served concurrently with the felony sentences.

At the trial, Jamal Williams, the grocery-store clerk victimized in the February 26 robbery, was unable to identify Mr. Moore as the culprit; however, he had done so earlier upon viewing a photographic lineup. Mr. Williams testified that he was a cashier at the store robbed on February 26. The robber approached him at the register and asked for a pack of cigarettes. When Mr. Williams told the robber what he owed, the robber reached in his pocket and handed Mr. Williams a note that said, "This is a robbery. Give me all your money." Mr. Williams testified that the robber said only that he did not want food stamps. The robber placed his hand in his coat pocket, and Mr. Williams said that he saw something "bulging out" toward him from the pocket where the robber's hand was and that he felt threatened and scared. He gave the robber all the cash from the register. Mr. Williams testified that he did not know what was in the robber's pocket, but he believed the "bulge" was a gun based on the way the robber had his hand in his pocket.

1. *Sufficiency of the evidence*

Robbery is defined in Ark. Code Ann. § 5-12-102(a) (Repl. 1993), in significant part, as follows: "A person commits robbery if, with the purpose of committing a felony or misdemeanor theft . . . he employs or threatens to immediately employ physical force upon another." One who commits robbery is guilty of aggravated robbery if one "is armed with a deadly weapon or represents by word or conduct that [one] is so armed;. . . ." Ark. Code Ann. § 5-12-103(a)(1) (Supp. 1995).

The motion for a directed verdict at the trial was as follows:

> [Defense Counsel]: . . . I would move for a directed verdict as to Count One of the information. The State has not met its burden, insufficient evidence. I believe Mr. Williams is charged [sic] as a victim in that count, aggravated robbery. I believe his testimony was that the defendant came into the store, presented a note written on a paper towel or a napkin or something to that effect, placed it upon the counter, he looked at the note. Once he realized that he was serious, then he handed the money to him. He then changed his testimony a little bit in terms of he said that the defendant had his hand in his pocket, he saw a bulge, and it was just his personal feelings.
>
> The Court: Thought he had a gun.
>
> [Defense Counsel]:—that he had a gun. There was no indication that there was any conduct on the part of the defendant by words or, as I said, conduct that he had a weapon.

The motion questioned only the sufficiency of the evidence to show that Mr. Moore was armed with a deadly weapon or represented himself to be armed with a deadly weapon. It thus questioned only the element that allegedly made the act aggravated robbery rather than robbery.

■■ To preserve for appeal the issue of sufficiency of the evidence to support a conviction of a lesser-included offense, a defendant's motion for directed verdict must address the elements of the lesser-included offense. *Webb v. State*, 328 Ark. 12, 941 S.W.2d 417 (1997); *Jordan v. State*, 323 Ark. 628, 917 S.W.2d 164 (1996). Mr. Moore's motion addressed only whether Mr. Williams was threatened by, or perceived the threat of, a deadly weapon. As the motion did not address any of the elements of

robbery, the offense of which Mr. Moore was convicted, we affirm the conviction.

2. Misdemeanor sentences

According to Ark. Code Ann. § 5-4-403(c) (Repl. 1993),

The power of the court to order that sentences run consecutively shall be subject to the following limitations:

(1) A sentence of imprisonment for a misdemeanor and a sentence of imprisonment for a felony shall run concurrently, and both sentences shall be satisfied by service of sentence for a felony; and

(2) The aggregate of consecutive terms for misdemeanors shall not exceed one (1) year.

The Trial Court thus lacked the authority to impose an aggregate sentence of more than one year for the two misdemeanor offenses. The sentence was also illegal in that it purported to run the misdemeanor sentences consecutively with the felony sentences. *Howard v. State*, 289 Ark. 587, 715 S.W.2d 440 (1986).

Mr. Moore's sentence is modified to reduce the total sentence for the two misdemeanor theft convictions to one year to be served concurrently with the life and forty-year sentences.

3. Ark. Sup. Ct. R. 4-3(h)

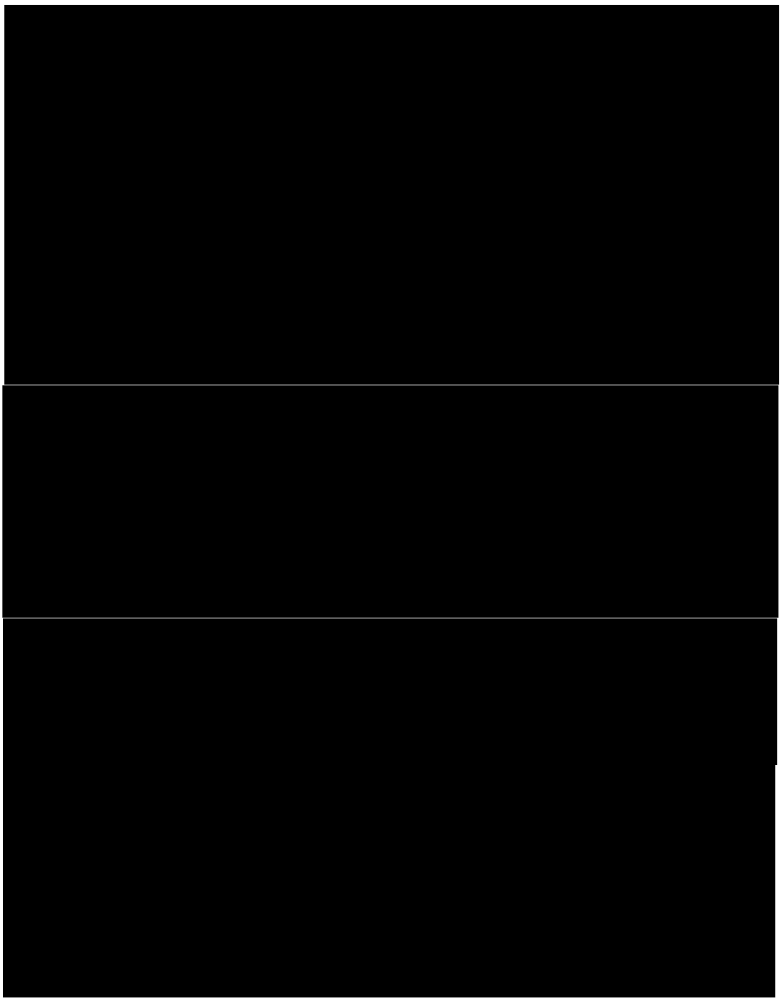
In accordance with Ark. Sup. Ct. R. 4-3(h), the record has been reviewed for erroneous rulings prejudicial to Mr. Moore, and none has been found.

Affirmed as modified.

Damien BROWN *v.* STATE of Arkansas

97-723 954 S.W.2d 276

Supreme Court of Arkansas
Opinion delivered November 13, 1997



William R. Simpson, Jr., Public Defender, by: *Deborah R. Sallings*, for appellant.

Winston Bryant, Att'y Gen., by: *Brad Newman*, Asst. Att'y Gen., for appellee.

TOM GLAZE, Justice. This is a companion case to *Damien Brown v. State*, 97-722, which is also being handed down today. Both cases involve Brown's appeal from an interlocutory order where the circuit court denied a motion to transfer his case to juvenile court. Here, Brown was charged in circuit court with aggravated robbery and theft of property. He was nine days short of being eighteen years old when he allegedly committed the crimes, and had turned eighteen when his transfer motion was denied.

At Brown's transfer hearing, Detective Jeff Norman testified that Brown had been identified as one of three subjects who entered a grocery store to steal money. One of the subjects had a gun and threatened to shoot the store employee if he did not open the cash register. Brown was identified as standing at the front door and telling the other two men to hurry. When the men were unable to open the cash register, they grabbed candy and cigarettes and fled. Norman further identified three prior juvenile orders, introduced into evidence, showing Brown had committed two thefts, battery in the third degree, and an aggravated robbery.

Brown also testified, confirming his age to be eighteen and admitting he had committed the prior crimes of theft, battery, and aggravated robbery. He also admitted to having violated probation. Detective Norman's and Brown's own testimony

showed Brown had participated in serious offenses where violence was employed, and his prior history of criminal acts was sufficient for the circuit court to conclude a repetitive pattern of adjudicated offenses showing he was beyond rehabilitation. In sum, this evidence bore on all three of the factors that a circuit court must consider under Ark. Code Ann. § 9-27-318(e) (Supp. 1995),[1] and it is more than sufficient to sustain the court's ruling to deny Brown's motion to transfer his charges to juvenile court. A factor not to be forgotten, too, is that Brown is now close to nineteen years old, and we have repeatedly held that young people over the age of eighteen can no longer be committed to the Division of Youth Services (DYS) for rehabilitation unless they are already committed at the time they turn eighteen. Brown had not been committed to DYS. *See* Ark. Code Ann. § 9-28-208(d) (Supp. 1995); *Maddox v. State*, 326 Ark. 515, 931 S.W.2d 438 (1996).

In conclusion, Brown contends the State's evidence was "incompetent" because Detective Norman's testimony was hearsay. His contention is meritless for several reasons. One, Brown never raised the issue below, so this court will not consider it on appeal. *Lammers v. State*, 324 Ark. 222, 920 S.W.2d 7 (1996). Two, Brown offered no objection to any part of Norman's testimony, and this court has held that hearsay admitted without objection can constitute sufficient evidence to support the denial of a transfer motion. *Sanders v. State*, 326 Ark. 415, 932 S.W.2d 315 (1996). And three, Brown's testimony alone sustains the trial court's ruling because it validated that he is over eighteen

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[1] The full text of § 9-27-318(e) reads as follows:

(e) In making the decision to retain jurisdiction or to transfer the case, the court shall consider the following factors:

(1) The seriousness of the offense, and whether violence was employed by the juvenile in the commission of the offense;

(2) Whether the offense is part of a repetitive pattern of adjudicated offenses which would lead to the determination that a juvenile is beyond rehabilitation under existing rehabilitation programs, as evidenced by past efforts to treat and rehabilitate the juvenile and the response to such efforts; and

(3) The prior history, character traits, mental maturity, and any other factor which reflects upon the juvenile's prospects for rehabilitation.

years old, had a prior history of criminal acts, and had previously violated probation in juvenile court.

For the reasons above, we affirm.

Larry JONES *v.* James D. PARRISH and Hope Parrish

97-350 954 S.W.2d 934

Supreme Court of Arkansas
Opinion delivered November 13, 1997

Benson & Robinson, P.L.C., by: *Jon Robinson*, for appellant.

Ray Hodnett and *Jones Law Firm*, by: *Robert L. Jones III*, for appellees.

TOM GLAZE, Justice. Appellee James D. Parrish initiated this litigation, by suing Larry Jones, Jones's Warehouse Sales grocery store, and Eric Donald for negligence that caused injury to Parrish. The events leading to Parrish's injuries began at Jones's store where Donald and a friend, Timothy Branson, tried to purchase some groceries. When Donald presented a check with someone else's name printed on it, Jones asked for identification, and while Jones was attempting to verify the check, Donald and Branson departed the store, got in Donald's vehicle and drove away. Jones, who was an auxiliary police officer and auxiliary fireman for the City of Clarksville, saw the two men leave, so he got in his truck and followed them. From his truck, Jones called the police dispatcher, and told her that he was following two men in their vehicle because the men had just attempted to cash a forged check at Jones's store. Sometime during Jones's pursuit, Donald accelerated his car, and Jones responded in kind. While trying to keep Donald's car in sight, Jones turned on his four-way flashers and a red bubble light which he kept in his truck, pursuant to his duties as an auxiliary fireman. Both vehicles were speeding. Jones was about one-quarter of a mile behind Donald's car when it skidded out of control and collided with a Missouri Pacific Railroad vehicle. The Railroad vehicle in turn struck Parrish, who was standing nearby. Parrish was thrown twenty-five feet into the air before falling to the ground. Parrish brought this suit for injuries allegedly sustained and caused by Jones's and Donald's negligence.

This case was tried to a jury, which returned a verdict for Parrish in the amount of $150,000.00 and $5,000.00 for Parrish's wife.[1] The jury assigned Donald to be eighty percent at fault and Jones twenty percent at fault. Because a pretrial settlement had

[1] Parrish and his wife were plaintiffs in the lawsuit. For convenience, we in most instances refer to Parrish in the singular.

been entered between Jones's business, Warehouse Sales, its insurance carrier (Argonaut Great Central Insurance Company), Timothy Branson,[2] and Mr. and Mrs. Parrish, the trial court reduced the jury award, but not in accordance with Jones's request. Since the Warehouse Sales's insurance company paid $15,000.00 in settlement of the store's possible liability, Jones claimed he should have received full credit in that amount against the amount he owed under the jury award. Instead, the trial court determined the $15,000.00 was to be divided equally between the Parrishes and Branson. Jones assigns this and two other errors he claims warrant reversal on appeal.

In his first argument, Jones urges the trial court erred in rejecting an interrogatory which he requested be given to the jury. That interrogatory was proffered during the trial court's conferencing of jury instructions. While that conference is abstracted, the abstract skips parts of the record, making it difficult to determine what exactly took place. Thus, since we are affirming this case, the record has been definitively read to be sure the parties' relevant objections and proffered documents are set forth.

In conferencing with counsel, the trial court first considered AMI Civ. 3d 306 which was based on Ark. Code Ann. § 12-9-303 (Repl. 1993), and reads as follows:

AMI CIVIL 3d, 306

> When I use the word "fault" in these instructions, I mean negligence.
>
> **12-9-303 AUTHORITY OF OFFICERS**
>
> (a) An auxiliary law enforcement officer shall have the authority of a police officer as set forth by statutes of this state when the auxiliary law enforcement officer is performing an assigned duty and is under the direct supervision of a full-time certified law enforcement officer.

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[2] Branson, Eric Donald's passenger, was also injured in the accident and had a claim against Jones.

> (b) When not performing an assigned duty and when not working under the direct supervision of a full-time certified law enforcement officer, an auxiliary law enforcement officer shall have no authority other than that of a private citizen.

Parrish objected to the court's giving AMI Civ. 3d 306, stating the instruction was untimely. He also complained that AMI Civ. 3d 306 was misleading because Jones offered no instructions on the statutes generally referenced in AMI Civ. 3d 306. The trial court disagreed and overruled Parrish's objection.

The next relevant matter raised was Jones's proffer of a modified AMI Civ. 3d 911 instruction which provides as follows:

> One issue you must decide is whether Larry Jones was acting as an auxiliary policeman at the time and place of the occurrence. If you find that Larry Jones was in the immediate pursuit of an actual and suspected law violator and was operating a red rotating emergency light on his vehicle which he was driving, then his vehicle may be considered an authorized emergency vehicle, and he was entitled to operate the vehicle in accordance with the following traffic laws applicable only to emergency vehicles:
>
> (a) Relieved of the obligation to obey speed limits, and
>
> (d) Emergency vehicles have the right of way over other vehicles.
>
> It does not relieve Larry Jones of the duty to exercise ordinary care for the safety of others. It is for you to decide if Larry Jones was an auxiliary police officer and whether he was operating an authorized emergency vehicle.

After the trial court refused the foregoing modified instruction, Jones then proffered the following interrogatory:

> Do you find by a preponderance of the evidence that Larry Jones was acting within the course and scope of his authority as an auxiliary police officer for the City of Clarksville at the time of the occurrence? Answer yes or no.

Parrish again objected, stating the interrogatory is an entirely new issue to be submitted to the jury upon which there has been no

previous instruction offered. He continued that, even if the jury were to find that he was an auxiliary police officer, that did not give Jones the authority to exceed the speed limits because he was not in an authorized vehicle. The trial court sustained Parrish's objection, saying, "I think that interrogatories number one through [five] that already have been agreed upon cover the situation."

Although Jones offered no argument or explanation to the trial court below concerning why he believed he was entitled to the interrogatory above, he argues on appeal that, at the time of Donald's accident, Jones, as an auxiliary police officer, was obeying a direct order from his supervisor, the city chief of police, to keep Donald's car in sight. Based on giving an instruction and interrogatory, concerning whether Jones was acting as an auxiliary officer at the time of the accident, he submits the jury could have found he was not negligent.

We find the record confusing when comparing the argument at trial with the one Jones now puts forth. Adding to that confusion is the manner by which Jones frames his legal issue on appeal. In this respect, Jones solely attacks the trial court's refusal to give his proffered interrogatory, but asks no reversal for the trial court's failure to give his proffered instruction.[3] While Jones acknowledges the trial court gave AMI Civ. 3d 306, which sets out the authority of auxiliary officers under § 12-9-303, he offers no argument why 306 was not sufficient to cover the theory of his case.

Moreover, assuming Jones is also challenging in this point for reversal the trial court's refusal to give his modified 911 instruction, that proffered instruction raises other questions. One, Jones modified AMI Civ. 3d 911 by adding language such as "You must decide . . . *whether Larry Jones was acting as an auxiliary policeman*" and "if you find Larry Jones was in pursuit of [a] violator and was operating a red rotating emergency light *on his vehicle . . . then his vehicle may be considered an authorized emergency vehicle . . . .*"

[3] In the text of his argument, Jones does recite his proffered modified AMI 911, and later generally cites authority for the proposition that it is error to refuse an instruction which is supported by the evidence.

The initial added language underscored in Jones's 911 instruction is already covered in 306 which defines when an auxiliary officer shall and shall not have the authority of a police officer. Also, the other underscored, added language in Jones's 911 instruction suggests Jones's truck, when equipped with a red rotating light, could be an authorized vehicle; however, Jones cites no legal authority for this proposition. Rather, we point out that the existing AMI Civ. 3d 911 defines an emergency vehicle as being an ambulance, fire truck, or police car, and makes no mention of a police officer's private vehicle.

While AMI Civ. 3d 911's note on use and comment refer to Ark. Code Ann. §§ 27-37-202 (Repl. 1994) and 27-49-219(d) (Repl. 1994), which cover flashing lights on emergency vehicles and define "authorized emergency vehicle," Jones made no mention of these statutes at trial when offering his modified 911 instruction. In defining "authorized emergency vehicle," § 27-49-219(d) includes (1) motor vehicles equipped with *blue* rotating or flashing emergency lights used by governmental *police agencies*; (2) vehicles equipped with *red* rotating or flashing emergency lights owned and used by *volunteer firefighters* while engaged in official duties, and (3) vehicles equipped with *amber* flashing or rotating emergency or warning lights and owned by *private individuals whose use is* determined by the Commissioner of Motor Vehicles, in accordance with regulations to prevent abuses thereof, to be for extra hazardous service. (Emphasis added.) Although these statutory provisions do not appear to help Jones, Jones presents no other argument regarding how his truck could even be considered an authorized emergency vehicle as he asserts in his 911 instruction.

In sum, we reiterate that Jones failed to articulate his reason or cite any law to the trial court in support of the giving of AMI Civ. 3d 911, as modified. For these reasons alone we need not consider his argument on appeal.

We add, somewhat in the same vein, that a trial court need not give an instruction which needs explanation, modification, or qualification, but to the contrary, the instruction offered must be simple, impartial, and free from argument. *Pineview*

Farms, Inc. v. Smith Harvestore, Inc., 298 Ark. 78, 765 S.W.2d 924 (1989). Here, as we have discussed, Jones's proffered 911 instruction is confusing and is clearly not free from argument. We conclude the trial court correctly rejected Jones's modified 911 instruction.

Because Jones's proffered interrogatory argument is dependent upon his 911 instruction, we hold the trial court was correct in refusing his interrogatory, as well.[4] Under Rule 49 of the Rules of Civil Procedure, the trial court has the discretion to submit to the jury written interrogatories upon one or more issues of fact. In this respect, we find no abuse of discretion in the trial court's refusal here, especially since Jones has never fully explained the trial court's error in its finding that the five interrogatories that had been agreed upon were sufficient to cover the parties' respective cases. Although there may have been another appropriate or possible instruction to warrant an interrogatory such as the one proffered by Jones, we hold no such clear and simple instruction was proffered in this case. Therefore, we affirm on this point.

Jones's second point concerns whether the trial court violated Ark. Code Ann. § 16-64-115 (Repl. 1993) when, after the jury retired for deliberation, it answered the juror's question, "Does Mr. Parrish have any future recourse in a court of law for the future wages if he loses his job after this ruling?" Over Jones's objection, the trial court answered, "Not as far as this claim is concerned."

Jones argued below, and now on appeal, that no testimony was presented as to what recourse Parrish might have in a court of law if he lost his job after this ruling, and the trial court's answer was based on speculation and conjecture. He further argues that Parrish's employer was not a party to the lawsuit, and if Parrish was terminated after this lawsuit, nothing prevented him from seeking recourse in court against his employer. Jones urges that

[4] Jones argues on appeal that, as an auxiliary police officer, he was immune from suit, and if the trial court had received his interrogatory and the jury found him to be an auxiliary officer, he would have been shielded from liability. This argument was not ruled on below, so this court will not consider it on appeal. *Lively v. Libbey Memorial Physical Medicine Ctr., Inc.*, 311 Ark. 41, 841 S.W.2d 609 (1992).

because the trial court's answer did not relate to evidence in the case, nor did the answer pertain to a question of law, the trial court abused its discretion in answering the jury's question. We disagree.

Here, the trial court carefully worded its answer to correlate to the jury's question, and, in doing so, limited its response so the jury would understand that Parrish had no future recourse as far as *this claim* is concerned. The law is well settled that the trial court has broad discretion to decide what information should be given to the jury. *National Bank of Commerce v. HCA Health Services of Midwest, Inc.*, 304 Ark. 55, 800 S.W.2d 694 (1990); *Dickerson Constr. Co., Inc. v. Dozier*, 266 Ark. 345, 584 S.W.2d 36 (1979); *Rose v. King*, 170 Ark. 209, 279 S.W.2d 373 (1926). Here, Jones fails to show the trial court abused its discretion in giving the narrow and carefully worded response it made to the jury.

Jones's last argument suggests the trial court erred when it failed to give him full credit for the $15,000.00 pretrial settlement amount his company, Warehouse Sales, paid for being dismissed from the lawsuit. Prior to trial, counsel for the Parrishes, Branson, Jones, and Warehouse Sales orally agreed that Warehouse Sales would pay $15,000.00 for the company's release, but the Parrishes reserved their rights to continue against Jones, individually. Some confusion arose over exactly how the settlement amount would be credited.

After the jury verdict, but before judgment was entered, the Parrishes notified the trial court that the Warehouse Sales settlement amount was divided equally with $7,500.00 going to the Parrishes and $7,500.00 to Branson. Counsel for the Parrishes and Jones voiced opinions that they thought all $15,000.00 would be paid the Parrishes, but instead, the release signed by the Parrishes, their counsel, and Branson reflected the amount divided between Branson and the Parrishes. To confuse matters further, one counsel for the Parrishes later said, sometime during trial, that Branson was to receive compensation in the amount of $7,500.00. Consistent with that understanding, the text of the release read that the $15,000.00 amount was paid in compromise of the claims

of the Parrishes and Branson against Warehouse Sales and its insurance carrier, Argonaut Great Central Insurance Company.

Of course, Jones asserts his belief that, at pretrial conference, all parties' interests were represented by counsel and no specific mention was made that Branson should receive $7,500.00. Consequently, Jones lays claim to the full amount. However, because of the considerable confusion surrounding who was to be credited the settlement monies, we believe the trial court resolved this matter soundly. Since the liability exposure of Warehouse Sales and its insurance company was separate from Jones's, those entities had a right to agree to limit and allocate their liability against the claims of the Parrishes and Branson in any manner they chose.

For the reasons hereinabove, we affirm the trial court's rulings on all points.

Sybil LOONEY, Executrix of the Estate of Carol Chamberlain, Deceased *v.* Dr. Michael BOLT, Dr. Munir M. Zufari, and Health Management, Inc., D/B/A Crawford Memorial Hospital

96-1504 955 S.W.2d 509

Supreme Court of Arkansas
Opinion delivered November 13, 1997

H. Ray Hodnett and *Eddie N. Christian, Jr.*, for appellant.

Ledbetter, Hornberger, Cogbill, Arnold & Harrison, by: *E. Diane Graham* and *J. Michael Cogbill*, for appellee Munir Zufari, M.D.

TOM GLAZE, Justice. This case represents another of a series of cases involving a medical injury which resulted in death and and the question as to whether the wrongful-death cause of action is controlled by the Medical Malpractice Act. Carol Chamberlain underwent surgery at the Crawford Memorial Hospital on September 25, 1991, which was allegedly undertaken by Dr. Michael Bolt and Dr. Munir Zufari without her informed consent and without her knowledge of alternatives available for her condition other than surgery. Chamberlain died on November 16, 1991, but Sybil Looney, executrix of Chamberlain's estate, did not file suit against Dr. Zufari, Dr. Bolt, and the hospital until December 2, 1993 — more than two years after Chamberlain's surgery and the alleged malpractice.

The trial court dismissed all of the estate's claims based on summary-judgment motions. However, the Chamberlain estate brings this appeal from the lower court's dismissal with prejudice against Zufari. The trial court's reason for dismissing the estate's suit against Zufari was that the estate's cause of action is for wrongful death caused by medical injury and that Ark. Code Ann. § 16-114-203 (Supp. 1995) of the Medical Malpractice Act requires all acts for medical injury to be commenced within two years after the action accrues. Because the estate's suit was filed after two years had expired, the trial court ruled the estate's claim was procedurally barred.

In its argument for reversal, the Chamberlain estate concedes this court, albeit in split decisions, has held that the Medical Malpractice Act applies to all causes of action for medical injuries accruing after April 2, 1979, and, as to such causes of action, the Act shall supersede any inconsistent provision of law. The estate further acknowledges that this court has specifically held that the Medical Malpractice Act's two-year limitations period conflicts with the three-year limitations period provided under the Wrongful Death Act and is therefore controlling where death ensues from medical injuries. *See Hertlein v. St. Paul Fire Ins. Co.*, 323 Ark. 283, 914 S.W.2d 303 (1996) (court in 4-3 decision

where death ensued from February 2, 1992 medical injury, dismissed claim not filed until May 1994); *Pastchol v. St. Paul Fire & Marine Co.*, 326 Ark. 140, 929 S.W.2d 713 (1996) (court, in a 5-2 decision where plaintiff filed wrongful-death action alleged from a medical injury on August 26, 1991, dismissed because belated complaint filed on September 7, 1993); *Morrison v. Jennings*, 328 Ark. 278, 943 S.W.2d 559 (1997) (court, in a 4-3 decision where alleged malpractice injury occurred on April 28, 1992, dismissed suit because complaint filed on July 11, 1994); *Scarlett v. Rose Care, Inc.*, 328 Ark. 672, 944 S.W.2d 545 (1997) (court, in a 5-2 decision where medical injury alleged on May 10, 1993, was dismissed as barred because complaint filed on June 11, 1996); *see also Ruffins v. ER Arkansas, P.A.*, 313 Ark. 175, 853 S.W.2d 877 (1993).

While the estate voices passing disagreement with this court's foregoing holdings, it states that it does not ask us to overrule those decisions. Instead, the estate contends that, because Ms. Chamberlain's medical injury occurred on September 25, 1991, and before any of the foregoing decisions, those holdings should not be retroactively applied to bar her claim. The estate submits that, at the time her claim accrued, reasonable doubt existed concerning whether the three-year wrongful-death statute or the two-year medical malpractice statute of limitations applied. Because Arkansas law generally favors applying the longer statutory period in these circumstances, the estate argues its entitlement to the three-year limitations period. *See Dunlap v. McCarthy*, 284 Ark. 5, 678 S.W.2d 361 (1984).

To support the estate's argument that this court's foregoing decisions should not apply to her injury, the estate cites *Chevron Oil Company v. Huson*, 404 U.S. 97 (1971), where the Supreme Court considered three factors when deciding whether a decision should be applied prospectively or retroactively. However, Arkansas has its own settled law on this subject, and this court considered that law in *Baker v. Milam*, 321 Ark. 234, 900 S.W.2d 209 (1995). *See also Flemens v. Harris*, 323 Ark. 421, 915 S.W.2d 685 (1996); *Wiles v. Wiles*, 289 Ark. 340, 711 S.W.2d 789 (1986); *Taliaferro v. Barnett*, 47 Ark. 359 (1886). In *Baker*, the court discussed its June 9, 1992 decision in *Weidrick v. Arnold*, 310 Ark. 138, 835 S.W.2d 843 (1992), where the court overruled *Jack-*

son v. Ozment, 283 Ark. 100, 671 S.W.2d 736 (1984), holding the sixty-day notice provision (and ninety-day extension of limitations provision) of the Medical Malpractice Act were invalid because the sixty-day provision conflicted with Ark. R. Civ. P. 3. Baker argued her injury accrued before the *Weidrick* decision, and she was entitled to rely on the sixty-day notice provision and correlating ninety-day extension period because prior decisions had validated that law. The court rejected Baker's argument because *Weidrick* had been decided when Baker filed her medical-injury action. The *Baker* court, citing *Wiles*, further relied on the principle that this court has long held that a decision of this court, when overruled, stands as though it had never been. *See Wiles*, 289 at 342.

The estate attempts to distinguish its situation from *Baker* and points out that the three-year wrongful-death limitations statute was not ruled in conflict with the two-year malpractice limitations period until *Hertlein* was decided on February 5, 1996, or *after* the estate filed its claim in decedent-Chamberlain's behalf. The estate further argues it justifiably relied on this court's earlier decision in *Brown v. St. Paul Mercury Ins. Co.*, 292 Ark. 558, 732 S.W.2d 130 (1987) (*Brown I*), where the court indicated Brown's death was due to a medical injury, and as a consequence, the wrongful-death three-year statute of limitations applied. We reject the estate's argument for two reasons.

First, we point out that the *Brown I* case was overruled in 1991 by *Bailey v. Rose Care Ctr.*, 307 Ark. 14, 817 S.W.2d 412 (1991). Moreover, when *Brown v. St. Paul Mercury Ins. Co.*, 308 Ark. 361, 823 S.W.2d 908 (1992) (*Brown III*), was decided on February 8, 1992, a caveat was issued by concurring opinion to the bench and bar underscoring that this court had not, as yet, decided whether the Medical Malpractice Act provisions applied in a case where a death results from a medical injury; it cautioned that it would be prudent to assume those provisions did apply. In sum, the earlier *Brown I* and *Brown III* cases offered the Chamberlain estate no precedent or comfort that the three-year wrongful-death limitations period applied to the estate's case when it filed its action on December 2, 1993.

Second, we underscore that this court's decision in *Ruffins v. ER Arkansas, P.A., supra*, was decided on May 17, 1993, and that holding, and the language contained therein, offered sufficient reasons for the Chamberlain estate to believe the two-year limitations statute would govern Ms. Chamberlain's wrongful-death case. We acknowledge the estate's contention that the language in *Ruffins* is overbroad and is not controlling of the estate's case. In this respect, the estate submits that, while the *Ruffins* decision held the sixty-day notice provision of the Medical Malpractice Act governed all causes of action for medical injuries, it argues the holding in *Ruffins* did not actually specify that two-year limitations provision of the Act would control medical injuries where a death ensued. The estate also mentions that *Ruffins* was a 4-3 decision which, in itself, was reason for the estate to believe some doubt remained, concerning whether the two-year limitations period might apply to the estate's wrongful-death action. We see no merit in the estate's contentions.

The *Ruffins* court framed the issue covered there very broadly, saying, "Our case law has reserved ruling on the issue of whether actions for wrongful death resulting from medical malpractice cases are subject to the Medical Malpractice Act." *Ruffins*, 313 Ark. at 180. Clearly this language undercuts any notion the Chamberlain estate may have had that *Brown I* was any precedent for the proposition that the three-year wrongful-death limitation applied when medical injuries were involved. The court then held as follows:

> The Medical Malpractice Act provides that it applies to "*all causes of action for medical injury*." The language is clear, and we are constrained to follow it. Accordingly, we hold that, under the then existing law, notice had to be given in compliance with the Medical Malpractice Act.

While only the notice provision was specifically brought into issue in *Ruffins*, the court, as a prerequisite, was compelled to decide the threshold issue that the Medical Malpractice Act governs all causes of action involving medical injuries, including those resulting in wrongful death. In sum, we fail to see any justifiable reliance on the estate's part for it to assume the three-

year limitations of the Wrongful Death Act would apply to its case. Nor are we aware of any reason to divert from our recent decisions that have consistently applied the Medical Malpractice Act retroactively to all causes of actions for medical injuries arising after April 2, 1979 — the date of the Act's passage.[1]

The Chamberlain estate lastly argues that the Medical Malpractice Act, particularly the two-year limitations provision, is unconstitutional because it denies a person's right to equal protection, due process, redress for wrongdoing, privileges and immunities, and violates Arkansas's constitutional prohibition against special legislation. These same constitutional challenges were raised in *Morrison v. Jennings, supra,* and like the plaintiff in *Morrison,* the estate here did not obtain a clear ruling from the trial court concerning those constitutional claims. *See Morrison,* 328 Ark. at 283-284. Instead, the trial court merely stated in its order granting Dr. Zufari's summary judgment motion "that the Medical Malpractice Act is constitutional." Because the trial court's ruling does not sufficiently address the estate's constitutional claims, a review of those issues is precluded. *Id.*

In addition, the estate offers almost no legal citation of authority to support its arguments except to reference the constitutional provisions themselves.[2] In other words, the estate offers no sound legal authority or convincing argument to support its multi-faceted constitutional claims. The estate does cite *Gay v. Rabon,* 280 Ark. 5, 652 S.W.2d 836 (1983), but that decision seems contrary to its constitutional arguments. There, this court considered the sixty-day notice provision against equal protection, due process, and special legislation claims. The *Gay* court concluded the vital question was one of reasonableness, and found no infringement upon the various constitutional provisions. The court held the legislature was not in error in determining that

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[1] This court has consistently applied the *Ruffins* decision retroactively to prior alleged medical injuries in the *Hertlein, Pastchol,* and *Morrison* cases.

[2] Regarding its special legislation argument, the estate does refer to *Knoop v. The City of Little Rock,* 277 Ark. 13, 638 S.W.2d 670 (1982), but mentions only generally the definitional statement, "a law is special in a constitutional sense when by force of an inherent limitation it arbitrarily separates some person, place, or thing from those upon which, but for such separation it would operate . . . ."

medical malpractice insurance rates were increasing and placing a heavy burden of medical expense on those who could least afford it. The court further stated the sixty-day notice requirement made it possible for the insurance carrier and the potential defendant to attempt to arrive at a settlement with the aggrieved person without the necessity of the parties incurring the expense of litigation. *Id.* at 8-9. In other words, the *Gay* court held that the Medical Malpractice Act was not arbitrary and capricious, but instead, the Act's provisions were reasonably related to the legislative goal of reducing medical malpractice insurance costs.[3]

Because no clear ruling was obtained on the estate's constitutional arguments or sound legal authority and convincing argument presented, we affirm on these constitutional points.

Affirmed.

NEWBERN, BROWN, and THORNTON, JJ., dissent.

DAVID NEWBERN, Justice, dissenting. Sybil Looney filed her complaint more than two years from the date on which the appellees allegedly caused Carol Chamberlain's medical injury but within three years of Ms. Chamberlain's death. In the fall of 1991, when Ms. Looney's cause of action accrued, her claim for wrongful death was subject to the three-year statute of limitations contained in the Wrongful Death Act, Ark. Code Ann. § 16-62-102(c)(Supp. 1995). Prior to the accrual of Ms. Looney's cause of action, we had held in *Brown v. St. Paul Mercury Ins. Co.,* 292 Ark. 558, 732 S.W.2d 130 (1987)("*Brown I*"), that the three-year statute governed claims for wrongful death resulting from medical injury and that such claims did not have to be filed within the two-year statute contained in the Medical Malpractice Act, Ark. Code Ann. § 16-114-203 (Supp. 1995). We said the Medical Malpractice Act's two-year statute was "irrelevant" to wrongful-death claims, and we reached this conclusion even though the

[3] We note that the estate offers argument to distinguish *Gay* by stating the entire Medical Malpractice Act is unconstitutional because its goal can no longer be met since the sixty-day notice provision of the Act was invalidated in *Weidrick*. Again, the estate, except to reference a dissenting opinion, offers no legal authority to support its argument, challenging the Act.

Medical Malpractice Act provided that it applied to "all causes of action for medical injury occurring after April 2, 1979, and, as to such causes of action, shall supersede any inconsistent provision of law." Ark. Code An. § 16-114-202.

Between the time of our decision in *Brown I* and the accrual of Ms. Looney's cause of action, we never questioned our holding that the three-year statute of limitations governed actions for wrongful death resulting from medical injury. The three-year statute was clearly in effect in the fall of 1991 when Ms. Looney's action accrued, and Ms. Looney complied with the statute by filing her complaint on December 2, 1993.

Although it is undisputed that Ms. Looney filed her claim in accordance with the law as it existed when her cause of action arose, the majority believes the claim was properly dismissed as untimely because it was filed more than two years from the date on which the appellees allegedly caused Ms. Chamberlain's medical injury. The Court in *Brown I* had held that the two-year statute was *not* applicable to the type of claim filed by Ms. Looney, and *Brown I* was the controlling law at the time Ms. Looney's claim arose. However, according to the majority, following our decision in *Brown I,* we rendered three decisions after Ms. Looney's cause of action had accrued but before her complaint was filed that repudiated *Brown I* and established the applicability of the two-year statute to claims for wrongful death resulting from a medical injury. In the wake of these decisions, the majority says, *Brown I* stood "as though it had never been," and it was therefore unreasonable for Ms. Looney to rely on that case in waiting more than two years from the date of Ms. Chamberlain's surgery to file suit against the appellees.

The majority's reasoning is flawed in several respects. First, the majority errs by suggesting that the statute of limitations in effect when Ms. Looney's claim was *filed* on December 2, 1993, is controlling. As many jurisdictions have recognized, "[t]he statute of limitation in effect when a cause of action accrues governs the time within which a civil action must be commenced." *Rauschenberger v. Radetsky,* 745 P.2d 640, 642 (Colo. 1987). *See also Chase v. Sabin,* 516 N.W.2d 60, 61 n.2 (Mich. 1994)("The perti-

nent statute of limitations is the one in effect when the plaintiff's cause of action arose."), *citing Winfrey v. Farhat,* 170 N.W.2d 34 (Mich. 1969). *See Matter of Estate of Weidman,* 476 N.W.2d 357, 364 (Iowa 1991); *Department of Health & Welfare v. Engelbert,* 753 P.2d 825, 826 (Idaho 1988); *Cavanaugh v. Abbot Laboratories,* 496 A.2d 154, 158 (Vt. 1985); *Dade County v. Rohr Industries, Inc.,* 826 F.2d 983, 989 (11th Cir. 1987); *Canadian Indem. Co. v. K & T, Inc.,* 745 F. Supp. 661, 663 (D.Utah 1990); *Cooper v. Summer,* 672 F. Supp. 1361, 1364-65 (D.Nev. 1987). As mentioned, the statute of limitations in effect when Ms. Looney's wrongful-death action accrued was the three-year statute contained in the Wrongful Death Act. Ms. Looney complied with that statute, and it is irrelevant whether her claim was timely under any conflicting limitations provision in effect on December 2, 1993.

The majority suggests that *Baker v. Milam,* 321 Ark. 234, 900 S.W.2d 209 (1995), supports the application of the statute of limitations in effect when Ms. Looney filed her complaint on December 2, 1993. In the *Baker* case, the issue was whether the Trial Court was correct to apply retroactively our decisions in *Weidrick v. Arnold,* 310 Ark. 138, 835 S.W.2d 843 (1992), and *Thompson v. Dunn,* 319 Ark. 6, 889 S.W.2d 31 (1994), which, respectively, invalidated the notice and 90-day-extension provisions contained in Ark. Code Ann. § 16-114-204 (1987). As the majority observes, the *Weidrick* case had been decided at the time Ms. Baker filed her complaint. Ms. Baker asserted that *Weidrick* and *Thompson* should not have been applied retroactively to bar her claim because her cause of action had accrued prior to the date of these decisions.

With very little discussion, we rejected Ms. Baker's argument and upheld the retroactive application of *Weidrick* and *Thompson* to her claim. We noted that those cases "had been decided when the trial court entered its decision in this case," we referred to a supposed "long-standing practice of applying our decisions retrospectively," and we said that Ms. Baker had not demonstrated any "justifiable reliance" on an "old rule of law." *Baker v. Milam,* 321 Ark. at 238, 900 S.W.2d at 211. We further intimated that, in other cases, we had applied the *Weidrick* case to actions that had accrued prior to the date of that decision. We emphasized that the

Trial Court had "correctly applied the decisional law of this court as it existed when it decided appellant's case." *Id.*

It was wrong for us to suggest that the Trial Court's retroactive application of *Weidrick* and *Thompson* was correct simply because those cases were in effect at the time the Trial Court rendered its decision. Although the *Weidrick* case was on the books when Ms. Baker filed her claim, we did not adopt a clear rule that the statute of limitations in effect at the time a complaint is filed, rather than the statute in effect when the cause of action accrues, is controlling. If the *Baker* decision is to be so interpreted, it should be unceremoniously and immediately overruled.

The majority suggests that the *Baker* case "relied on the principle that this court has long held that a decision of this court, when overruled, stands as though it had never been." Although we did not refer to this "principle" in the *Baker* case, we have recited it in other cases, often in conjunction with a statement that our "long-standing practice" is to apply our decisions retroactively. We do, of course, apply our decisions retroactively when they are declarations of what the law has always been rather than decisions that overrule or change the law. One need only review our most recent decisions to see that, when our decisions establish new rules of law, we apply them prospectively only. *See, e.g., Union Pacific R.R. Co. v. Sharp,* 330 Ark. 174, 952 S.W.2d 658 (1997); *Shannon v. Wilson,* 329 Ark. 143, 947 S.W.2d 349 (1997); *Wiles v. Webb,* 329 Ark. 108, 946 S.W.2d 685 (1997).

We have "acknowledged the need, when overruling prior case law, to recognize the validity of actions taken in faith upon old decisions while stating the rules to be followed in the future." *Wiles v. Wiles,* 289 Ark. 340, 342, 711 S.W.2d 789, 791 (1986). Clearly, where a party has demonstrated reliance on an overruled case, we have not treated the case as if it never existed. *See also Crisco v. Murdock Acceptance Corp.,* 222 Ark. 127, 136, 258 S.W.2d 551, 557 (1953)("Even though such retroactive judicial pronouncements are permitted by the constitution, they are manifestly contrary to a sense of fair play.")(supp. op. den. reh'g); *Oliver v. State,* 323 Ark. 743, 749, 918 S.W.2d 690, 692 (1996)("We conclude that fairness dictates a prospective applica-

tion of our holding. Oliver could justifiably have relied on the cases now overruled.").

Our approach to this issue is, and should be, thus largely consistent with that of the United States Supreme Court as expressed in *Chevron Oil v. Huson,* 404 U.S. 97 (1971). A decision should be applied prospectively if, among other things, it establishes "a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed," or if a retroactive application of the decision will "produce substantial inequitable results" or "injustice or hardship." *Id.* at 106-07 (citations omitted). The majority shrugs off the *Chevron Oil* case, but we have followed it in at least two previous decisions. *See, e.g., Pledger v. Bosnick,* 306 Ark. 45, 811 S.W.2d 286 (1991); *American Trucking Ass'ns, Inc. v. Gray,* 295 Ark. 43, 746 S.W.2d 377 (1988).

In any event, the notion that "an overruled case is to be treated as if it never was the law" is clearly outmoded; the more modern view is that this principle should be rejected as a "myth." Annotation, *Prospective or Retroactive Operation of Overruling Decision,* 10 A.L.R.3d 1371, 1383 (1966). *See also Chevron Oil v. Huson,* 404 U.S. at 107 ("We should not indulge in the fiction that the law now announced has always been the law and, therefore, that those who did not avail themselves of it waived their rights.")(citation omitted).

The second flaw in the majority's reasoning is its conclusion that three of our cases decided prior to the filing of Ms. Looney's claim on December 2, 1993, overruled *Brown I* and established the applicability of the two-year statute over the three-year statute. Even if the majority is correct in its suggestion that the controlling statute of limitations is the one in effect when Ms. Looney filed her claim on December 2, 1993, it is clear that the law in effect at that time was still the three-year statute.

The majority contends that *Bailey v. Rose Care Center,* 307 Ark. 14, 817 S.W.2d 412 (1991); *Brown v. St. Paul Mercury Ins. Co.,* 308 Ark. 361, 823 S.W.2d 908 (1992)("*Brown III*"); and *Ruffins v. ER Arkansas, P.A.,* 313 Ark. 175, 853 S.W.2d 877 (1993), reversed *Brown I* and rendered applicable the two-year provision.

These cases could not have had the effect attributed to them by the majority. The *Bailey* case overruled our holding in *Brown I* that the injury sustained by the deceased was a "medical injury" within the meaning of the Medical Malpractice Act, but it did not discuss, let alone disturb, our holding in *Brown I* that the three-year limitations provision applied to actions for wrongful death resulting from medical injury.

In *Brown III,* we again said that an action for wrongful death resulting from a medical injury was governed by neither the notice provision nor the two-year statute of limitations contained in the Medical Malpractice Act. We emphasized that, "[b]ecause this is a wrongful death action, compliance with the medical malpractice statutes . . . is irrelevant." *Brown v. St. Paul Mercury Ins. Co.,* 308 Ark. at 363, 823 S.W.2d at 909. In a concurring opinion, Justice Glaze observed that the question of the Medical Malpractice Act's applicability to actions for wrongful death resulting from a medical injury had not been "fully developed and argued in this appeal." *Id.* at 364, 823 S.W.2d at 910 (Glaze, J., concurring). The concurring opinion cautioned attorneys to assume that the Medical Malpractice Act, and the notice provisions in particular, would in fact apply to such actions. The question, however, is whether *Brown III* overruled *Brown I* and established the applicability of the two-year statute. Whatever the efficacy of the "caveat" issued in the concurring opinion, the holding in *Brown III* unquestionably maintained the *status quo* established in *Brown I* and did nothing to suggest that the three-year statute was no longer applicable to actions for wrongful death resulting from a medical injury.

Likewise, nothing in the *Ruffins* case altered the rule established in *Brown I* that the three-year statute applied to the type of claim brought by Ms. Looney. To the extent that the *Ruffins* case could be viewed as changing the applicable statute of limitations from the three-year provision to the two-year provision, under the *Chevron Oil, Wiles,* and *Crisco* cases, the decision should not be applied retroactively to bar Ms. Looney's claim. The majority asserts that we have applied *Ruffins* retroactively in past cases. Even if that assertion is true, it provides no basis for applying the case retroactively here in view of the fact that our decisions in the

cases cited by the majority do not reflect that the plaintiffs urged a prospective-only application of the case.

If the controlling statute of limitations were the one in effect at the time a claim is filed, here is what could happen. A claimant whose claim arises when a three-year statute of limitations is in effect thinks she has three years within which to file it. She may wish to delay filing her complaint for a variety of reasons, for example, to allow time to ascertain the extent of her injury. More than two years after the claim arose, the General Assembly by statute, or this Court by decision, changes the law to say a two-year limitation applies. The claim is barred. Nothing could be more unfair, and that is why the other jurisdictions cited above hold that the limitations period in effect at the time the claim arose applies. The only fair rule is simply this — if a decision changes the law it should be applied prospectively; if not, it should be applied retroactively.

The Court will likely remain divided on the issue of whether the two-year statute or the three-year statute should apply to actions for wrongful death resulting from medical injury. Despite the division on that issue, we should all agree, at the very least, that the timeliness of a plaintiff's cause of action should be determined with reference to the law as it existed when the cause of action accrued. We should not penalize Ms. Looney for changes in the law that she could not have foreseen. Because Ms. Looney complied with the law existing when her cause of action arose, as well as the law existing when her claim was filed, we should allow her to pursue her claim.

I respectfully dissent.

THORNTON, J., joins in this dissent.

ROBERT L. BROWN, Justice, dissenting. I continue in my belief that *Ruffins v. ER Arkansas, P.A.*, 313 Ark. 175, 853 S.W.2d 877 (1993), did not decide the statute-of-limitations question at issue in the instant case. That issue was not squarely addressed by this court until *Hertlein v. St. Paul Fire Ins. Co.*, 323 Ark. 283, 914 S.W.2d 303 (1996). In any case, I respectfully dissent for the reasons stated in my dissenting opinion in *Morrison v.*

Jennings, 328 Ark. 278, 943 S.W.2d 559 (1997) (J. Brown, dissenting).

Cynthia DAVIS *v.* DILLMEIER ENTERPRISES, INC.

97-360 956 S.W.2d 155

Supreme Court of Arkansas
Opinion delivered November 13, 1997

Sexton & Fields, P.L.L.C., by: *William J. Kropp III*, for appellant.

Gary W. Udouj, for appellee.

DONALD L. CORBIN, Justice. Appellant Cynthia Davis appeals the judgment of the Sebastian County Circuit Court dismissing with prejudice her complaint against Appellee Dillmeier Enterprises, Inc., for discrimination in violation of the Arkansas Civil Rights Act of 1993, Ark. Code Ann. §§ 16-123-101 to -108 (Supp. 1995). The trial court dismissed Appellant's complaint for lack of subject-matter jurisdiction, holding that Appellant's claim was covered by the Workers' Compensation Act, Ark. Code Ann. §§ 11-9-101 to -1001 (Repl. 1996). This case presents an issue of first impression requiring statutory interpretation; hence, our jurisdiction is pursuant to Ark. Sup. Ct. R. 1-2(a)(17)(i) & (vi). The sole issue raised by Appellant is whether an employee who is discriminated against based upon a disability resulting from a work-related injury may sue her employer under the Arkansas Civil Rights Act. We find that such suit is permissible, and we reverse.

The relevant facts, which are not in dispute, are set out in the complaint as follows. Appellant was employed by Appellee at its facility in Fort Smith beginning in September 1993. In October 1993 and also in April 1994, Appellant sustained bilateral carpal tunnel syndrome, which was caused by the rapid and repetitive motion in Appellant's work-related environment. Appellant's injuries were accepted as compensable, and she completed her rights under the workers' compensation laws by joint petition filed

with the Arkansas Workers' Compensation Commission on November 28, 1995. After her injuries were accepted as compensable, Appellant was placed under active treatment from two physicians and underwent epineurolysis and decompression for her injuries in both March and May 1995. During the time she was under active treatment, Appellant continued working for Appellee and was able to perform the essential functions of her job, with or without reasonable accommodations, under limited duties or restrictions. Specifically, in a status report dated June 21, 1995, Appellant was instructed by her primary physician to wear a splint, sling, or brace and was restricted from performing any repetitive motion and any gripping, pulling, pushing, or lifting of items weighing in excess of zero pounds for a period of four weeks. Similarly, Appellant was advised by Dr. Kenneth Rosenzweig on that same date as follows:

> I would like for her to continue her rehab[ilitation] efforts and try some light duty job if available — that should be with her padded gloves on, no excessive pressure in the palm of her hand, and avoiding any heavy gripping, pushing, pulling and/or repetition for at least another month and at that time, things should be well enough to go back to her regular job. This should be on a trial basis and if she is unable to tolerate it despite surgical repair, then she may be forced to do something less intensive.

Two months later, on August 22, 1995, Appellant was given a full and complete release from treatment and rehabilitation by both physicians, with noted permanent restrictions. Particularly, Appellant was advised to refrain from any repetitive motion of any activity seventy-one degrees, to continue restrictive activities, and to pursue job rotation to avoid any overuse in any one particular mode. Appellant was assigned a rating of five percent permanent physical impairment in each upper extremity. On that same date, after having obtained her release from treatment, Appellant reported to work, where she was immediately terminated from employment by Appellee.

As a result of her termination, Appellant brought an action against Appellee for discrimination based upon a physical disability, in violation of the Arkansas Civil Rights Act. Appellant asserted in her complaint that Appellee terminated her despite the

fact that she had been previously performing the essential functions of her job and despite the fact that her permanent impairments were less restrictive and less severe than those initially indicated by her treating physicians. Appellant claimed damages in the form of lost wages, mental anguish, and loss of dignity. She also asked for punitive damages in the amount of $200,000.

Appellee filed a motion to dismiss Appellant's complaint on the ground that exclusive jurisdiction of her claim was clearly vested in the Arkansas Workers' Compensation Commission, specifically pursuant to section 11-9-505(a)(1). After hearing argument from both sides, the trial court dismissed with prejudice Appellant's complaint, reasoning that it was the General Assembly's intent that the remedies provided under the Workers' Compensation Act were to be exclusive.

On appeal, Appellant argues that her claim is cognizable under the Arkansas Civil Rights Act. She contends that workers who are discriminated against because of a disability from a work-related injury are not entitled to less protection under the law than are workers who are disabled by other means. She contends further that the Workers' Compensation Act was never intended to be a vehicle for protecting a worker's civil rights, and that the damages available under the Arkansas Civil Rights Act are more complete than those offered under the Workers' Compensation Act. In support of her argument, Appellant relies on this court's holding in *Malone v. Trans-States Lines, Inc.*, 325 Ark. 383, 926 S.W.2d 659 (1996).

In *Malone*, the appellant had filed a complaint in circuit court against his employer for retaliatory discharge under the Workers' Compensation Act and for discrimination in violation of the Arkansas Civil Rights Act. The trial court dismissed the complaint for lack of subject-matter jurisdiction and failure to state a claim upon which relief could be granted. There, as in the present case, the appellant argued that his civil rights claim was cognizable in circuit court and that the trial court had thus erred in dismissing with prejudice his complaint for lack of subject-matter jurisdiction. This court did not directly address the merits of that argument, but nonetheless held that the complaint should have been

dismissed without prejudice, to allow the appellant to amend his complaint to include the specific facts, as opposed to bare conclusions of law, in support of his claim. This court stated:

> While we are somewhat sympathetic to appellant's contention that he has asserted two distinct causes of action based on two distinct statutes, on this limited record we cannot fully discuss the merits of appellant's arguments for reversal of the trial court's rulings regarding subject-matter jurisdiction. *Suffice it to say that because appellant has asserted a cause of action in circuit court based in part on the Arkansas Civil Rights Act of 1993, we reverse that part of the order dismissing the complaint for lack of subject-matter jurisdiction.*

Id. at 386-87, 926 S.W.2d at 662 (emphasis added). It is this language that Appellant relies on in support of her assertion that her claim is actionable in circuit court. Additionally, Appellant points to a concurring opinion in *Malone.* It was stated unequivocally that the exclusive-remedy doctrine of the Workers' Compensation Act "in no way conflicts with or bars a properly established or alleged claim under the Civil Rights Act." *Id.* at 387-88, 926 S.W.2d at 662.

Appellee, on the other hand, asserts that Appellant's claim is limited to the remedy provided under section 11-9-505, which addresses an employee's rights when the employer refuses to return the injured employee to work. Appellee asserts further that while the Arkansas Civil Rights Act generally addresses the rights of disabled persons to obtain and hold employment, the Workers' Compensation Act specifically addresses the rights of employees who were injured on the job to return to work. Accordingly, Appellee asserts that the specific remedies provided in the Workers' Compensation Act must prevail over the general remedies available under the Arkansas Civil Rights Act.

In response to Appellee's argument, Appellant contends that the issue in this case is not that Appellee refused to return her to work after her injury; rather, she contends that the action filed in circuit court under the Arkansas Civil Rights Act is a separate and distinct cause of action based upon Appellee's decision to terminate her because of her physical disability. Appellant contends that this is not a case of Appellee's refusal to return her to work, because she had been allowed to return to work after her injuries,

during the time she was receiving physical rehabilitation and was under medical restrictions.

The initial question then is whether this case is one of discrimination on the part of the employer in terminating an employee based upon her disability or, rather, whether it is one of the employer's refusal to return the employee to work after having suffered a work-related injury. Should we determine that this case presents an issue of employer discrimination, we must next determine whether there is an adequate remedy for such discrimination available to Appellant under the Workers' Compensation Act. If, on the other hand, we should determine that this case concerns the employer's refusal to return the injured employee to work, we should affirm the trial court's dismissal with prejudice of Appellant's complaint, as her exclusive remedy would be found in section 11-9-505 of the Act. For the reasons set out below, we conclude that this case presents an issue of employer discrimination, rather than a situation where the employer has refused to return the injured employee to work.

Section 16-123-107(a) of the Arkansas Civil Rights Act of 1993 provides in pertinent part:

> The right of an otherwise qualified person to be free from discrimination because of race, religion, national origin, gender, or the presence of any sensory, mental, or physical disability is recognized as and declared to be a civil right. This right shall include, but not be limited to:
>
> (1) The right to obtain and hold employment without discrimination[.]

As previously noted, the issue presented by this appeal is one of first impression in this State. As such, we look to cases from other jurisdictions for guidance. The Supreme Court of Washington recognized that, in addition to obtaining workers' compensation benefits, an employee has the right to file suit against the employer for discrimination based upon a physical disability. *Reese v. Sears, Roebuck & Co.*, 731 P.2d 497 (Wash. 1987), *overruled on other grounds by Phillips v. Seattle*, 766 P.2d 1099 (Wash. 1989). The court found that there was no conflict between the Industrial Insurance Act ("IIA"), Washington's workers' compensation act,

and the Law Against Discrimination, the state's civil rights act. The court reasoned that under the workers' compensation law, the appellant-employees sought recovery for their out-of-pocket costs attributed to specific physical injuries arising out of their employment, but that, in contrast, under the civil rights law, the appellant-employees claimed that they were injured, "not by the physical workplace injuries that gave rise to their respective disabilities, but by a particular employer action taken months after they became disabled." *Id.* at 502. The court held:

> It is the *employer response* to the disabled worker that is at issue. Appellants' claimed injuries in this action turn *exclusively* on the employers' deliberate behavior. For purposes of the Law Against Discrimination, it does not matter how the handicap arose; only the employer's response to the handicap matters.

Id. at 502-03. In concluding that there was no conflict between the two statutory schemes, and thus no need to choose between giving full effect to either act, the court stated:

> In sum, we hold that appellant employees' discrimination actions are not barred by the IIA exclusive remedy provision. Appellants claim to have suffered two separate injuries — a workplace physical injury and a subsequent injury arising from the employers' alleged handicap discrimination. Because the injuries (1) are of a different nature, (2) must arise at different times in the employee's work history, and (3) require different causal factors (an IIA claim is indifferent to employer fault, a discrimination claim requires such fault), the two injuries cannot be "the same injury." Since the Legislature intended the IIA and the Law Against Discrimination to address the two separate injuries alleged by the appellants, no conflict exists between the two statutes in question.

Id. at 503.

Similarly, in *Cox v. Glazer Steel Corp.*, 606 So.2d 518 (La. 1992), the Supreme Court of Louisiana held that an employee who had previously settled a claim for an industrial accident could sue the former employer for discrimination against the handicapped. The court applied the same reasoning expressed by the Washington Supreme Court that the two statutory schemes have different bases: Specifically, the workers' compensation principle

excludes the concept of employer fault, but "the Civil Rights Act for Handicapped Persons is fault-based legislation, intended to prevent discrimination, prejudice and intolerance." *Id.* at 519-20. The court went on to conclude that the purposes of the two laws were also different, stating:

> The worker's compensation law provides compensation for accidental industrial injury or death. Guaranteeing civil job rights for the handicapped is intended to assure the handicapped equal employment opportunity. The two pieces of legislation are directed at distinct problems.

Id. at 520. It should be noted that the Louisiana decision also turned on the fact that its workers' compensation act specifically provides that it does not bar other statutory causes of action. That distinction notwithstanding, we find the reasoning expressed by the court to be persuasive. We turn now to a related decision from this court.

In *Travelers Ins. Co. v. Smith*, 329 Ark. 336, 947 S.W.2d 382 (1997), we determined that an action filed in circuit court was not barred by the exclusive-remedy provision of the Workers' Compensation Act where the injury was not compensable and was beyond the scope of coverage of the Act. The facts of that case were that the plaintiff's deceased husband was killed in a one-vehicle trucking accident while in the course of his employment with Gerald Johnson Trucking Company. The plaintiff brought suit in circuit court against the insurance company and its claims adjuster on the grounds that the adjuster had made misrepresentations to her causing her to refrain from embalming her husband's body and proceeding with the funeral. She claimed that she had experienced severe and extreme mental anguish as a result of those misrepresentations. The insurance company and its adjuster argued that the plaintiff's claim was barred by the exclusive-remedy provision of the Act. We held that, "we cannot construe Anna Smith's claims of misrepresentation and extreme mental anguish to be an aggravation of an initial, compensable injury suffered by her husband." *Id.* at 342, 947 S.W.2d at 385. We then acknowledged that the pertinent issue was whether the lack of a remedy under the Act necessarily answered the question of whether the circuit court lacked jurisdiction to hear the plaintiff's claim. In an

attempt to answer that question, we turned to the writings of Professor Larson for guidance:

> If . . . the exclusiveness defense is a "part of the *quid pro quo* by which the sacrifices and gains of employees and employers are to some extent put in balance," it ought logically to follow that the employer should be spared damage liability only when compensation liability has actually been provided in its place, or, to state the matter from the employee's point of view, rights of action for damages should not be deemed taken away except when something of value has been put in their place.

Travelers, 329 Ark. at 343, 947 S.W.2d at 385-86 (quoting 6 ARTHUR LARSON & LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW § 65.40, at 12-55 (1997) (footnotes omitted)). We concluded that permitting the plaintiff's claims in circuit court was entirely consistent with Professor Larson's teachings:

> If the essence of the tort, in law, is non-physical, and if the injuries are of the usual non-physical sort, with physical injury being at most added to the list of injuries as a makeweight, the suit should not be barred. But if the essence of the action is for recovery for physical injury or death, . . . the action should be barred even if it can be cast in the form of a normally non-physical tort.

Id. at 344, 947 S.W.2d at 386 (quoting 6 ARTHUR LARSON & LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW § 68.34(a), at 13-180 (1997) (footnote omitted)). Thus, from the decision in *Travelers*, it is clear that in determining whether an action involving a work-related injury may be filed in circuit court, an important consideration is whether the Workers' Compensation Act provides a remedy to the plaintiff.

In the case at hand, we conclude that there is no such remedy available to Appellant under the Act for her claim of injury resulting from her termination from employment with Appellee. Neither section 11-9-505 nor section 11-9-107 provide a remedy to Appellant in this instance. Section 11-9-505(a)(1) provides:

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

We construe the plain language of that provision as providing benefits *in addition* to those workers' compensation benefits already being received by the claimant. Such construction is evident, as the statute provides to the injured employee the *difference* between the compensation benefits being received and the average weekly wages lost during the period of refusal. Clearly, the combination of compensation benefits and additional benefits are designed to pay the employee a total amount equal to his or her average salary, thus making the employee whole. From the circumstances presented in this case, Appellant would not qualify for additional benefits under section 11-9-505 because she is no longer receiving any compensation benefits for her injury.

Moreover, the facts of this case do not describe a situation where the employer has refused to return the injured employee to work. Appellant had in fact already been returned to work during the time that she was receiving medical treatment and compensation benefits. It was only upon Appellant's reporting to work after having been released from treatment, but having sustained a permanent impairment to both upper extremities, that Appellee terminated her. Appellant's termination thus cannot be viewed as a refusal by Appellee to return her to work; rather, it can be viewed only as a termination. Accordingly, the benefits contemplated by section 11-9-505 do not offer this Appellant any remedy for her injuries.

Similarly, section 11-9-107, which provides for administrative and criminal penalties against an employer who engages in discrimination, does not provide a remedy to Appellant. Section 11-9-107 was intended by the legislature to be a remedy for willful discrimination by the employer done in retaliation for the

employee's having sought compensation under the Act. That section provides in pertinent part:

> (a)(1) Any employer who willfully discriminates in regard to the hiring or tenure of work or any term or condition of work of any individual *on account of the individual's claim for benefits under this chapter*, or who in any manner obstructs or impedes the filing of claims for benefits under this chapter, shall be subject to a fine of up to ten thousand dollars ($10,000) as determined by the Workers' Compensation Commission.
>
> (2) This fine shall be payable to the Second Injury Trust Fund and paid by the employer and not by the carrier. [Emphasis added.]

Section 11-9-107 was amended by the legislature in 1993 in order to preserve the exclusive remedy of the Workers' Compensation Act by eliminating the common-law remedies for retaliatory or wrongful discharge. *See* section 11-9-107(e). In the present case, Appellant does not allege, nor has Appellee contended, that she was fired in retaliation for having sought workers' compensation benefits. To the contrary, the information provided in the complaint demonstrates that Appellant's injuries were accepted as compensable by Appellee and that benefits were completed by joint petition to the Commission. Thus, any remedy offered by section 11-9-107 is inapplicable to the facts of this case.

In sum, we conclude that there is no remedy under the Workers' Compensation Act for an employee who is terminated from his or her job on the basis of a disability. Thus, the exclusive-remedy provision of the Act does not preclude Appellant from bringing an action under the Arkansas Civil Rights Act based upon Appellee's alleged discrimination in terminating her on the bases of her permanent restrictions and impairments. In this respect, we agree with the reasoning espoused by the Washington Supreme Court that it matters not how the disability came about; rather, the focus should be upon the subsequent deliberate action by the employer in terminating the employee based upon a disability. Additionally, we are persuaded that the rights and remedies provided by both Acts are considerably different and serve to fulfill different purposes. Appellant has alleged two separate injuries — one being a work-related physical injury, for which she has

received workers' compensation benefits, and one being a subsequent nonphysical injury arising from Appellee's action in terminating her based upon her physical disability. The first injury is exclusively cognizable under the Workers' Compensation Act, while the subsequent injury is of the type envisioned by the Arkansas Civil Rights Act of 1993.

Accordingly, we reverse the decision of the trial court dismissing with prejudice Appellant's complaint, and we remand this case for further proceedings. We note that by our holding today, we make no decision as to whether Appellant has established that she has a "disability" within the meaning of that term as used in the Arkansas Civil Rights Act, section 16-123-102(3). Nor do we reach the issue of the reasons for Appellant's termination from her employment with Appellee. We hold only that Appellant may proceed with her claim under the Arkansas Civil Rights Act.

Reversed and remanded.

NEWBERN and BROWN, JJ., dissent.

DAVID NEWBERN, Justice, dissenting. The majority opinion runs afoul of the exclusive-remedy provision of the Workers' Compensation Act. That provision makes no exception for a claim under the Arkansas Civil Rights Act ("ACRA") based on a disability resulting from a compensable work-related injury. The majority's analysis, based in large part on decisions in jurisdictions where the statutes differ from the Arkansas Workers' Compensation Act, contains several flaws that cause it to ignore the clear command of the General Assembly.

Ms. Davis and the majority rely on the holding of *Malone v. Trans-States Lines, Inc.*, 325 Ark. 383, 926 S.W.2d 659 (1996), which reversed the dismissal of a discrimination complaint cognizable under the ACRA. The complaint had been dismissed at the trial level for lack of subject-matter jurisdiction. We did not discuss the merits of the claim, but held that complaints based on the ACRA fall within circuit court jurisdiction. Some reliance is also placed upon a concurring opinion in the *Malone* case which stated that the exclusive-remedy doctrine of the Workers' Compensation

Act "in no way conflicts with or bars a properly established or alleged claim under the Civil Rights Act." *Id.* at 387-88, 926 S.W.2d at 662 (Glaze, J., concurring). Even if that statement had been an *obiter dictum* found in the majority opinion in the *Malone* case, it would hardly have answered the question presented here.

Our Workers' Compensation Act provides a remedy for an employee such as Ms. Davis. Arkansas Code Ann. § 11-9-505(a)(1) (Repl. 1996) provides:

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

Refusal to return an injured employee to suitable work is covered by that section regardless of the reason of the employer for doing so. The law thus provides a remedy for an employee who is discriminated against due to her injury, and the General Assembly has made that remedy exclusive. "The . . . remedies granted to an employee . . . on account of injury . . . shall be exclusive of all other rights and remedies of the employee . . . ." Ark. Code Ann. § 11-9-105(a) (Repl. 1996).

It might be argued that Ms. Davis does not fit within the situation described in section 11-9-105(a) because she was returned to work during her healing period but was dismissed after the permanent restrictions on her activities were made known. Surely, however, we would not render a decision that would discourage employers from retaining injured employees at least until the extent of disability is finally determined.

In *Reese v. Sears, Roebuck & Co*, 731 P.2d 497 (Wash. 1987), *overruled on other grounds by Phillips v. Seattle*, 766 P.2d 1099 (Wash. 1989), cited by the majority opinion, the Supreme Court of Washington held that the Industrial Insurance Act, Washington's workers' compensation act, and the Law Against Discrimination, the State's civil rights act, did not conflict. The Court concluded

that the Washington legislature intended expressly to preclude the possibility that discriminatory actions would be protected from remediation because of earlier enacted laws. There is no provision in the ACRA indicating it was intended to trump a provision such as § 11-9-105(a).

In *Cox v. Glazer Steel Corp.*, 606 So.2d 518 (La. 1992), the Louisiana Supreme Court noted, as did the Washington court in the *Reese* case, that the civil rights law and the workers' compensation law were meant to remedy different injuries. While that may be so, it does not answer § 11-9-105(a). A Louisiana statute cited in the *Cox* opinion provided, "Nothing in this Chapter [Louisiana Workers' Compensation Act] shall affect the liability of the employer, . . . under any other statute or the liability, civil or criminal, resulting from an intentional act." LSA-R.S. 23:1032(B). The Louisiana workers' compensation law is simply not exclusive of other statutory remedies, and that was the holding of the case.

The majority also relies on *Travelers Ins. Co. v. Smith*, 329 Ark. 336, 947 S.W.2d 382 (1997), where we held that a factor in determining whether the exclusive-remedy doctrine barred the action was whether the Workers' Compensation Act provided a remedy for the injury at issue. In that case, the claimant, unlike Ms. Davis, was not an injured employee and had no remedy under the Workers' Compensation Act. It is of no precedential value here.

The majority concludes that there is no workers' compensation remedy available to Ms. Davis by construing § 11-9-505 to mean that a claimant must be currently receiving workers' compensation benefits to qualify for additional benefits under this section. I do not agree. The section says that an employer who refuses to return an employee to work "shall be liable to pay to the employee the difference between benefits received and the average weekly wages lost *during the period of such refusal.*" (Emphasis supplied.) In this instance, the benefits received "during the period of such refusal" would be zero to be subtracted from the average weekly wages lost, giving Ms. Davis the whole sum to be received as the difference for one year.

Ms. Davis was dismissed upon presentment of her permanent restrictions. She can pursue a remedy under § 11-9-505 by filing a workers' compensation claim and can also petition under § 11-9-107 for her employer to be penalized if she can prove discrimination. From the penalty Ms. Davis can collect attorney's fees.

Under §11-9-505(a)(1) Ms. Davis must prove (1) by a preponderance of the evidence that she sustained a compensable injury; (2) that suitable employment within her physical and mental limitations is available with the employer; (3) that the employer has refused to return her to work; and (4) that the employer's refusal to return her to work is without reasonable cause. *Torrey v. City of Fort Smith,* 55 Ark. App. 226, 230, 934 S.W.2d 237, 239 (1996). In this case, Ms. Davis has alleged facts in support of each of the requirements.

Section 11-9-105 states that the remedies granted to an employee subject to the provisions of the workers' compensation chapter shall be "exclusive of all other rights and remedies of the employee." This Court has previously held that "other statutes must yield to the Workers' Compensation Act because it is in the interest of the public policy to give that act priority as an exclusive remedy." *Cherry v. Tanda*, 327 Ark. 600, 616, 940 S.W.2d 457, 462 (1997)(quoting from *Helms v. Southern Farm Bureau Casualty*, 281 Ark. 450, 664 S.W.2d 870 (1984)).

I respectfully dissent.

BROWN, J., joins this dissent.

LITTLE ROCK NEWSPAPERS, INC. *v.*
J. Michael FITZHUGH

96-1050 954 S.W.2d 914

Supreme Court of Arkansas
Opinion delivered November 13, 1997
[Petition for rehearing denied January 8, 1998.*]

* BROWN and IMBER, JJ., not participating.

Williams & Anderson, by: *Philip S. Anderson, John E. Tull III*, and *Leon Holmes*; and *Hardin, Dawson & Terry*, by: *Rex M. Terry*, for appellant.

Everett Law Firm, by: *Thomas A. Mars*, for appellee.

DONALD L. CORBIN, Justice. Appellant Little Rock Newspapers, Inc., appeals the judgment of the Sebastian County Circuit Court imposing the jury's verdict awarding $50,000 in damages to Appellee J. Michael Fitzhugh for his defamation claim against Appellant's newspaper, the *Arkansas Democrat-Gazette*. Our jurisdiction of this appeal is pursuant to Ark. Sup. Ct. R. 1-2(a)(15), as it presents questions concerning the law of torts. Appellant raises four points for reversal. We find no error and affirm.

The record reflects that on Monday, June 20, 1994, the *Arkansas Democrat-Gazette* printed an article on the front page of its "Arkansas" section entitled, "Whitewater counsel kicks off first prosecution." There were two photographs included in the article — one of Charles Matthews, with the caption "Matthews" beneath it and one of Appellee, with the caption "Fitzhugh" beneath it. The substance of the article is as follows:

Whitewater counsel kicks off first prosecution

> The first case to be prosecuted by the office of Robert Fiske Jr., the special counsel in the Whitewater Development Corp. affair, is to start in U.S. District Court at Little Rock today.

But don't look for the prominent political figures usually associated with Fiske's investigation.

The defendants are Charles Matthews and Eugene Fitzhugh. The men are little known outside Little Rock, and their attorneys argue the case doesn't belong under Fiske's jurisdiction.

Matthews, Fitzhugh and former Pulaski County Municipal Judge David Hale were indicted by a federal grand jury last fall for conspiring to defraud the Small Business Administration of $900,000 through Hale's federally licensed lending company, Capital Management Services Inc. of Little Rock.

Capital Management Services was supposed to raise capital to match money from the SBA and then make loans to socially and economically disadvantaged companies and individuals.

Fitzhugh's attorney, Randy Satterfield of Little Rock, said his client's defense is that "he's pretty much a victim of some big scheme that Hale had going on."

Hale helped fuel calls for the Whitewater investigation — and Fiske's eventual appointment in January by Attorney General Janet Reno — by alleging that then-Gov. Bill Clinton pressured him during the 1980s to make a $300,000 loan to Susan McDougal.

The president and first lady Hillary Rodham Clinton were partners with James and Susan McDougal from 1978-92 in Whitewater, a 230-acre residential development along the White River in Marion County.

James McDougal also owned Madison Guaranty Savings & Loan Association, which failed in 1989 at a cost to taxpayers of at least $47 million. Fiske is investigating allegations that money was transferred illegally from Madison accounts to Whitewater accounts.

Hale pleaded guilty to two felonies in March. His sentencing is on hold while the government evaluates his cooperation with Fiske's investigation.

Fitzhugh and Matthews have said that if anybody defrauded the SBA, it was Hale. Yet their link to Whitewater — however small — will ensure national news coverage of their trial.

Satterfield said he has been contacted by reporters from *The New York Times*, *USA Today* and other publications.

Fitzhugh has tried unsuccessfully to have Fiske disqualified from the case, arguing the Whitewater connection has turned the trial into a "media event."

The prosecution will be handled by two associate counsels in Fiske's office.

Fitzhugh and Matthews are accused of using a wealthy Shreveport family's money to help Hale misrepresent the amount of private capital held by his company. That misrepresentation allegedly allowed the company to qualify improperly for $900,000 from the SBA.

Matthews and Fitzhugh split $250,000 as their payoff, the government contends.

Fitzhugh, a Little Rock lawyer, represented a member of the Shreveport family.

Matthews, a North Little Rock lawyer and former securities dealer, handled some of the family's investments. Matthews was a state representative and chairman of the Arkansas Democratic Party in the late 1960s.

Court papers filed by the government and defense lawyers recently indicate how the trial may proceed.

The government says it can make its case without testimony from Hale.

Fiske's office, however, said it expects defense attorneys to call Hale as a witness to discredit him.

Prosecutors have asked U.S. District Judge Stephen Reasoner to limit Hale's testimony about his crimes to prevent distracting the jury from the "relevant issues" in the case.

"The obvious ploy is to set up Hale as a straw man," prosecutors argued last week in a motion to limit testimony about Hale's confessed crimes.

Satterfield said he has subpoenaed Hale.

"There's a lot of activity about limiting his testimony, so I don't know" whether to call him, the lawyer said.

> The government also has argued that unlimited examination of Hale could damage Fiske's investigation of other matters.
>
> A spokesman for Fiske's office said the prosecution hopes to present its case "within a week" but declined to respond to other questions.
>
> Satterfield said he expects the trial to last no more than a week.

After receiving telephone calls from Appellee, the newspaper printed a correction the following day. The correction, which was printed in the lower left corner of the front page of the "Arkansas" section under the headline of "Getting it straight," included a true photograph of Eugene Fitzhugh. The correction read:

> On Monday on the front of the Arkansas section a photo of J. Michael Fitzhugh was run in place of a photo of Eugene Fitzhugh. The correct photo of Eugene Fitzhugh is shown.

Appellee filed his complaint against Appellant on September 2, 1994, alleging that the juxtaposition of his photograph against the headline and accompanying article was defamatory *per se* and was the result of gross carelessness on the part of Appellant's employees. In its answer, Appellant asserted that Appellee was a public figure and that, as such, it was necessary for Appellee to prove that its employees acted with actual malice in placing Appellee's photograph in the Whitewater article.

I. Sufficiency of the Evidence

For its first two points for reversal, Appellant argues that the trial court erred in denying its motion for summary judgment and for refusing to grant a directed verdict in its favor. Appellant contends that Appellee failed to prove that the article in question was a false statement of fact of and concerning him and that his reputation was actually harmed as a result of the article's publication. Appellant does not challenge the amount of damages awarded to Appellee by the jury; rather, it challenges the award of any damages.

We first note that the denial of a motion for summary judgment is not reviewable on appeal. *Pugh v. Griggs*, 327 Ark. 577, 940 S.W.2d 445 (1997); *White v. Welsh*, 327 Ark. 465, 939 S.W.2d 299 (1997). Such review is not available even after a trial on the merits, as the final judgment must be tested upon the record as it exists at the time it is rendered, rather than at the time the motion for summary judgment is denied. *Ball v. Foehner*, 326 Ark. 409, 931 S.W.2d 142 (1996). Hence, we review only Appellant's argument as it pertains to the trial court's denial of its motion for directed verdict.

A motion for directed verdict should only be granted if the evidence is so insubstantial as to require that the jury's verdict be set aside. *Dodson v. Dicker*, 306 Ark. 108, 812 S.W.2d 97 (1991). In reviewing the denial of a directed verdict, we give the evidence its highest probative value, viewing it in a light most favorable to the party against whom the verdict is sought. *Id.* The standard of review in cases of defamation, including factual findings, is whether the jury's verdict can be supported by substantial evidence. *Thomson Newspaper Publishing, Inc. v. Coody*, 320 Ark. 455, 896 S.W.2d 897, *cert. denied*, 116 S. Ct. 563 (1995). An action for defamation turns on whether the communication or publication tends or is reasonably calculated to cause harm to another's reputation. *Id.*; *Little Rock Newspapers, Inc. v. Dodrill*, 281 Ark. 25, 660 S.W.2d 933 (1983).

In order to establish a claim of defamation, a party must prove the following elements: (1) The defamatory nature of the statement of fact; (2) that statement's identification of or reference to the plaintiff; (3) publication of the statement by the defendant; (4) the defendant's fault in the publication; (5) the statement's falsity; and (6) damages. *Minor v. Failla*, 329 Ark. 274, 946 S.W.2d 954 (1997) (citing *Mitchell v. Globe Intern. Pub., Inc.*, 773 F. Supp. 1235 (W.D. Ark. 1991)).

A. False Statement of and Concerning Appellee

Appellant relies on this court's decision in *Pigg v. Ashley County Newspaper, Inc.*, 253 Ark. 756, 489 S.W.2d 17 (1973), for the proposition that in determining whether an article is libelous,

we must construe the article in its entirety. Appellant asserts that in reading the present article as a whole, it cannot reasonably be construed as being a false statement of fact of and concerning Appellee. Appellant asserts that the evidence demonstrated that the article is clearly of and concerning Eugene Fitzhugh, identified in the article as a Little Rock lawyer who is not a prominent figure and is little known outside of Little Rock. We disagree.

Whether the words, taken together with the attendant circumstances, implicate the plaintiff in the commission of a crime is a question of fact for the jury to resolve. *Minor*, 329 Ark. 274, 946 S.W.2d 954. The question of whether a jury may reasonably determine that the placement of a plaintiff's photograph in a potentially defamatory article was a false statement of fact of and concerning that plaintiff is an issue of first impression in this State. We thus look to other jurisdictions for guidance.

In *Brown v. Tallahassee Democrat, Inc.*, 440 So. 2d 588 (Fla. App. 1983), cited by Appellee in his brief, the article, headlined "Prosecution rests case in Madison murder trial," described the criminal defendant Larry Joe Johnson, but contained a photograph of the appellant Brown with the caption "Johnson" beneath it. The Florida court noted at the outset that the "allegedly defamatory publication must be considered in its entirety rather than with an eye constrained to the objectionable feature alone." *Id.* at 589. In so construing the article, the court concluded that it was error for the trial court to have granted summary judgment to the newspaper because, given the juxtaposition of Brown's photograph, the ordinary reader may have been left with the sense that Brown was guilty of or on trial for murder.

In *James v. Fort Worth Telegram Co.*, 117 S.W. 1028 (Tex. Civ. App. 1909), the Texas Court of Civil Appeals reviewed a defamation case involving an article describing an ax-murderer, Daniel Herring, which contained a photograph of the appellant James. The court held that the article "should be construed as imputing the homicide to the man whose picture, forming a part of the publication, was identified by references to it as that of the man who did the killing." *Id.* at 1029. The court went on to hold that

because it was undisputed that the photograph was of James, the publication clearly imputed the killing to him.

Similarly, in *Farley v. Evening Chronicle Pub. Co.*, 87 S.W. 565 (1905), the Missouri Court of Appeals held that whether a photograph of the appellant Farley included in a newspaper article about a person of the same name, who was described as a strikebreaker, was defamatory to Farley was a question for the jury to resolve. The court stated:

> If we scrutinize yet more closely the publication of the article and the picture, the conclusion cannot be escaped that the defendant's editor intended the readers of his paper to understand that the person whose picture was published was the person to whom the article alluded. In that sense the article meant and referred to this plaintiff, and he was intended to be described by the writer.

Id. at 570.

In accordance with the holdings espoused in the above-cited cases, we conclude that there was sufficient proof for the trial court to submit to the jury the issue of whether the article could be construed as being a false statement of and concerning Appellee. It is undisputed that Appellee's photograph was contained in the article and that the caption under the photograph stated "Fitzhugh," as opposed to "Eugene Fitzhugh." It is also undisputed that the subject of the article was referred to as merely "Fitzhugh" seven different times. Several witnesses, all friends or acquaintances of Appellee, testified that they initially believed the article was about Appellee due to the inclusion of Appellee's photograph in the article. Additionally, one witness indicated that he and his wife had wondered whether Appellee's middle name was Eugene, which is Appellee's brother's name. There was thus sufficient evidence presented by Appellee's witnesses upon which the jury could have reasonably determined that persons who were not so personally acquainted with Appellee may have been left with the permanent impression that Appellee was charged with a crime in the Whitewater scandal. We thus turn to the issue of Appellee's proof of damages.

B. Damage to Appellee's Reputation

Appellant argues that Appellee failed to prove specific, actual injury to his reputation because none of the witnesses testified that Appellee's reputation had actually suffered or that they looked badly upon him as a result of the article's publication. Appellant argues further that although Appellee may have produced evidence that generally established that any person associated with the Whitewater scandal would have been harmed, he failed to produce any evidence demonstrating that he, personally, had suffered an injury to his reputation. We disagree.

In the landmark case of *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the Supreme Court held that states may not permit recovery of presumed damages in actions for defamation absent a showing of knowledge of falsity on the part of the publisher or a reckless disregard for the truth. This holding applies equally to those plaintiffs who are private figures and those who are classified as public figures or officials. On the issue of proof of damages, the Court stated:

> We need not define "actual injury," as trial courts have wide experience in framing appropriate jury instructions in tort actions. *Suffice it to say that actual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering.* Of course, juries must be limited by appropriate instructions, and all awards must be supported by competent evidence concerning the injury, *although there need be no evidence which assigns an actual dollar value to the injury.*

Id. at 349-50 (emphasis added). Thus, the Court left to the states the question of what particular proof of damages must be offered by the plaintiff in order to show that he or she had suffered "actual injury" as a result of the defamation. As pertains to such actions in this State, part of that question was answered by this court in *Dodrill*, 281 Ark. 25, 660 S.W.2d 933.

In *Dodrill*, which is relied upon heavily by Appellant, this court rejected the notion expressed by the Court in *Gertz* and later in *Time, Inc. v. Firestone*, 424 U.S. 448 (1976), that the Con-

stitution does not require proof of injury to reputation before recovery for mental suffering can be had. Instead, this court held that in Arkansas, an action for defamation has always required proof of reputational injury:

> It is settled law that damage to reputation is the essence of libel and protection of the reputation is the fundamental concept of the law of defamation. The action turns on whether the communication or publication tends or is reasonably calculated to cause harm to another's reputation. Such injury to reputation is a prerequisite to making out a case of defamation and an action lacking that claim becomes another cause of action.

Id. at 28, 660 S.W.2d at 935 (footnote and citations omitted). In support of its conclusion that there must be proof of injury to reputation, and in accordance with the holding in *Gertz* that damages to reputation may not be presumed in cases involving First Amendment rights, this court stated:

> To allow recovery in a defamation action where the primary element of the cause of action is missing not only sets the law of defamation on end, but also substantially undercuts the impact *Gertz* seeks to effect. The law of defamation has always attempted to balance the tension between the individual's right to protect his reputation and the right of free speech. To totally change the character of defamation to allow recovery when there has been no loss of the former right, would be an unjustified infringement on the First Amendment.

Id. at 31, 660 S.W.2d at 936. Undeniably, the present case is one involving First Amendment rights. As such, damages may not be presumed. The question then is how much proof of actual injury to reputation is sufficient to render the issue one for the jury to resolve.

Appellee points to this court's subsequent decision in *Hogue v. Ameron, Inc.*, 286 Ark. 481, 695 S.W.2d 373 (1985), in support of his assertion that there was sufficient evidence from which the jury could have concluded that his reputation was damaged. In *Hogue*, the appellant, an Arkansas State Police trooper, filed an action for defamation on the basis of a letter written to his superiors stating that the appellant had been photographed driving an unlicensed vehicle. At trial, the appellant testified that his reputa-

tion had been harmed by the ensuing investigation. Another witness testified vaguely that the appellant's reputation had changed for the worse at about the time of the investigation. Concluding that the trial court erred in granting a directed verdict against the appellant, this court held that where there was some evidence of harm to the appellant's reputation, it was a question for the jury to resolve. Notwithstanding the holding in *Hogue*, the question still remains as to what particular type of proof is sufficient to sustain a jury's verdict in favor of a plaintiff in a defamation action. In order to resolve this question, it is necessary to look beyond the decisions of this court.

In *Salomone v. MacMillan Publishing Co., Inc.*, 429 N.Y.S.2d 441 (N.Y. App. Div. 1980), the New York Supreme Court, Appellate Division, held that the plaintiff in a libel suit, who was a private individual, had failed to prove any damages compensable in law. The subject of the libel action was a parody of a children's book of cartoons entitled *Eloise*. The original children's book was about a fictional six-year-old girl who lived at the Plaza Hotel with her nanny. One of the book's drawings showed a man bowing from the waist and Eloise curtseying in return, with the caption referring to the man as Mr. Salomone, the hotel manager. In the parody of the book, entitled *Eloise Returns*, the opening drawing shows Eloise in the men's room of the hotel, where the walls are now covered with graffiti. On a large mirror, underneath where the girl is writing "Eloise Returns," are the words "Mr. Salomone was a child molester." Plaintiff Salomone was the manager of the Plaza Hotel when the original *Eloise* was written. He filed suit for libel against the publisher of *Eloise Returns*, who was shocked to learn that Mr. Salomone was anything other than a fictional character. New York law required the plaintiff in such actions to prove damage to his reputation; evidence that the plaintiff had suffered embarrassment and mental anguish was not sufficient to support an award of damages. In concluding that the plaintiff's damages were insufficient, the court held:

> He claims damages for loss of reputation and for mental anguish. He has been unable to come forth with any proof of loss of reputation *because he knows of no one who believes he was a child molester or thinks less of him due to the publication*. . . . While

> the U.S. Supreme Court, in *Gertz*, would appear to have allowed the states sufficient latitude to include in the definition of "actual injury" mental anguish unaccompanied by loss of reputation, this has not occurred in this state.

Id. at 442-43 (citations omitted) (emphasis added).

The holding in *Salomone* thus indicates that proof of damage to reputation may include: (1) Proof that people believed the plaintiff to be guilty of the conduct asserted in the publication, or (2) proof that people thought less of the plaintiff as a result of the publication's defamatory content. We view that language as persuasive authority on the issue presented in this case, given that the law applied in *Salomone* parallels the applicable law in this State, requiring proof of injury to reputation above and beyond that of mental suffering or anguish. Hence, the pertinent question now before us is whether it was sufficient proof that the witnesses who read the article initially believed that Appellee was the subject of the stated Whitewater investigation. After reviewing the testimony, we conclude that the proof was sufficient.

Appellee testified that he believed that the article's publication throughout the state had damaged his reputation. In this respect, Appellee indicated that he was aware of this because people had told him it had had an effect. He gave numerous examples of how he was harmed by the article. He stated that a fellow lawyer had driven by him and made a comment about the article and how Appellee was the subject of conversation in that lawyer's law firm. He stated that a friend of his, Gilbert Travis, had called and wanted to know what Appellee's middle name was and that Travis had told him that he had seen the article and thought it was about Appellee because his photograph was attached. He stated that a childhood friend, Mackie Watson, had seen him at a soccer tournament and had loudly inquired as to whether Appellee's name was "Michael Eugene" or "J. Michael." He stated that Watson then told him that she had spoken to Jeannie Luttrell about the article. Appellee stated further that he had been kidded about the article by some people but that he had never thought it was funny. He stated that he did not want to be connected with the Whitewater prosecution because it is a stain on the State of Arkansas and the legal profession in general. Additionally, he stated that

he had had difficulty sleeping and that he would wake up during the night thinking about the article.

Jeannie Luttrell, a childhood friend of Appellee's, testified that when she saw the article and Appellee's photograph, she believed it was about him, even though she indicated that it was hard for her to believe that about Appellee because of his high moral character. When asked what she believed had happened to Appellee, she explained:

> I believed that he probably lost his job as a federal prosecutor when the administration changed, and that perhaps he had moved to Little Rock, and he somehow got involved with these people. It was hard for me to believe that because they were Democrats and Mike was Republican, but I believed it.

Luttrell stated that she had talked to some people about the article and that she had continued to believe that the article was about Appellee until she was told by Mackie Watson, some months later in the fall of 1994, that the article was not about him.

Dr. Cole Goodman, Appellee's friend, stated that at the time Appellee went into private practice in Fort Smith, he had an excellent reputation. He stated that when he had initially seen the June 20, 1994 article and Appellee's photograph, he thought that Appellee must have been prosecuting the case. He stated that when he remembered that Appellee was no longer a prosecutor, he read the article. Upon seeing the name "Eugene Fitzhugh," he stated that he thought the newspaper had confused Appellee's name with that of his brother Eugene. In explanation of his reaction to the article, he stated: "And then I read through this and saw where these people had defrauded a significant amount of money, and my initial response then was to get perturbed at Mike for doing this." He stated that upon rereading the article, however, he realized that it was not about Appellee.

Gilbert Travis, another friend of Appellee's, testified that he was reading the newspaper on June 20, 1994, when he saw Appellee's photograph with the article describing Eugene Fitzhugh. He stated that he then called to his wife and asked her what other name Appellee went by besides Mike, to which his wife responded that she did not know. He stated that he had con-

cluded from the article that Appellee was in trouble. He stated that he then called Appellee to see if he could do anything to help him.

Similarly, Howard Pearson, the principal at Ramsey Junior High School and Appellee's wife's boss, stated that he had viewed the article as a whole as indicating that Appellee had done something wrong. He stated that he had trouble believing it, but that he did believe it because it contained Appellee's photograph.

Asa Hutchinson, former United States Attorney and Appellee's former boss, testified generally as to the effect of such an article on a lawyer's reputation. When asked to relate to the jury his experience in trying to establish a private law practice in Fort Smith after having been employed as a federal prosecutor, Hutchinson stated that it takes a significant amount of time to build up a client base and that the way to generate clients was through experience and personal reputation. Hutchinson stated that from both a personal and professional standpoint, a lawyer's chief asset is his reputation. When asked if he felt that being accused of wrongdoing in connection with Whitewater would have damaged his reputation, Hutchinson stated that "[i]t would harm anyone's reputation."

Robert Lutgen, managing editor of the *Arkansas Democrat-Gazette*, testified that the article had caused some damage to Appellee and was embarrassing to him, but that it was the newspaper's position that the article had not caused "significant damage" to Appellee. Lutgen admitted that Whitewater was the biggest news story that the newspaper had covered since 1992. When asked to explain how much damage had been caused to Appellee, Lutgen echoed Appellee's earlier testimony that there was probably not any way of actually measuring the damage done to him. Lutgen finally stated that it was the newspaper's position that the article had caused "minor damage" to Appellee.

Appellee contends that Lutgen's testimony alone is sufficient proof of damage to his reputation. Appellant, on the other hand, attempts to shrug off Lutgen's testimony by arguing that he never specifically testified that the article had caused damage to Appellee's *reputation*, but rather, only that the article had caused damage

in general. We are not persuaded by Appellant's argument. Instead, we conclude that a fair reading of Lutgen's testimony *in toto* indicates that the damage to which he was referring was damage to Appellee's reputation. A review of Lutgen's testimony demonstrates that prior to his answering questions concerning the amount of damage sustained by Appellee, he stated that Appellant's newspaper had the ability to severely damage a person's reputation by printing false information about that person.

The foregoing testimony demonstrates that Appellee's reputation was injured as a result of Appellant's publication of the defamatory article. This proof is most evident through the testimony of the various witnesses who believed that Appellee was involved in the Whitewater investigation. The fact that some of the witnesses' beliefs were held only for a short period of time is of no consequence to Appellant. What is significant is that those persons believed that Appellee was the subject of the article and was, thus, the target of a criminal investigation. We reject Appellant's argument that Appellee failed to show that people thought less of him as a result of the article. The fact that the witnesses believed that Appellee was charged with a crime involving the Whitewater scandal demonstrates that they thought less of Appellee as a result of the article. Moreover, we are persuaded by Appellee's assertion that none of the witnesses who were personally acquainted with him would have thought badly of him on a permanent basis because they were able to personally verify that he was not the person being charged with the Whitewater crimes. On the other hand, persons who were not personally acquainted with Appellee would not have been capable of verifying the truth nor would they have been known to Appellee so that he could secure their testimony for trial. We thus conclude that the trial court did not err in denying Appellant's directed-verdict motion, as the proof presented at trial was sufficient to sustain the jury's conclusion that Appellee's reputation had been damaged as a result of Appellant's negligent publication of his photograph with the article.

II. Public Figure/Actual Malice

For its final two points for reversal, Appellant argues that the trial court erred in refusing to declare Appellee to be a public figure and, correspondingly, in refusing to instruct the jury that Appellee had the burden of proving that the newspaper acted with actual malice in publishing the defamatory falsehood. Appellant's contention that Appellee is a public figure is based upon the fact that he had been a United States Attorney for a period of some eight years. Appellee concedes that he was and still is a public figure for the limited purpose of any article or news story concerning his actions as a federal prosecutor. He disputes, however, that he was a public figure within the context of the Whitewater investigation, which was the subject of the defamatory article.

Evidence presented at trial established that Appellee became an Assistant United States Attorney for the Western District of Arkansas in May 1974. Appellee remained in that position until November 1985, when he was appointed as temporary or acting United States Attorney for the Western District of Arkansas, replacing Asa Hutchinson, who had resigned to run for the United States Senate. Appellee was later appointed permanently as United States Attorney for that district, a position he held until he resigned in March 1993. During his tenure as United States Attorney, Appellee had participated in several press conferences, had been named in numerous newspaper articles, and had routinely issued press releases pertaining to investigations that his office was conducting. Appellee had also been the subject of a local television news broadcast, detailing his life and work in the Fort Smith community. Additionally, Appellee had twice submitted his name for appointment to a federal judgeship approximately three to four years before the article was printed, although he was not successful in that endeavor. Appellee had never sought elective office. Appellee joined the Bethell law firm in Fort Smith in August 1993. A telephone book advertisement for the Bethell law firm identified Appellee as a former United States Attorney. Appellant asserts that such evidence demonstrates that Appellee was a public figure under the standard established in *Gertz*. We disagree.

Whether an individual is a public official or a public figure is a mixed question of fact and law that is for the trial court to determine. *See, e.g., Gertz*, 418 U.S. 323; *Cornett v. Prather*, 293 Ark. 108, 737 S.W.2d 159 (1987). In *Gertz*, the Supreme Court held that public figures normally enjoy greater access to effective channels of communication and, thus, have more realistic opportunities to counteract false statements than do private individuals. The Court described public figures as those persons who:

> have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.

Id. at 345. A private individual, on the other hand, has not accepted public office nor assumed an "influential role in ordering society." *Id.* (citing *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 164 (1967) (Warren, C. J., concurring in result)). A private individual has not relinquished his interest in the protection of his own good name, and consequently has a more compelling case for redress of injury inflicted by defamatory falsehood. *Id.* Holding that the designation of a public figure may rest on either of two alternative bases, the Court stated:

> In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions.
>
> . . . Absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life. *It is preferable to reduce the public-figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation.*

Id. at 351-52 (emphasis added).

The facts of that case demonstrated that Gertz was an attorney representing the family of a juvenile who had been shot and killed by a Chicago police officer. The officer had been convicted of second-degree murder, and his conviction had generated considerable publicity. The civil litigation, brought by the family against the officer, received national attention when the respondent published an article in *American Opinion*, a monthly magazine espousing the views of the John Birch Society, that contained numerous inaccuracies about Gertz. The article labeled Gertz as a criminal, a Leninist, a Communist-fronter, an official of the "Marxist League for Industrial Democracy," and an instigator of the riots that had occurred at the 1968 Democratic National Convention in Chicago. The Court concluded that based upon the facts of that case, Gertz was not a public figure, as he did not "thrust himself into the vortex of this public issue, nor did he engage the public's attention in an attempt to influence its outcome." *Id.* at 352. Rather, the Court declared that Gertz's participation in that public issue related solely to his representation of a private client.

Since *Gertz*, courts have construed the term "public figure" narrowly, with a greater emphasis on the plaintiff's status as it relates to the subject of the defamation. In *Time, Inc. v. Firestone*, 424 U.S. 448 (1976), the Court held that the respondent, the ex-wife of Russell Firestone (the descendant of the wealthy Firestone Tire family), was not a public figure for purposes of an article in *Time* magazine about the Firestones' divorce. The Court held that notwithstanding that there may have been public interest in the wealthy couple's divorce, Mrs. Firestone was not a public figure because she had not assumed "any role of especial prominence in the affairs of society, other than perhaps Palm Beach society, and she did not thrust herself to the forefront of any particular public controversy in order to influence the resolution of the issues involved in it." *Id.* at 453.

In the initial *Dodrill* appeal, *Dodrill v. Arkansas Democrat Co.*, 265 Ark. 628, 590 S.W.2d 840 (1979), *cert. denied*, 444 U.S. 1076 (1980), this court held that the plaintiff, a Little Rock attorney

who had been previously suspended from the practice of law pending his retaking the bar examination, was not a public figure for purposes of an article published in the *Arkansas Democrat* reporting that Dodrill had failed the exam. The evidence showed that Dodrill had not failed the exam, only that his name had been initially withheld from publication pending further investigation of his readmission by the Board of Bar Examiners. The newspaper had argued that Dodrill was a public figure within the context of the public controversy surrounding his suspension from the bar. This court rejected that argument, holding that there was no evidence that demonstrated that Dodrill had thrust himself into the vortex of public controversy or that he had taken steps to attract public attention or to achieve a degree of public acclaim.

In *Ryder v. Time, Inc.*, 557 F.2d 824 (D.C. Cir. 1976), a case of mistaken identity, the United States Court of Appeals for the District of Columbia held that the plaintiff, Richard J. Ryder, a lawyer and former Virginia state legislator, was not a public figure for purposes of an article in *Time* magazine reporting that Virginia attorney Richard Ryder (actually referring to Richard R. Ryder) had been suspended from the practice of law because he had concealed stolen money and a sawed-off shotgun belonging to his client. The court held that while it was true that the plaintiff had been a public official and had been a candidate for public office, his public activities had nothing to do with the reference to Richard Ryder's illegal activities mentioned in the article.

The Supreme Court of New Mexico concluded that the appellant Marchiondo, a well-known attorney and member of the Democratic Party, was not a public figure for purposes of his action against a journal for defamation in connection with an article containing his photograph and detailing organized crimes' interest in New Mexico. *Marchiondo v. Brown*, 649 P.2d 462 (N.M. 1982). The court so held because Marchiondo had not voluntarily injected himself into the controversy on organized crime.

Likewise, the Texas Court of Appeals held that an attorney who had been appointed as a special counsel to a court of inquiry, and had served as such until about two months prior to the

defamatory news broadcast, was not a public figure in connection with a news story linking him to the Chicken Ranch, a local club used as a front for various activities including orgies and prostitution. The court noted that the fact that the plaintiff had held a number of press conferences as special counsel for the court of inquiry did not render him a public figure within the limited context of his alleged involvement with the Chicken Ranch. *Durham v. Cannan Communications, Inc.*, 645 S.W.2d 845 (Tex. App. 1982).

Even well-known Wyoming defense attorney Gerry Spence was deemed not to have been a public figure within the context of his defamation suit against *Hustler* magazine. *Spence v. Flynt*, 816 P.2d 771 (Wyo. 1991), *cert. denied*, 503 U.S. 984 (1992). The article, which was more like an editorial, blasted Spence for his representation of Andrea Dworkin in her pornography suit against publisher Larry Flynt. The Supreme Court of Wyoming held that although Spence may have been a public figure for some purposes, he was not a public figure for his representation of a client in a lawsuit.

Based upon the above-recited case law and the circumstances of this case, we conclude that Appellee was not a public figure for all purposes, nor was he a limited-purpose public figure within the context of the Whitewater investigation. Although Appellee did have some connection to the Whitewater investigation through his representation of two witnesses, the evidence revealed that he had not actually represented one of those witnesses until after the article in question had been published. Moreover, as noted by the Supreme Court in *Gertz* and the Wyoming Supreme Court in *Spence*, the mere fact of an attorney's representation of a client involved in a matter of public controversy does not, in itself, automatically render the attorney a public figure within the context of the controversy. In short, there was no evidence presented at trial showing that Appellee had thrust himself into the vortex of the Whitewater controversy, or that he had engaged the public's attention in an attempt to influence the outcome of the controversy.

Furthermore, Appellee did not, by virtue of his having been a federal prosecutor for eight years, occupy a position of

persuasive power and influence or one of especial prominence in the affairs of society, such that he could be labeled an all-purpose public figure. While it is true that Appellee had been a public official and may have had some influence over societal affairs in Fort Smith during his tenure as United States Attorney, his public activities had nothing to do with the subject of the newspaper article. In short, there was no clear evidence presented at trial showing that Appellee had achieved such general fame and notoriety throughout the state, where the newspaper was circulated, such that would render him a public personality for all aspects of his life.

Because we conclude that Appellee was a private individual within the context of this lawsuit, it necessarily follows that the trial court did not err in instructing the jury that Appellee was only required to prove negligence, rather than actual malice.

Affirmed.

Special Justices TRUMAN YANCEY and PAT HALL join in this opinion.

ARNOLD, C.J., NEWBERN and THORNTON, JJ., dissent.

BROWN and IMBER, JJ., not participating.

DAVID NEWBERN, Justice, dissenting. In seeking a directed verdict at the close of Mr. Fitzhugh's case-in-chief, Little Rock Newspapers argued, among other things, that Mr. Fitzhugh had offered no evidence to show that the article published by the *Arkansas Democrat-Gazette* actually injured his reputation. Little Rock Newspapers was correct in this assertion, and its motion for directed verdict should have been granted.

With respect to the damages question in this case, the majority perceives the issues to be "what particular type of proof is sufficient to sustain a jury's verdict in favor of a plaintiff in a defamation action" and "how much proof of actual injury to reputation is sufficient to render the issue one for the jury to resolve."

Since 1983, the "type" of proof of damages that we have required in a defamation case such as this one is proof of actual injury to reputation. *Little Rock Newspapers, Inc. v. Dodrill*, 281

Ark. 25, 660 S.W.2d 933 (1983). *See generally* HOWARD W. BRILL, ARKANSAS LAW OF DAMAGES § 33-9, at p. 577 (3d ed. 1996) (stating that, in a case against a media defendant, "damages to reputation are not presumed. In the absence of a showing of actual malice, no damages may be recovered without proof of some actual injury to the reputation. Recovery for the mere humiliation, mental suffering or sorrow of the plaintiff, standing alone without injury to reputation, is not permitted")(footnotes omitted); David A. Anderson, *Reputation, Compensation, and Proof,* 25 WM. & MARY L. REV. 747, 758 (1984)("If a plaintiff suffers no demonstrable harm to his reputation, however, he should have no cause of action for defamation.").

In order to create a jury question on the issue, a plaintiff simply must introduce substantial evidence, or evidence "of sufficient force and character to induce the mind of the factfinder past speculation and conjecture," *Allred v. Demuth*, 319 Ark. 62, 64, 890 S.W.2d 578, 580 (1994), that the publication of the defamatory statement has in fact injured his reputation. In *Hogue v. Ameron, Inc.*, 286 Ark. 481, 695 S.W.2d 373 (1985), which did not involve a media defendant, we said the issue of reputational injury should have gone to the jury where the plaintiff had testified that his reputation had been harmed as a result of the publication of the allegedly defamatory statement and another witness had testified, albeit "rather vaguely," that the plaintiff's reputation had "changed for the worse" following publication of the statement. *Id.* at 483, 695 S.W.2d at 374. Citing the *Hogue* case, a federal district court and a commentator have suggested that the burden of proving reputational injury in this jurisdiction is not difficult. *See Mitchell v. Globe Intern. Pub., Inc.*, 773 F. Supp. 1235, 1237 (W.D. Ark. 1991)("The showing of actual damage to reputation required by other Arkansas cases has been slight."); BRILL, *supra* ("The amount of evidence of damage to reputation necessary to take the case to the jury appears to be easily satisfied."). Regardless of how one characterizes the *quantum* of proof necessary to sustain a verdict, the proof, at least in this type of defamation case, must establish, as a threshold matter, that the statement actually injured the plaintiff's reputation.

Our cases since *Little Rock Newspapers, Inc. v. Dodrill, supra,* have not prescribed a clear method by which a plaintiff may prove that his reputation has been injured by the publication of a defamatory statement. Able commentators have made several good suggestions, however. A student commentator has noted that a plaintiff's interest in his reputation

> is a "relational interest" that involves the opinions which others in the community may have of the plaintiff. The most important relations that people have are family relations, social relations, trade relations, and professional relations. The plaintiff's task is to prove the defamatory statements have been communicated to others *who reacted to the detriment of these relations.*

Steve Garner, *Little Rock Newspapers, Inc. v. Dodrill: Proving Damage to Reputation in a Libel Action,* 38 ARK. L. REV. 889, 908 (1985)(emphasis added). *See also* PROSSER & KEETON ON THE LAW OF TORTS § 111, at p. 771 (5th ed. 1984)(stating "defamation is an invasion of the interest in reputation and good name. This is a 'relational' interest, since it involves the opinion which others in the community may have, or tend to have, of the plaintiff.").

The plaintiff's "evidence must focus upon proving damages to relational interests" and demonstrate "the impact the statements had upon others to the detriment of the plaintiff's relationships with them." Garner, *supra,* at 911. Toward this end, the plaintiff may introduce testimony bearing on his "standing and reputation prior to the libel" and the "effect the libel had on his family, business, and social relations." *Id.* at 908. Testimony showing any "specific instances of social ostracism and rebuke," as well as testimony "concerning the impression and effect which the libel had on the minds of other persons," would also be relevant. *Id.* at 909. *See also* BRILL, *supra* ("Specific instances of rebuke, humiliation and insults may aid in demonstrating post-defamation reputation."). Other approaches to proving reputational injury are discussed in David A. Anderson, *Reputation, Compensation, and Proof,* 25 WM. & MARY L. REV. 747, 764-78 (1984); RODNEY A. SMOLLA, LAW OF DEFAMATION § 9.06[6], at pp. 9-15 to 9-16 (1993); and 2 DAN B. DOBBS, LAW OF REMEDIES § 7.2(5), at p. 274 (1993).

Based on the evidence introduced by Mr. Fitzhugh, reasonable men and women could not have concluded that the article published in the *Arkansas Democrat-Gazette* caused actual harm to Mr. Fitzhugh's reputation. Mr. Fitzhugh's case for damages rested on his own testimony as well as that of his wife and his friends and acquaintances who had read, or heard about, the article. Mr. Fitzhugh maintained at trial that the publication of the article had damaged his reputation "because people have told me it has an effect." Mr. Fitzhugh testified that, following the publication of the article, some 25 to 30 friends and acquaintances, family members, or colleagues in the legal profession had either telephoned him or approached him at various times and places to inquire or comment about the article or the status of his lawsuit against the newspaper.

According to Mr. Fitzhugh, these individuals made a variety of comments. Some indicated to Mr. Fitzhugh that they had seen the article and had discussed it with others. Some asked whether there would be a retraction or whether a lawsuit would be filed. Others, according to Mr. Fitzhugh's very general testimony, just "made comments" about the case or "inquired" about it. Mr. Fitzhugh mentioned certain individuals who had told him that they were glad he was not involved in the Whitewater investigation; that they were concerned for him; or that they did not believe the story was about him. One individual wondered if the article had used Mr. Fitzhugh's middle name, and he called Mr. Fitzhugh to ask what his middle name was. Some individuals "tried to kid" Mr. Fitzhugh about the article.

The majority suggests that Mr. Fitzhugh's testimony helped establish that his reputation was injured as a result of the publication of the article. The majority's analysis, however, overlooks the remainder of Mr. Fitzhugh's testimony. On cross-examination, Mr. Fitzhugh conceded that he did not think that the individuals he had mentioned believed that he was being prosecuted for a Whitewater-related crime. Mr. Fitzhugh conceded that none of these individuals ever shunned or avoided him. He testified that he had remained friends with his "close friends" and that he knew of no one who had "quit seeing [him] because of this article." Mr. Fitzhugh said that he knew of no lawyers who had quit speak-

ing to him, or referring clients to him, on account of the article. Furthermore, Mr. Fitzhugh never claimed that publication of the article had deleteriously affected his law practice or income or had hindered his ability to maintain or expand his client base. He specifically testified that he was not seeking special damages of this kind, and there was no evidence of such damages introduced at trial.

Although Mr. Fitzhugh testified that he was upset and embarrassed by the article and that he had experienced difficulty sleeping, such evidence of mental anguish, in the absence of proof of an actual reputational injury, cannot support an award of damages in a defamation action. *Little Rock Newspapers, Inc. v. Dodrill, supra.* Absolutely nothing in Mr. Fitzhugh's testimony supports the conclusion that his reputation was harmed as a result of the article in question. Mr. Fitzhugh cited no relationships that were actually injured on account of the article, and he could not name one person who held him in lower esteem after having read the story. Mr. Fitzhugh could not recall one instance of rebuke, "shunning," or social ostracism that occurred as the result of the article's publication. Although Mr. Fitzhugh had testified that "people," whom he never identified, had told him that publication of the story would have the "effect" of damaging his reputation, he did not point to any conversation in which he was told that the article had *in fact* injured his reputation. Nothing that Mr. Fitzhugh said suggests that *anyone* actually held him in lower esteem after having read the article in the *Arkansas Democrat-Gazette.* The relationships that Mr. Fitzhugh did discuss were clearly unaffected by publication of the article.

Likewise, the testimony of the other witnesses called by Mr. Fitzhugh did nothing to establish that the publication of the article caused an actual injury to Mr. Fitzhugh's reputation. Mr. Fitzhugh's wife testified that Mr. Fitzhugh was upset and had lost sleep over the article and that he was worried about his reputation. Ms. Fitzhugh testified she, too, had "worried about the people we didn't know that thought it was him." This testimony, however, showed only the emotional harm that the Fitzhughs suffered as a result of the article's publication and did not show any reputational injury. Ms. Fitzhugh testified that people would inquire and ask

her and her husband "what was going on." However, Ms. Fitzhugh conceded that none of Mr. Fitzhugh's relationships had suffered because of the publication. On cross-examination, she testified, as abstracted, that "[n]one of his friends avoided him to my knowledge, and none of our couple friends avoided us. We were never asked to leave the country club as a result of this article." Like Mr. Fitzhugh, Ms. Fitzhugh referred to no instances of social ostracism that occurred as a result of the article's publication. Her testimony did nothing to show any injury to Mr. Fitzhugh's reputation.

Testimony was also given by Jeannie Kay Luttrell, Cole Goodman, Gilbert Travis, Philip Merry, Howard Pearson, Ben Barry, and Asa Hutchinson. Ms. Luttrell and Messrs. Goodman and Travis testified that they initially believed the article was about Mr. Fitzhugh. Ms. Luttrell testified that she was under this impression from June until some point in the fall when she learned the truth from a friend. Mr. Goodman testified that he initially believed Mr. Fitzhugh had been indicted in the Whitewater case and was "perturbed" with him for a few moments until he immediately reread the article and realized it was about someone else. Mr. Travis stated he initially believed Mr. Fitzhugh was "in trouble" until he phoned Mr. Fitzhugh to ask what was going on.

Although these three witnesses initially believed the story and concluded that Mr. Fitzhugh had in fact been indicted for fraud, they did not testify that they, or anyone else, held Mr. Fitzhugh in lower esteem or thought less of him as a result of the article's publication. As Ms. Luttrell testified, "I was friends with Mr. Fitzhugh before this occurred and am still." In no manner did she indicate that her opinion of Mr. Fitzhugh wavered during the time that she believed he was a criminal defendant in the Whitewater case. She admitted she never called the Fitzhughs during this time but explained that she had not wanted to embarrass them with questions. Likewise, Mr. Coleman testified that the article had not damaged his relationship with Mr. Fitzhugh, and Mr. Travis testified that the article would not prevent him from going to Mr. Fitzhugh for legal advice if he needed to change attorneys.

The testimony of the remaining witnesses also failed to establish any injury to Mr. Fitzhugh's reputation. Mr. Merry testified that he had not even read the article in question, and he stated that Mr. Fitzhugh has "always" had a good reputation in the community. Mr. Pearson testified that he understood the article "as a whole" to suggest that Mr. Fitzhugh had "done something wrong," but he indicated that he had not believed the article. Mr. Barry testified that he knew the article was not about Mr. Fitzhugh and that the article had not impaired his friendship with Mr. Fitzhugh. Finally, Mr. Hutchinson testified that he, too, had not believed the article was about Mr. Fitzhugh and that the article had not affected his friendship with Mr. Fitzhugh or prevented him from referring clients to Mr. Fitzhugh.

These witnesses specifically testified that publication of the article in question had no impact on their own relationships with Mr. Fitzhugh or their opinions of him. Not one of them identified anyone else who held Mr. Fitzhugh in low esteem as a result of the article's publication, and not one of them referred to an actual present or potential relationship between Mr. Fitzhugh and any other person that suffered on account of the article's publication. Moreover, none of them mentioned any instances of rebuke or social ostracism encountered by Mr. Fitzhugh as a result of the article's publication.

Ms. Luttrell and Mr. Goodman said that they "*would think*" that the article "*would harm*" Mr. Fitzhugh's reputation or "*would have* a damaging effect" on it and that the article "might" cause potential clients to seek legal assistance elsewhere. Mr. Travis added that some "people" who saw the article and were seeking to hire counsel "*might* have second thoughts" about hiring Mr. Fitzhugh. Mr. Hutchinson similarly predicted that an article like the one in question "would harm anyone's reputation." These witnesses did not testify, however, that Mr. Fitzhugh's reputation in particular had in fact been damaged by the article's publication or that the article had in fact turned potential clients away. Dr. Goodman conceded on cross-examination that he did not know whether Mr. Fitzhugh had lost clients or potential clients on account of the article, and Mr. Hutchinson conceded that he had no personal knowledge of Mr Fitzhugh's law practice. These wit-

nesses did no more than testify that they *presumed* an injury to Mr. Fitzhugh's reputation had resulted from publication of the article. This was clearly insufficient under our holding in the *Dodrill* case.

The last bit of evidence cited by the majority is the testimony of Robert Lutgen, a managing editor at the *Arkansas Democrat-Gazette*. The majority endorses Mr. Fitzhugh's position on appeal that Mr. Lutgen's apparent "admission" that publication of the article caused "minor damage" to Mr. Fitzhugh suffices as proof of injury to his reputation. The majority rejects Little Rock Newspapers' argument that Mr. Lutgen was not talking about Mr. Fitzhugh's reputation when he made that statement.

After conceding that a newspaper has the power to damage a person's reputation by printing false information about him or her, Mr. Lutgen moved on to discuss other issues in the case. Counsel for Mr. Fitzhugh later asked him whether the newspaper believed Mr. Fitzhugh had suffered any "damage" as a result of the article's publication. Mr. Lutgen answered that the publication had not caused "significant damage" because the newspaper had printed a retraction. Mr. Lutgen conceded that the article had caused "some damage" and that "the question is how much," but he never indicated whether he was referring to damage to Mr. Fitzhugh's reputation or some other type of damage such as emotional distress. Counsel for Mr. Fitzhugh asked Mr. Lutgen to state "how much damage you believe this caused to Mike Fitzhugh," and Mr. Lutgen answered, "We understand it was embarrassing to him. We understand that it was a mistake er—I don't suspect there is any way of actually measuring the damage." Counsel then suggested that Mr. Lutgen could not "put a dollar figure on your reputation," and Mr. Lutgen answered, "right." Mr. Lutgen later discussed his estimate of the number of readers who had recognized Mr. Fitzhugh and stated that it had been difficult to "assess the overall damage." Counsel asked Mr. Lutgen to describe once more the amount of "damage" that he believed Mr. Fitzhugh had suffered, and Mr. Lutgen responded that publication of the article had caused "minor damage."

The record does not clearly establish, one way or the other, whether Mr. Lutgen made the statement that publication of the

article had caused "minor damage" in reference to damage to reputation. Mr. Lutgen did not specifically indicate that he was referring to any reputational injury, and his statement that the article had been "embarrassing" to Mr. Fitzhugh suggests he was referring only to damages for mental anguish. Other portions of the testimony, however, particularly Mr. Fitzhugh's estimate of the number of readers who might have recognized Mr. Fitzhugh, could suggest that Mr. Lutgen was assessing the impact of the article on Mr. Fitzhugh's reputation.

Given the obvious ambiguity in the testimony, we should not assume that Mr. Lutgen was necessarily giving an opinion as to the effect of the article on Mr. Fitzhugh's reputation. However, whether or not Mr. Lutgen was in fact stating a belief that the article's publication had injured Mr. Fitzhugh's reputation, his testimony was not sufficient to establish such an injury. The statement in question was no more than a guess that Mr. Fitzhugh's reputation had suffered as a result of the article's publication. Like the other witnesses, Mr. Lutgen pointed to no relationship that was actually harmed by the publication of the story, and he did not mention any person who in fact held Mr. Fitzhugh in lower esteem after having read the story.

In sum, none of the witnesses who testified on Mr. Fitzhugh's behalf established that the *Arkansas Democrat-Gazette*'s publication of the article in question had in fact (1) negatively affected their own relationships with, or opinions of, Mr. Fitzhugh; (2) negatively affected any other person's relationship with, or opinion of, Mr. Fitzhugh; (3) caused Mr. Fitzhugh to experience any type of rebuke or social ostracism from any person; or (4) caused Mr. Fitzhugh to suffer any "special damages," such as loss of income to his law practice. Little Rock Newspapers' motion for directed verdict therefore should have been granted. *See Richie v. Paramount Pictures Corp.*, 544 N.W.2d 21, 26-27 (Minn. 1996) (affirming summary judgment in defendants' favor where plaintiff could "point to no specific facts demonstrating that her reputation has been affected" and where proof showed, among other things, that no one thought less of plaintiffs on account of defamatory broadcast and that there was no "change in behavior" in those plaintiff regularly encountered in his employment).

At most, the evidence introduced by Mr. Fitzhugh showed that some witnesses who read the article thought it had the tendency or propensity to injure Mr. Fitzhugh's reputation or that some witnesses believed that Mr. Fitzhugh had been implicated in the federal Whitewater investigation. However, as our holding in the *Dodrill* case makes clear, the proof of damages must show an actual injury to reputation, not merely that the publication of the article "could have" harmed or "had the tendency to harm" the plaintiff's reputation. *See also Reveley v. Berg Publications, Inc.*, 601 F. Supp. 44, 46 (W.D. Tex. 1984)(". . . the court concludes that in the wake of *Gertz* even if evidence was heard that the article *tended* to injure plaintiff, that a mere tendency to injure without proof of actual injury cannot support a finding of defamation . . . .").

Moreover, none of our defamation cases, and no defamation case from any other state that has adopted, as we did in the *Dodrill* case, a requirement of reputational injury, *see, e.g., Richie v. Paramount Pictures Corp.*, 544 N.W.2d 21 (Minn. 1996); *Gobin v. Globe Publishing Co.*, 649 P.2d 1239 (Kan. 1982); *France v. St. Clare's Hospital and Health Center*, 82 A.D.2d 1, 441 N.Y.S.2d 79 (A.D. 1st Dept. 1981); *see generally* Annotation, *Proof of Injury to Reputation as Prerequisite to Recovery of Damages in Defamation Action—Post-Gertz Cases*, 36 A.L.R.4th 807, 811-13 (1985 & Supp. 1997), has ever *held* that proof of reputational injury may be established by testimony showing that, for a brief amount of time, a witness believed that the publication was true. Other than the barest *obiter dicta* from *Salomone v. MacMillan Pub. Co., Inc.*, 77 A.D.2d 501, 429 N.Y.S.2d 441 (A.D. 1st Dept. 1980), nothing is cited by the majority to support its novel position that a reputational injury occurs whenever an individual, if only for a fleeting moment, believes the truth of a defamatory publication.

The majority essentially *presumes* that Mr. Fitzhugh's relationships with Ms. Luttrell and Messrs. Goodman and Travis were harmed by the article's publication simply because they said they initially believed Mr. Fitzhugh had been indicted in the Whitewater case. Not only does this position lack the support of a holding of any defamation case, but it also blatantly ignores the testimony of these very witnesses who plainly stated that their high opinions

of Mr. Fitzhugh remained unchanged despite their initial belief in the truth of the publication. These witnesses' testimony directly refutes the majority's assertion that "[t]he fact that the witnesses believed that Appellee was charged with a crime involving the Whitewater scandal demonstrates that they thought less of Appellee as a result of the article."

More troubling, however, is the majority's statement that "persons who were not personally acquainted with Appellee would not have been capable of verifying the truth nor would they have been known to Appellee so that he could secure their testimony for trial." The suggestion seems to be that there *might have been* individuals who read the story and, as they did not know Mr. Fitzhugh and were therefore unable to inquire with him about the truth of the article, *must have* held him in lower esteem as a result of having read the article. The mere possibility that readers of the *Arkansas Democrat-Gazette* think less of Mr. Fitzhugh on account of the article, the majority seems to say, is additional proof that his reputation was actually injured by the publication of the article.

The majority pays lip service to the rule from *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), that damages may not be presumed in cases against media defendants absent evidence of malice, and yet it sustains the award of damages in this case based in part on a hunch that readers who did not testify at trial *might* have seen the article and *might* have thought less of Mr. Fitzhugh as a result. The majority presumes damages in direct contravention of the *Gertz* case and our holding in the *Dodrill* case and bases that presumption upon unknown readers' *presumed* reactions to the article.

I respectfully dissent.

ARNOLD, C.J., and THORNTON, J., join this dissent.

STATE of Arkansas *v.* Larry James STEPHENSON

CR 97-365 955 S.W.2d 518

Supreme Court of Arkansas
Opinion delivered November 13, 1997

Winston Bryant, Att'y Gen., by: *Brad Newman*, Asst. Att'y Gen., for appellant.

Mosby Law Firm, by: *Lori A. Mosby*, for appellee.

DONALD L. CORBIN, Justice. Appellee Larry James Stephenson was charged as a habitual offender with possession of drug paraphernalia and maintaining a drug premises. Appellee was tried by a jury on December 4, 1996. The case never reached the jury, however, because the trial court directed a verdict for Appellee on both charges at the close of the State's evidence. The State has filed this appeal. The threshold issue in this case is whether the State is permitted to appeal from the trial court's order directing a verdict for Appellee. Resolution of this preliminary issue requires our construction of Ark. R. App. P.—Crim. 3(c); our jurisdiction is thus pursuant to Ark. Sup. Ct. R. 1-2(a)(17)(vi). We accept appeals by the State when our holding would be important to the correct and uniform administration of the criminal law. Rule 3(c). As a matter of practice, this court has only taken appeals "which are narrow in scope and involve the interpretation of law." *State v. Banks*, 322 Ark. 344, 345, 909 S.W.2d 634, 635 (1995). Where an appeal does not present an issue of interpretation of the criminal rules with widespread ramifications, this court has held that such an appeal does not involve the correct and uniform administration of the law. *State v. Harris*, 315 Ark. 595, 868 S.W.2d 488 (1994). Appeals are not allowed merely to demonstrate the fact that the trial court erred. *State v. Spear and Boyce*, 123 Ark. 449, 185 S.W. 788 (1916).

Our law is well settled that the State is not permitted to appeal from a directed verdict acquitting the defendant when the sole issue is the sufficiency of the evidence of the defendant's guilt. *State v. Long*, 311 Ark. 248, 844 S.W.2d 302 (1992); *State v.*

Dixon, 209 Ark. 155, 189 S.W.2d 787 (1945). The reasoning behind this rule is stated as follows:

> The question of the legal sufficiency of the evidence in a given case constitutes a question of law for the decision of the court, but it cannot become a precedent for application in another case because of the varying state of facts in different cases, and therefore the decision of that question, even though it be one of law, is not important in the "uniform administration of the criminal law."

Spear and Boyce, 123 Ark. 449, 450, 185 S.W. 788, 789.

The State contends that the transcript in this case demonstrates that the prosecution was prejudiced and that, thus, this appeal is necessary to ensure the correct and uniform administration of the criminal law, as provided in Ark. R. App. P.—Crim. 3(c). The State argues that the trial court erroneously weighed the credibility of the evidence and ignored key evidence favorable to the State, rather than deciding the motions strictly on the sufficiency of the evidence. The State relies heavily on this court's decisions in *State v. Johnson*, 326 Ark. 189, 931 S.W.2d 760 (1996), and *Long*, 311 Ark. 248, 844 S.W.2d 302. Such reliance is misplaced because the facts of both cases differ considerably from those in the present case.

In *Johnson*, the appellee was tried on the charge of driving while intoxicated. In granting the directed verdict, the trial court commented that Johnson's blood-alcohol content, 0.06 percent, was "terribly low," and observed that there had been no field sobriety tests performed at the time of the stop. The trial court remarked further about the "subjective" observations of the officers and concluded that the low result of the blood-alcohol test coupled with the absence of any "objective" tests mandated a directed verdict in Johnson's favor. This court accepted the appeal in that case due to the trial court's remarks and, perhaps more significantly, due to the trial court's erroneous belief that a conviction for driving while intoxicated is dependent upon quantified evidence of blood-alcohol content, as opposed to sufficient other evidence of intoxication. Thus, a review of the case was warranted in order to ensure the correct and uniform administration

of the criminal law, particularly that pertaining to the offense of driving while intoxicated. Here, the State does not contend that the trial court misinterpreted the law.

In *Long*, 311 Ark. 248, 844 S.W.2d 302, the appellees were charged with capital murder. At the end of the State's case, the trial court directed verdicts for both appellees. In a written order, the trial court recited the evidence presented by the State and then made conclusory comments. The trial court pointed to numerous inconsistencies and discrepancies in various witnesses' testimonies and then concluded that the jury would have had to engage in too much speculation and conjecture to sort out the inconsistencies and find the appellees guilty of the crimes charged. This court concluded that the trial court's remarks amounted to an improper weighing of the evidence, as variances and discrepancies in the proof go to the weight or credibility of the evidence, which is for the jury to resolve.

Here, at the conclusion of the State's case and outside the presence of the jury, Appellee's counsel made a motion for directed verdict on the grounds that the State had failed to prove that Appellee had a proprietary interest in the home where he was arrested and that the drug paraphernalia found in the home was possessed by Appellee. The trial judge granted the directed verdict. Subsequently, the trial judge explained his ruling to the jurors:

> The Court's directing a verdict for the defendant in this case. The Court is not convinced that there's sufficient evidence for a jury to do anything other than speculate as pertains to the premises. The affidavit for search warrant itself makes clear that the state was under the impression that a female was maintaining that particular premises. Contrary to the inference that a person simply being in a premise is enough to establish a proprietary interest, that is not the law in the State of Arkansas. And, specifically, the Court asked Miss Sakevicius [Arkansas State Crime Laboratory chemist] if there were any traces even of cocaine in her exhibit number three, which is the only item that was taken off of Mr. Stephenson. And she said, "no." So, that is not sufficient to establish. Usually even on a bag, there are traces or residue to show that there has been some cocaine in the bag. But Miss Sakevicius, specifically in response to the Court's own ques-

> tions, said that she did not find cocaine in what she identified as her E-3. And that is the one that was taken off Mr. Stephenson.
>
> Thank y'all very much. You can relieve yourselves of your badges. You all are excused.

This case is unique in that the State has based its grounds for appeal on the words of the trial judge, which were not directed to trial counsel in the form of an order, but rather, were directed as a lay explanation to the jurors who had served in the case. We have no other indication of the trial judge's reasons for directing the verdict, as the written order from the trial court reveals only that Appellee's motion for directed verdict was granted and that he was acquitted.

The State asserts that the trial judge improperly weighed the evidence in granting the motion for directed verdict and failed to consider the totality of the State's proof, viewing the evidence in a light most favorable to the State. The State asserts further that the trial judge ignored critical evidence of Appellee's guilt and relied, instead, on selective evidence that tended to favor Appellee. The State does not argue that the trial judge commented on one witness's credibility over another, or that he stated that the State's evidence was not believable, or that he indicated that there were too many discrepancies in the witnesses' testimonies for the jury to convict Appellee. In other words, the State merely contends that the trial judge erred in directing a verdict in favor of Appellee because there was sufficient evidence presented to convict him of the charges. Such contention is not a proper basis for an appeal by the State.

Accordingly, we dismiss the appeal. It is not for this court to engage in a search for error where any determination by this court would not set precedent or serve as a guide in future prosecutions. Even assuming *arguendo*, that the trial court erred in directing the verdict for Appellee, we would still hold that the appeal must be dismissed, as Rule 3(c) does not contemplate such an appeal by the State. Additionally, we do not view the trial judge's comments as indicating that he improperly weighed the credibility of the evidence. Instead, the trial judge's comments demonstrate only that he concluded that there was not sufficient

evidence presented demonstrating that Appellee maintained the premises or that he had possessed drug paraphernalia. The trial judge in this case did not engage in a comparison of various witnesses' testimonies in an effort to harmonize them. Nor did he express any sentiment that the State's witnesses were not credible or that their testimony was not believable. Thus, we cannot say that the trial judge improperly weighed the credibility of the evidence, as opposed to viewing the evidence as merely being insufficient to sustain a conviction on the charges.

Appeal dismissed.

GLAZE, J., dissents. I would agree to review this unusual case, and can think of no reason not to do so; especially since the defendant here is free from future prosecution as a result of the trial court's granting him a directed verdict.

J & J BONDING, INC. *v.* STATE of Arkansas

97-48 955 S.W.2d 516

Supreme Court of Arkansas
Opinion delivered November 13, 1997
[Petition for rehearing denied December 18, 1997.]

Stuart Vess, for appellant.

Winston Bryant, Att'y Gen., by: *Kelly Terry*, Asst. Att'y Gen., for appellee.

ROBERT L. BROWN, Justice. This case concerns an appeal bond that was executed on January 5, 1994, on behalf of Gary D. Samples, who had been convicted of sexual abuse and sentenced. The appeal bond was issued by appellant J & J Bonding, Inc. On September 18, 1995, the Arkansas Court of Appeals issued its mandate following an affirmance of the judgment against Samples. On September 19, 1995, a copy of the mandate was filed with the Pope County Circuit Clerk.

On May 6, 1996, the circuit court entered an order for J & J Bonding to forfeit the appeal bond because Samples had failed to surrender himself to authorities. On July 16, 1996, a summons was issued by the circuit clerk to "James Milburn Houston d/b/a J & J Bonding Inc." That summons contained notice of a show-cause hearing to be held on August 14, 1996, at which time the court would determine whether the bond should be forfeited.

Although J & J Bonding was represented by counsel, counsel did not attend the hearing on August 14, 1996. According to

statements made by the circuit court at the show-cause hearing, counsel for the bonding company had sent a letter to the circuit court which included his arguments of why the bond should not be forfeited. James Houston, however, did attend the hearing and spoke on behalf of the bonding company. The circuit court remarked that the statutes referred to in counsel's letter were not applicable to an appeal-bond situation. The letter sent by counsel to the circuit court has not been made part of the record on appeal, and the statutes referred to by the circuit court were unidentified at the show-cause hearing.

Also, at the hearing, Houston advised the court that he had not received notice of the Court of Appeals mandate until July 16, 1996, when he was served with the summons and notice. As a consequence, he requested additional time to apprehend Samples. The circuit court ruled that Rule 6 of the Arkansas Appellate Rules - Criminal applied and that it did not provide for any additional time for the bonding company to apprehend a missing appellant.[1] The court ordered judgment to be entered against J & J Bonding in the amount of $50,000, which was the amount of the bond.

The bonding company now contends on appeal that the circuit court erred in its application of Rule 6 and in failing to apply the procedures in Ark. Code Ann. § 16-84-201 in forfeiting the appeal bond. We conclude that this argument is not preserved for our review because we are unable to determine from the record and abstract whether this argument was made to the circuit court and whether the circuit court ruled on it. *See Cosgrove v. City Of West Memphis*, 327 Ark. 324, 328, 938 S.W.2d 827 (1997); *see also Reeves v. Hinkle*, 326 Ark. 724, 934 S.W.2d 216 (1996); *Hardy Constr. Co. v. Arkansas State Hwy. & Transp. Dept.*, 324 Ark. 496, 922 S.W.2d 705 (1996). To be more precise, which statutes were brought to the circuit court's attention cannot

[1] The circuit court actually referred to Rule 36.5 of the Arkansas Rules of Criminal Procedure. Rule 36.5 was adopted March 27, 1995. It was replaced by Rule 6 of the Appellate Rules - Criminal, which was effective January 1, 1996. The forfeiture procedures under former Rule 36.5 and Rule 6 are essentially the same.

be determined from the record. Hence, the issue is procedurally barred.

J & J Bonding next argues that its due-process rights were violated because of insufficient notice of the Court of Appeals mandate, its lack of familiarity with Rule 6, and the absence of time in which to apprehend Samples before forfeiture. This argument has no merit. It is true that Houston raised some of these points at the show-cause hearing, but the arguments were not couched in terms of a constitutional violation. Moreover, on appeal, J & J Bonding adduces no caselaw or other authority for its due-process contention. When an appellant does not cite authority or make a convincing argument and when it is not apparent without further research that the point is well taken, we will affirm. *Qualls v. Ferritor*, 329 Ark. 235, 947 S.W.2d 10 (1997). There is also the fact that Rule 6 was in effect at the time of the show-cause hearing, and its procedures were followed by the circuit court with respect to (1) the order of the circuit court forfeiting the bond due to Samples's failure to surrender, (2) the summons and notice to J & J Bonding regarding the show cause hearing, (3) the hearing itself, and (4) the judgment of forfeiture. *See* Appellate Rules - Criminal, Rule 6(c).

In short, because the record does not include counsel's arguments raised in his letter to the circuit court, or the statutes counsel deemed relevant for the trial court's consideration, we will not address J & J Bonding's arguments concerning the retroactivity of Rule 6 or its potential conflict with state statutes. It is incumbent on the appellant to provide this court with an adequate record for review of the points raised on appeal. *Cosgrove v. City of West Memphis, supra*; *King v. State*, 325 Ark. 313, 925 S.W.2d 159 (1996).

Affirmed.

Damien BROWN *v.* STATE of Arkansas

97-722 954 S.W.2d 273

Supreme Court of Arkansas
Opinion delivered November 13, 1997

William R. Simpson, Jr., Public Defender, by: *Deborah R. Sallings*, for appellant.

Winston Bryant, Att'y Gen., by: *Brad Newman*, Asst. Att'y Gen., for appellee.

RAY THORNTON, Justice. Appellant, Damien Deshun Brown, brings this interlocutory appeal of the trial court's order denying his motion to transfer the charges against him to juvenile court. Because the trial court's decision to retain jurisdiction of this case was not clearly erroneous, we affirm.

Brown was charged with aggravated assault, a Class D felony, on July 29, 1996, five months before his eighteenth birthday. Three months later, he was charged with robbery, a Class B felony. By the time of the hearing on the motion to transfer both charges, Brown was eighteen years old.

The alleged robbery occurred on a Central Arkansas Transit bus. An investigating officer testified that two subjects fought with, and forcibly removed a jacket from a passenger. The officer stated that one of the subjects was wearing a red cast on his arm.

When Brown was apprehended, he was wearing a red arm-cast. Brown was later identified by someone in a photo lineup at the police station.

The aggravated assault charge resulted from dog-bite injuries after a pit bull was allegedly ordered to attack the victim. In support of its charge, the State called the investigating officer who testified to the following:

> At the time we made contact with the victim, and he stated that a black male was walking his pit bull down Crutcher Street. And during that time, the black male told the pit bull to bite him. And later we learned through Mr. Brown's cousin his address, and we then went to that address and made contact with Mr. Brown.

After the officer testified about the seriousness of the victim's injuries, counsel for the State asked, "And [the victim] indicated that Mr. Brown had told the pit bull to get him?" The officer answered, "Right. That's right."

In support of his motion to transfer, Brown testified that he was seventeen years old at the time of each offense, and that while he had been through the juvenile court system before, he had been sent to training school on only one occasion.

At the conclusion of the hearing, the trial court denied Brown's motion to transfer the charges to juvenile court, stating that it had "considered all those factors" of the relevant section of the Arkansas code. For error, Brown brings two claims: First, the State failed to produce substantial evidence to support the charges levied against him, and second, the State produced no evidence to show a repetitive pattern of adjudicated offenses that would suggest he was beyond rehabilitation.

In reviewing a transfer-denial decision, we do not overturn the circuit court unless the decision is clearly erroneous. *McClure v. State*, 328 Ark. 35, 39, 942 S.W.2d 243, 245 (1997) (citing *Holmes v. State*, 322 Ark. 574, 911 S.W.2d 256 (1995)). Further, the court's decision to retain jurisdiction must be supported by clear and convincing evidence of three statutory factors: (1) the seriousness of the offense, and whether the juvenile used

violence in its commission; (2) whether the offense is part of a repetitive pattern of adjudicated offenses that would lead the court to determine that the juvenile is beyond rehabilitation under existing programs; and (3) the juvenile's prior history, character traits, mental maturity, and other factors that would show potential for effective rehabilitation. Ark. Code Ann. § 9-27-318(e)-(f) (Supp. 1995). We have held that the trial court is not required to give equal weight to each of these three factors. *Jenson v. State*, 328 Ark. 349, 353, 944 S.W.2d 820, 822 (1997).

Brown does not contest that he has been charged with serious and violent offenses. He argues, however, that the State did not present substantial evidence to link the charges to serious and violent conduct. In particular, he asserts that the testifying officers did not present any direct evidence that linked him to the offenses. What evidence the State did present, Brown asserts, was based on the hearsay testimony of the officers who were not present during the commission of the offenses.

We address the hearsay assertion first. We have said that inadmissible "hearsay admitted without objection may constitute substantial evidence to support a ruling." *Sanders v. State*, 326 Ark. 415, 421, 932 S.W.2d 315, 318-19 (1996). Because Brown's counsel did not object to the hearsay, the trial court did not err in considering it.

We next consider whether the State demonstrated that the charges were linked to the serious and violent nature of the offenses. We have said that "an information can constitute sufficient evidence to establish that the defendant is charged with a serious and violent crime." *Sanders*, 326 Ark. at 420, 932 S.W.2d at 318 (citations omitted). In *Sanders*, however, we expressed concern that under the current interpretation of the juvenile code, prosecuting attorneys can file a serious charge against the juvenile in circuit court without producing substantial evidence to support the charge. *Id.* at 423, 932 S.W.2d at 319 (dictum); *see also Sims v. State*, 329 Ark. 350, 947 S.W.2d 376 (1997) (affirming the trial court's refusal to transfer the case to juvenile court based on the serious and violent nature of the offense, and the State's evidence tending to link defendant with the crime). Noting this potential

for abuse, the dictum in *Sanders* warned that our interpretation was not meant to do away with the need for a meaningful hearing. *Sanders*, 326 Ark. at 423, 932 S.W.2d at 319.

In the case before us, the concerns expressed in *Sanders* do not apply because we conclude that Brown was given a meaningful hearing. Evidence was elicited at a hearing to show that the person who committed the offenses manifested conduct that is to be characterized as "serious" and "violent." In addition, there was evidence to support other criteria of section 9-27-318 (e) - (f). Finally, we note that a juvenile-transfer hearing does not require a showing of probable cause. Indeed, it is the job of the circuit court to determine a defendant's guilt or innocence.

The State's evidence of fighting with and forcibly removing a jacket from a bus passenger is sufficient to establish that the robbery charge is linked to serious and violent conduct. Likewise, the State's evidence supports the link between the aggravated assault charge against Brown and the serious and violent nature of that offense. This link was established by the police officer's testimony regarding the seriousness of the injuries, the manner in which the injuries occurred, and an indication that the victim identified Brown as the offender. We conclude that the circuit court did not err in retaining jurisdiction pursuant to section 9-27-318(e).

We next turn to Brown's second claim that the State produced no evidence to show a repetitive pattern of adjudicated offenses that would suggest that he was beyond rehabilitation. The State put on some evidence to suggest a repetitive pattern of adjudicated offenses. Brown admitted that he had been through juvenile court before, placed on probation, and sent to training camp after his probation was revoked, therefore providing evidence of a repetitive pattern.

As we consider whether there are other factors that would show potential for effective rehabilitation, we note that Brown was eighteen years old at the time of the hearing. In *Rice v. State*, 330 Ark. 257, 954 S.W.2d 216 (1997), we dispensed with the appellant's argument by focusing on his age and reasoned that because he was eighteen years old, "his potential for rehabilitation

within the juvenile system [was] nil." Our decision in that case was based on statutory and case law establishing that a youth cannot be committed to the State Division of Youth Services for rehabilitation after the eighteenth birthday. Ark. Code Ann. § 9-28-208(d) (Supp. 1995); *Jensen v. State*, 328 Ark. 349, 944 S.W.2d 820 (1997); *Hansen v. State*, 323 Ark. 407, 914 S.W.2d 737 (1996). Brown argues that the juvenile code provides a remedy. He asserts that because he was seventeen when the alleged offenses occurred, he could be adjudicated delinquent and kept under the watchful eyes of the court until his twenty-first birthday. Ark. Code Ann. § 9-27-303(1)(B) (Supp. 1995). This argument is unpersuasive when charges of serious and violent felony offenses remain to be adjudicated and the defendant is already more than eighteen years of age.

Based on considerations of Brown's age and the State's evidence linking the robbery and aggravated assault charges to serious and violent offenses, we conclude that there was no clear error in the trial court's decision to deny transfer to juvenile court.

Affirmed.

GLAZE, J., concurs.

TOM GLAZE, Justice, concurring. In concurring, I write only to mention my understanding of the concern this court expressed in *Sanders v. State*, 326 Ark. 415, 932 S.W.2d 315 (1996). There, the court stated that, under the court's current interpretations of the juvenile code, prosecuting attorneys could file a serious *charge* against a juvenile in circuit court *and do nothing more*. (Emphasis added.) That concern involved cases like *Walker v. State*, 304 Ark. 393, 803 S.W.2d 502 (1991), where the court held that, in a motion-to-transfer hearing, the criminal information alone was sufficient evidence to determine the seriousness of the juvenile's offense and the violence employed when denying a transfer. *Walker* was a 4-3 decision, and since that holding, this court in *Sanders* has indicated the *Walker* case should be revisited; also since *Walker* and *Sanders*, *see Humphrey v. State*, 325 Ark. 753, 940 S.W.2d 800 (1997), and Justices Brown's and Imber's concurring opinion in *McClure v. State*, 328 Ark. 35, 942 S.W.2d 243

(1997), reflecting their shared view that the Arkansas Rules of Evidence should be applicable to juvenile-transfer hearings.

While certainly I, too, think the time is ripe for revisiting the *Walker* decision, the present case is not the one to review the criminal information, as evidence, issue. Here the record, aside from the criminal information, contains more than sufficient evidence to deny Brown's request for transfer. A hearing was conducted where Brown conceded he was well over eighteen years old — a factor which prevents his being committed to a youth services center, making his chance for rehabilitation within the Division of Youth Services nonexistent. In addition, Officer Derrick Wallace testified without objection to facts showing that Brown, by using a pit bull, committed aggravated assault and forcible robbery when taking a victim's jacket. In sum, the evidence clearly supported the denial of Brown's transfer motion. For that reason alone, I join in the majority court's opinion.

Wilbert MULDREW *v.* STATE of Arkansas

CR 97-561 954 S.W.2d 272

Supreme Court of Arkansas
Opinion delivered November 13, 1997

David Mark Gunter, for appellant.

No response.

PER CURIAM. The appellant, Wilbert Muldrew, was convicted on January 28, 1997, in Hempstead County Circuit Court of three counts of delivery of a controlled substance (cocaine) and was sentenced to 120 years' imprisonment. His attorney, David Mark Gunter, filed a notice of appeal on Muldrew's behalf on February 3, 1997. The transcript in the case was filed on May 22, 1997. Mr. Gunter requested and received two extensions to file Muldrew's brief, which was due on September 26, 1997. When the brief had not been filed, the Clerk of the Court wrote to Mr. Gunter inquiring about the status of the case. On October 13, 1997, Mr. Gunter telephoned the Clerk and indicated that he would file a motion for belated brief within ten days. As of this date, no motion has been filed.

In light of the above circumstances, we hereby order David Mark Gunter to appear before this court on December 4, 1997, at 9:00 a.m. to show cause why he should not be held in contempt for his failure to file Muldrew's brief.

Woodrow DAVIS III *v.* STATE of Arkansas

CR 97-562 955 S.W.2d 705

Supreme Court of Arkansas
Opinion delivered November 20, 1997

William R. Simpson, Jr., Public Defender, by: *Deborah R. Sallings*, for appellant.

Winston Bryant, Att'y Gen., by: *Gil Dudley*, Asst. Att'y Gen., for appellee.

TOM GLAZE, Justice. Appellant Woodrow Davis, III, was convicted of capital murder for the shooting death of Billy Sanders on January 31, 1995. Although the State sought the death penalty, Davis was sentenced to life imprisonment without parole.

At trial the State introduced a taped conversation made on April 17, 1995, between Davis and an acquaintance, Bobby Tygart. Tygart had suspected Davis's involvement in Sanders's death and had offered to aid law enforcement officers in the investigation of the murder. Unbeknownst to Davis, Tygart was wired when Tygart initiated conversation and successfully obtained Davis's statements implicating himself in Sanders's murder. Also, as a part of the State's case-in-chief, the State introduced into evidence Davis's confession which officers obtained on April 18, 1995.

Davis's only point for reversal on appeal is that the trial court erred in refusing to exclude from evidence five segments from Davis's and Tygart's recorded conversation. Davis's argument is meritless.

In addressing Davis's point, we are met with his general contention that the five segments he sought to exclude at trial had little or no probative value and whatever value they might have had was outweighed by their unfair and undue prejudice. *See* Ark. R. Evid. 403 (1997). Davis also claims the content of the disputed segments had no independent relevance to the State's case and tended only to show him as a bad person. *See* Ark. R. Evid. 404 (1997).

The only meaningful way to examine and understand Davis's argument is to abstract all of his statements made during his conversation with Tygart, but in doing so, we sequentially number and italicize the five passages to which Davis objects:[1]

> What are you doing? Let's go. Come here, boy. Where's your old lady at? Fayetteville? What for? Oh yeah —. (Tygart's aunt is in the hospital in Jacksonville; the aunt's car is messed up, and explains to Davis this is why he got away without his wife.) Oh yeah.
>
> You don't got no dope? No, not, I did some crack. I used a big old rock of crack. Cocaine. Oh, let's go get a rock. No (Davis doesn't have any money), I was going to get twenty from you. I was gonna borrow twenty from you. You! On "E?" (Tygart's gas gauge) Just out runnin' around? He's left town (referring to a man named "Johnny"). Supposed to be headed to Wisconsin.
>
> (Tygart asks where he can get a gun.) (1) *What for? I don't man, what for? To kill somebody. If you kill somebody, book 'em and run.* Talk to old Jim. He may have one. (Jim) Milam. Old Jim, he won't tell nobody. Hasn't got as much power does it? (referring to the car) How's that? It ain't (the same part of the car). Room and board up here at Cecil's house. I'm gonna ask him about y'all's shit. And I'll see if I can borrow twenty dollars from

[1] Davis's entire conversation with Tygart was recorded on three tapes, but the trial court excluded a substantial portion of the conversation as being irrelevant.

him. No (Cecil doesn't have a gun). Jim may have one. He had one that I used a time or two but, he was supposed to got rid of it. We can check 'em.

(Davis next gives directions to Tygart)

No. I'd have to go by myself (to talk to Milam; Tygart then remarks he does not want to talk to Milam). Why not? What? (Tygart responds he has a lot on his mind). I do, too. Got it from my old lady. Jim will give me fifty dollars in the morning, but he can't get it until morning 'cause his old lady is there, and that's why I couldn't talk to him. (Jim is) Robert's uncle or his nephew. He's (Robert) out there somewhere — staying —. I ain't seen him — Well, I seen him the other day. I went over there and seen him.

(The next portion of the conversation discusses what Robert's Uncle is in jail for and more directions to Cecil's).

(Tygart and Davis discuss Tygart's requirement of being in Jacksonville by 9:00, and directions once more.)

(2) *I'll pop a mother fucker in the head. (Unintelligible) — Bull shit walks. Mother fucker pay me right. Mother fucker pay me right, I'll pop the mother fucker for ya. But, uh, you can.* Yeah. (Inaudible) have to pay right, huh. (Tygart states he doesn't know if he could shoot a person). (3) *I can. I can. I can.* (Tygart asks if Davis would have bad dreams afterwards). *I hadn't.* I can't tell ya (who he shot). I got fucked up, boy. You know the mother fucker. Who? (Has Tygart figured out? Tygart says Bill.) How do you figure? I didn't say that. You don't know that. I'll go to the penitentiary for life on that. Oh I figured (Unintelligible) that you looked at me (laughing) uh, yeah, Woody did (Unintelligible). Hey, man, fuckin' planned on — paying for a fuckin' (Unintelligible). Somebody else got paid to do it and then couldn't. And never got it done. Never got it done and then I got in on the deal.

Uh, like I say, I got in on the deal, and it took me forever and ever, kept putting it off. Then I — 'Cause I was scopin' him. Uh, I was sitting across the woods every morning and sitting across the road in the woods watching that mother fucker every morning in the mud, rain, cold. Shoot, about four, five or six months before I ever finally got any — Well, what it got down to, the boy that I — we was doing it for said that —. Peoples on

him — that peoples on him, and they said, you know, look, they on me. It's either him or y'all. He said ya'll done know too much, Said either get him, or we're gonna get y'all. No, not you. Me and the guy I did it for.

Me and the guy that was with me that was supposed to do it, I just supposed to do all of the driving and shit. Then when it come down, he didn't have the balls, so I had to do it. Well, shit I got — I didn't get rid of that — I just planned my shit out and screwed around and got by with it. There's a reward out now over it I heard. Don't nobody know but me, the guy that was with me and the guy that had us do it, and you. I ain't gonna say nothing about it again. Fuckin' took forever. Goddamn.

(Tygart then questions Davis about how he felt afterwards.)

(4) *I's real hurt. I had to go get some stuff. I went and got me a gram, phew, the whole half. Yeah (at one time). I's pushing. Pheewwww, boy I was going. Shit. Took me a while, I have — I felt better when I got over it though. It wasn't, wasn't like I thought it was gonna be. I don't think about it. When I think about how the pussy the mother fucker acted about it.* He was scared. Mother fucker went through — Yeah, damn near. He had to of, 'cause you know, Bob told him, hey man, you better come off that shit if you want to live. And he thought he's gonna live and give me all his shit, but he didn't live. I knew what I had to do. Mother fucker with a .357 in your side.

No, he was supposed to have (some dope). No. He bought it. He fuckin' bought an ounce a week or two ounces a week. A kilo or something. Fucking crystal or cocaine, and he pushed it. He bought that a week. He's got all that money stashed in his house. Cause the guy was fuckin' his old lady, she come by and gave —. Well, he don't no more, he's gone. Bill got the dope, and he put it up to his pushers, mainly in Jacksonville, and then they went out, you know. He, he always passes out two or three people —.

That if I didn't kill him, they were going to kill me for not killing him, 'cause I already knew too much. Yeah. And they'd still kill me now if I say anything. Don't nobody know nothing but me, him and him and — the militia — These mother fuckers are worse than the militia. I ain't lying. These mother fuckers are worse than the militia. It's like the Mafia.

(Tygart then explains some trouble he is in.)

(5) *Boy, don't ever fucking say nothing about that shit, 'cause Goddamn, we'd both have to get killed. I ain't lying. I ain't lying. What was really so fucked up about it was the mother fucker was such a pussy about it, 'cause you know, when you got a .357 in your side, you gonna suck his dick if you want — if you want. If you don't —.* It wasn't what there was supposed to be (the money on Sanders). No, not all of it (was spent by Davis buying crack). Crystal, bought the boys some toys and shit.[2]

Davis specifically objected to each numbered segment set out above as follows:

(1) Any reference to "If you kill somebody, book 'em and run" was not probative of any issue involved, showed Davis was nonchalant about killing a person and portrayed him as a bad person.

(2) When referring to "popping" a person for the right money, the statement made no reference to a specific person and was merely a general observation.

(3) In stating he could shoot somebody and it not bother him, it was not probative, but was highly prejudicial.

(4) His statement concerning the taking of drugs to make him feel better after shooting [Billy] did not reflect Davis's state of mind on the day of the incident [murder] and was irrelevant to any issue at trial.

(5) His reference to using a .357 on Billy Sanders added no new information, and the remainder of the statement portrayed Davis as remorseless, which was not an issue in this case.

In reviewing Davis's arguments in light of the full text of his statements to Tygart, we conclude the five disputed passages were highly relevant, and any prejudicial effect they had were clearly outweighed by their probative value. In fact, to remove those segments challenged by Davis would only cause confusion regarding

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[2] There are seven to eight additional abstract pages containing statements of Davis to Tygart, but those statements were introduced at trial without objection and are unnecessary to recite for purposes of this opinion.

the meaning of the remaining portions of his conversation with Tygart that were introduced without objection.

The importance of the full text of Davis's April 17, 1995, conversation with Tygart is best illustrated because his statements to Tygart corroborate Davis's April 18, 1995, confession. While Davis does not challenge on appeal the trial court's ruling that allowed his confession into evidence, Davis argued at trial that his confession should have been suppressed because it was not voluntarily, knowingly, and intelligently given. In his closing argument to the jury, Davis's counsel argued that Davis's confession resulted from some type of coercion.[3] Moreover, Davis also offered testimony reflecting that Sanders's employer had received a prior death threat on Sanders's life from a man other than Milam, Reeves or Davis, who claimed Sanders had been seeing the man's wife.

Davis's confession very clearly related how he, Robert Reeves, and Reeves's uncle, Jim Milam, killed Sanders. Milam was the one who initiated the plan by contacting Reeves. Milam gave Reeves a 30-30 rifle, but Reeves did not do the "job." Milam then offered money to Reeves and Davis if they would kill Sanders. Davis and Reeves made several morning trips to woods located near Sanders's house, but Reeves still would not shoot Sanders. Davis said that, after Reeves and Davis failed to kill Sanders, Milam threatened them that "it was either Bill (Sanders) or us."

Davis's confession detailed the day of Sanders's murder, setting out how each party participated. Milam furnished a .357 pistol to Davis and Reeves; afterwards Davis and Reeves found Sanders, driving his truck into his employer's car lot on the morning of January 31, 1995. Reeves and Davis got into Sanders's truck and proceeded to drive to a landfill in Pulaski County. Milam drove his vehicle to the landfill to join them, and after Reeves, Davis, and Sanders arrived, Milam shot Sanders in the head while Sanders was still in his truck. Reeves then placed Sanders's truck in gear so it would roll off and submerge into a

[3] Davis also argued his due process right was violated because Tygart had been provided some compensation or reward for his cooperation. However, Tygart had received no compensation or reward at the time of trial.

water hole. Davis and Reeves had taken Sanders's ring and $300.00 in cash. Davis said the cash was split equally between him, Reeves and Milam, but Davis's wife's stepfather later pawned the ring.

[redacted] In sum, Davis argues the five disputed segments prejudicially placed before the jury evidence and general observations that had no relevance to any issue at trial. Those segments considered along with Davis's confession show Davis's part in Sanders's murder and that Davis's statements to Tygart related to his past participation in that murder. As far as Davis's expressed concern that his mention of a .357 pistol to Tygart added nothing new to the State's case, the State was not limited in the amount of proof it could introduce to prove its case. Instead, the rule is that relevant evidence may be excluded only if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence. Ark. R. Evid. 403. Here, considering the record before us, we are unable to say the trial court abused its discretion in rejecting Davis's argument that the probative value of the State's evidence was outweighed by danger of unfair prejudice or needless cumulative evidence. Again, to the contrary, we believe the jury likely would have been confused or misled if the five segments objected to had been excluded from evidence.

Pursuant to Ark. Sup. Ct. R. 4-3(h), the record has been examined in its entirety, and no other rulings adverse to Mr. Davis involving prejudicial error were found. We affirm.

Nathaniel LEWIS *v.* STATE of Arkansas

CR 97-538 955 S.W.2d 904

Supreme Court of Arkansas
Opinion delivered November 20, 1997

Don Trimble, for appellant.

Winston Bryant, Att'y Gen., by: *David R. Raupp*, Sr. Asst. Att'y Gen., for appellee.

ROBERT L. BROWN, Justice. This appeal arises out of a judgment of conviction for first-degree battery and residential burglary. Appellant Nathaniel Lewis was sentenced to 20 years on each count to run concurrently. His one issue on appeal concerns whether the trial court erred in refusing to allow him to impeach his own witness, Gordon Brown, with a videotaped statement Brown purportedly gave to West Memphis police officers. He files his appeal in this court based on his contention that this is an

issue of significant public interest. We affirm for failure to comply with Ark. Sup. Ct. R. 4-2(b)(2).

This court has repeatedly held that it will not consider arguments that have not been properly abstracted. *Wallace v. State*, 326 Ark. 376, 931 S.W.2d 113 (1996); *Richmond v. State*, 326 Ark. 728, 934 S.W.2d 214(1996); *Watson v. State*, 313 Ark. 304, 854 S.W.2d 332 (1993). We have stated that it is a fundamental rule that the appellant is required to provide an abstract that contains information from the record necessary to an understanding of the questions presented to the Court for decision. Ark. Sup. Ct. R. 4-2(a)(6); *Richmond v. State, supra*; *D. Hawkins, Inc. v. Schumacher*, 322 Ark. 437, 909 S.W.2d 640 (1995); *Carmical v. City of Beebe*, 316 Ark. 208, 871 S.W.2d 386 (1994).[1] Scattered references to the record contained in the argument portion of the brief are not sufficient to meet this court's requirements under Rules 4-2(a)(6) and 4-2(b)(2). *See Richmond v. State, supra*; *Wynn v. State*, 316 Ark. 414, 871 S.W.2d 593 (1994); *Watson v. State, supra.*

Here, Lewis not only failed to abstract material parts of the record, but he failed to include in his brief any abstract of the record at all. In his brief, Lewis merely quoted part of the colloquy between counsel, Brown, and the trial court as part of his argument. This is plainly not enough to satisfy our rule. His brief is flagrantly deficient, and under such circumstances, we affirm. Ark. Sup. Ct. R. 4-2(b).

Affirmed.

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[1] Arkansas Supreme Court Rule 4-2(a)(6) was redesignated Arkansas Supreme Court Rule 4-2 (a)(5) by per curiam opinion dated July 15, 1996. *In Re: Supreme Court Rule 1-2, and Other Matters Related to the Jurisdiction of the Supreme Court and Court of Appeals*, 325 Ark. 525 (1996). On June 30, 1997, a new subsection 4-2(a)(2) was added to Rule 4-2, thereby again making the abstract subsection 4-2(a)(6). *In Re: Supreme Court Rule 1-2, Rule 2-4 and Rule 4-2(a), Rule 2 of the Rules of Appellate Procedure—Criminal, and Rule 3 of the Rules of Appellate Procedure—Civil*, 329 Ark. 656 (1997).

Robert BLAYLOCK, Michael Ibsen, and Steve Perry *v.*
SHEARSON LEHMAN BROTHERS, INC.

96-1176 954 S.W.2d 939

Supreme Court of Arkansas
Opinion delivered November 20, 1997

Robert R. Cloar, for appellants.

Parker, Hudson, Rainer & Dobbs, by: *David G. Russell* and *Nancy H. Baughan*; and *Hardin, Dawson & Terry*, by: *Rex M. Terry*, for appellee.

RAY THORNTON, Justice. This case presents the question whether a voluntary dismissal, or nonsuit, by a plaintiff is automatically effective as soon as it is filed, or whether a court order or docket entry is required to dismiss the action without prejudice and start the clock ticking on the statutory savings period. The trial court found that a nonsuit becomes effective upon filing, without any action by the trial court; the court further found that, as a consequence, the August 17, 1995 complaint filed by appellants Robert Blaylock, Michael Ibsen, and Steve Perry was time barred. We disagree and reverse and remand.

While it is well settled that a person who files a lawsuit may voluntarily dismiss that lawsuit and has a statutory right to refile the action within one year pursuant to Ark. Code Ann. section 16-56-126 (1987), we have never before addressed the question whether the nonsuit is effective upon filing or whether some action by the court is required. In reaching that issue, we consider the following rule of civil procedure on voluntary dismissals:

> VOLUNTARY DISMISSAL: EFFECT THEREOF. Subject to the provisions of Rule 23(d) and Rule 66, an action may be dismissed without prejudice to a future action by the plaintiff before the final submission of the case to the jury, or to the court where the trial is by the court, provided, however, that such dismissal operates as an adjudication on the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based upon or including the same claim, unless all parties agree by written stipulation that such dismissal is without prejudice. In any case where a set-off or counterclaim has been previously presented, the defendant shall have the right of proceeding to trial on his claim although the plaintiff may have dismissed the action.

Ark. R. Civ. P. 41(a) (1997). We have long interpreted this rule as creating an absolute right to a nonsuit prior to submission of the case to the jury or to the court. *Whetstone v. Chadduck*, 316 Ark. 330, 871 S.W.2d 583 (1994); *Doan v. Bush*, 130 Ark. 566, 198 S.W. 261 (1917). Although the rule does not provide for it, we have held that it is within the court's discretion to permit a nonsuit without prejudice even after final submission of the case. *Wright v. Eddinger*, 320 Ark. 151, 894 S.W.2d 937 (1995). When a nonsuit has been made effective, a new action may be filed within one year of the nonsuit or within the applicable statute of limitations, whichever is longer. *Shelton v. Jack*, 239 Ark. 875, 395 S.W.2d 9 (1965).

[redacted] We have stated that, for a judicial order to take effect, a judgment or decree must be "entered" to be effective. *Standridge v. Standridge*, 298 Ark. 494, 769 S.W.2d 12 (1989). We said in *Standridge* that under Ark. R. Civ. P. 58 and Arkansas Supreme Court Administrative Order No. 2, the term "entered" means that the judgment or decree must be "set forth on a separate document" and filed by the clerk in the court's docket book. *Id.* at 497, 769 S.W.2d at 14. This decision reflects the importance of having the court maintain control of its docket as well as providing an accurate record of the status of the litigation. This control protects the integrity of information, and the court and parties to the litigation rely on it when reviewing court orders and docket entries in the case.

The requirement for an order may also be inferred from our decisions reversing a trial court's denial of a plaintiff's absolute right to a voluntary nonsuit. We have provided relief for such an erroneous denial by reversing and remanding with instruction to the trial court to grant the nonsuit, rather than determining that the nonsuit was effective at the time it was requested. *Brown v. St. Paul Mercury Ins. Co.*, 300 Ark. 241, 778 S.W.2d 610 (1989).

Decisions from other jurisdictions reflect sound reasoning for requiring court action to effectuate a nonsuit. The Virginia Supreme Court has interpreted its state statute dealing with nonsuits to require a court order to be effective. *Nash v. Jewell*, 227 Va. 230, 315 S.E.2d 825 (1984). The court in *Nash* discussed the importance of having some court action on the issue as follows:

> [C]ourts act by orders and decrees. There is no termination of litigation until the court enters an appropriate order. Therefore, before entry of such an order the plaintiff may reconsider his decision to take a nonsuit. He has no right to withdraw the nonsuit, but he has a right to move the trial court to permit withdrawal. The granting or denial of the motion is a matter for the trial court to determine in the exercise of judicial discretion.

Id. at 237, 315 S.E.2d at 829 (citations omitted).

In *Dorney v. Dorney*, 98 N.H. 159, 96 A.2d 198 (1953), the New Hampshire Supreme Court stated that merely filing the motion for voluntary dismissal does not automatically end the action. The court explained its reasoning as follows:

> The plaintiff cannot discontinue his suit without the privity of the court. The nature of the motion is such that some action on it by the court is contemplated and required. The circumstances under which it is filed determine whether the granting of it is a matter of the Court's discretion or a matter of right. Even in the latter situation, some act or agreement of the plaintiff may have estopped him from exercising the right or costs may be assessed as a condition of the dismissal. An order of the court granting such a motion is not in itself a judgment but is only the basis upon which a final decree may be entered at the established judgment day, unless otherwise ordered. Judgment is the law's last word in a judicial controversy. It is not until a judicial determination has been reduced to judgment that an action is finally terminated.

Id. at 160, 96 A.2d at 199 (citations omitted).

For all the reasons we have stated, we choose to apply the holding of *Standridge* to all dismissals from litigation, including those voluntary dismissals without prejudice to which a plaintiff may have an absolute right. We therefore hold that a court order is necessary to grant a nonsuit and that the judgment or decree must be entered to be effective. Further, we determine that, under the facts before us, the trial court erred in dismissing the case as time barred. We now turn to the facts of this case.

This is the third case filed on behalf of appellants against the appellee Shearson Lehman Brothers, Inc. All three cases alleged violations of the Arkansas Securities Act relating to the sales of stock to appellants and were grounded upon causes of action that arose in 1986. The five-year statute of limitations for filing an action for securities fraud, Ark. Code Ann. § 23-42-106(f) (Supp. 1995), would have run in 1991, except that the commencement of a class action tolls the running of the statute as to purported members of the class during the pendency of the litigation. *American Pipe & Constr. Co. v. Utah,* 414 U.S. 538 (1974).

Appellants were purported members of the class in the first of the three cases, *Gentile v. Shearson,* a proposed class action against appellee, filed on October 16, 1990. On March 3, 1993, class certification was denied. *Gentile* is not before us in this appeal, but it acted to toll the running of the five-year statute of limitations.

Two days later, 140 plaintiffs, including appellants, filed an action on substantially the same grounds. That case, *Morton v. Shearson Lehman Brothers, Inc.,* is likewise not before us in this appeal; however, some of the facts from *Morton* are relevant to this third case, which is now before us. During the proceedings in *Morton,* appellants joined more than eighty plaintiffs in filing a document captioned a "nonsuit" on July 6, 1993. The abstract in this appeal discloses that no action was taken by the *Morton* trial court on the nonsuit filed on July 6, 1993. The abstract shows also that counsel for plaintiffs subsequently attempted to amend the nonsuit on two occasions for the stated purpose of restoring some nonsuiting plaintiffs to active status. The court did not act

on either of these first two "amended nonsuits." Then, on July 6, 1994, counsel for plaintiffs filed another "amendment to nonsuit" to restore appellants to active status.

As a result of appellee's objections to this third attempt to amend the nonsuit, a hearing was held on August 17, 1994. Appellee argued that it was too close to trial for appellants to be restored to active status, and appellants' counsel contended that the nonsuit had not become effective because no court action had been taken. The *Morton* trial court, in denying the request to restore appellants to active status, said the following from the bench: "Okay. Right or wrong, you're gonna need to refile those, I'm sorry." Appellants do not appeal that decision, or any other action taken by the trial court in *Morton.*

This third case, *Blaylock v. Shearson,* was filed on August 17, 1995, seeking relief on the original cause of action. Appellee moved to dismiss *Blaylock* on the basis that the claim was time barred. By its order filed June 3, 1996, the trial court found that appellants' claims were nonsuited on July 6, 1993, and it dismissed the complaint as time barred.

Appellee argues that the trial court's dismissal was not erroneous for the following reasons: (1) the July 6, 1993 nonsuit in *Morton* was effective when filed, (2) the voluntary dismissal from *Morton* on July 6, 1993 terminated the tolling of the five-year statute of limitations, and (3) appellants' filing of *Blaylock* was time barred because both the five-year statute of limitations and the one-year statutory savings period had run before the *Blaylock* complaint was filed. These arguments lack merit.

Because of our holding that a judgment or decree must be entered before a nonsuit becomes effective, we have carefully examined the abstract and find no order or decree granting a nonsuit in *Morton,* nor any entry reflecting such action on or before October 17, 1994, when the abstract before us ends its references to the *Morton* case. Based upon our conclusion that no nonsuit was effectively granted, it follows that appellants were not dismissed from the *Morton* lawsuit, that the one-year savings statute was never activated, and that the general five-year statute of limitations applicable to securities fraud continues to be tolled for so

long as appellants are not dismissed from *Morton*.[1] The trial court in *Morton* granted a summary judgment against some plaintiffs on October 17, 1994, and on the basis of a settlement, dismissed the action of other plaintiffs on the same date. However, the abstract shows that appellants were not included in either order.

[redacted] From the abstract before us, we conclude that appellants' August 17, 1995 complaint was erroneously dismissed as time barred, and we reverse and remand for further proceedings.

[redacted]

Stanley Frank BOYD *v.* Honorable Tom KEITH

97-991 954 S.W.2d 942

Supreme Court of Arkansas
Opinion delivered November 20, 1997

[redacted]

Appellant, pro se.

No response.

PER CURIAM. Petitioner Stanley Frank Boyd, a prisoner in the Arkansas Department of Correction, states that on April 2, 1997, he filed a Freedom of Information Act request with the Honorable Tom Keith, Carroll County Circuit Judge. The

[1] We note that our rule of civil procedure, Rule 12(b)(8), provides a defense against an action based on the pendency of another action between the same parties arising out of the same transaction or occurrence; however, this defense is waived under Rule 12(h)(1) if it is not included in the original responsive pleading.

request sought copies of records allegedly in the files of the Circuit Court. The matter apparently remains pending before the Circuit Court. Petitioner Boyd seeks a writ of mandamus to cause Judge Keith to grant his request.

The Attorney General, on behalf of Judge Keith, has responded by denying that the request has merit rather than addressing the Circuit Court's failure to act on the request.

The writ of mandamus is granted to require only that the Circuit Court act upon the request of Mr. Boyd.

Henderson BROWN *v.* STATE of Arkansas

CR 79-5 955 S.W.2d 901

Supreme Court of Arkansas
Opinion delivered November 20, 1997

Appellant, pro se.

Winston Bryant, Att'y Gen., by: *Gil Dudley*, Asst. Att'y Gen., for appellee.

PER CURIAM. Henderson Brown was found guilty by a jury of aggravated robbery and theft of property, charges which arose from a hold-up of a branch office of a savings and loan association in January 1978. He was sentenced as a habitual offender to an aggregate sentence of thirty years' imprisonment. We affirmed. *Brown v. State*, CR 79-5 (April 16, 1979). Brown subsequently filed in this court a petition pursuant to Criminal Procedure Rule 37, which resulted in his being granted leave to file a petition for postconviction relief in the trial court. *Brown v. State*, CR 79-5

(December 10, 1979). The Rule 37 petition in the trial court was denied after a hearing, and we affirmed the order. *Brown v. State*, 274 Ark. 205, 623 S.W.2d 186 (1981).

Brown now petitions this court to reinvest the trial court with jurisdiction to consider a petition for writ of error coram nobis in the case. The petition for leave to proceed in the trial court is necessary because the circuit court can entertain a petition for writ of error coram nobis after a judgment has been affirmed on appeal only after we grant permission. *Larimore v. State*, 327 Ark. 271, 938 S.W.2d 818 (1997).

A writ of error coram nobis is an exceedingly narrow remedy, appropriate only when an issue was not addressed or could not have been addressed at trial because it was somehow hidden or unknown and would have prevented the rendition of the judgment had it been known to the trial court. *Penn v. State*, 282 Ark. 571, 670 S.W.2d 426 (1984) (citing *Troglin v. State*, 257 Ark. 644, 519 S.W.2d 740 (1975)). The writ is allowed only under compelling circumstances to achieve justice and to address errors of the most fundamental nature. A presumption of regularity attaches to the criminal conviction being challenged, *Larimore, supra*, (citing *United States v. Morgan*, 346 U.S. 502, 512 (1954)), and the petition must be brought in a timely manner. *Penn, supra*. Newly discovered evidence in itself is not a basis for relief under coram nobis. *Larimore, supra*; *Smith v. State*, 301 Ark. 374, 784 S.W.2d 595 (1990). A claim of newly discovered evidence must be addressed to the trial court in a motion for new trial made within the time in which a notice of appeal must be filed. *See* A.R.Cr.P. 33.3; *Penn, supra*.

Petitioner claims that jurisdiction should be reinvested in the trial court to consider an error coram nobis petition because another person confessed to the crime for which he was convicted. He states that he learned of the confession while the appeal of the denial of his Rule 37 petition was in progress, which would have been some time before the order was affirmed in November 1981. He explains that he has not previously raised the issue because he was unaware that there was a state remedy avail-

able to bring the issue to the court, presumably until *Larimore, supra,* was recently rendered.

It appears that petitioner has misconstrued *Larimore.* In *Larimore,* we cited *Davis v. State,* 325 Ark. 96, 925 S.W.2d 768 (1996), in which we explained that the writ was available to address certain errors of the most fundamental nature which are most commonly to be found in one of four categories:

> Error coram nobis is a rare remedy. It is available only where there is an error of fact extrinsic to the record, such as insanity at the time of trial, a coerced guilty plea or material evidence withheld by the prosecutor, that might have resulted in a different verdict. *Taylor v. State,* 303 Ark. 586, 799 S.W.2d 519 (1990). The writ has also been used in cases in which a third party confessed to the crime during the time between conviction and appeal. *Smith v. State,* 301 Ark. 374, 784 S.W.2d 595 (1990).

Id. at 109.

Larimore concerned a claim that material evidence had been withheld by the prosecutor, an allegation which can be made after a judgment has been affirmed because evidence of such misconduct on the part of the prosecutor may have remained hidden for some time from even the most diligent petitioner. *Larimore* did not broaden the remedy set out in *Penn* for advancing an allegation that a third party had confessed to the crime of which the petitioner was convicted, an allegation which must be raised before affirmance of the judgment. The petition in *Penn,* which alleged that another person had issued a sworn affidavit admitting to the crime for which Penn was found guilty, was filed in the period between trial and the conclusion of this court's appellate review of the judgment and was thus timely filed. We emphasized that the ruling in *Penn* did not open the door to other petitions beyond those which qualified under the facts of that case and which were brought within that narrow window of time in which the judicial system is best in a position to weigh with accuracy the merit of the petitioner's claim. *Id.* at 577.

While there are circumstances in which a petition to reinvest the trial court with jurisdiction to hear a petition for writ of error coram nobis can be considered timely if filed *after* affirm-

ance of a judgment, such as prosecutorial misconduct in concealing exculpatory evidence from the defense, the questions of fact which invariably accompany an allegation of a third-party confession demand prompt scrutiny. The mere fact that another person has confessed to a crime cannot, alone, be grounds for relief for such confessions are not uncommon and must be approached with some skepticism. The trial court must carefully scrutinize the complete circumstances surrounding the confession and all the available evidence. Assessing the merits of the third-party confession requires that all of the evidence be available and unimpaired by the passage of time so that the trial court's examination can be exhaustive and decisive. Our requirement that such a claim be raised before affirmance serves to limit such claims to the time frame in which it is most likely that the trial court can determine with certainty whether the writ should issue. Assertions of a third-party confession after a judgment is affirmed may be addressed to the executive branch in a clemency proceeding. *See Penn, supra.*

The concurrence questions whether a petition based on a third-party confession should be limited to the time before a judgment is affirmed while other grounds are permitted to be raised after affirmance, but the limitation is one clearly mandated by the holding in *Penn. Penn*, which for the first time allowed a writ based upon an allegation of a third-party confession, requires that the allegation be raised before affirmance and that precedent is followed here. We made clear in *Penn* that the time limitation was integral to our recognition of this new ground for a writ of error coram nobis. The concurrence argues that the traditional grounds listed in *Davis v. State*, 325 Ark. 96, 109, 925 S.W.2d 768, 775 (1996), i.e. insanity at the time of trial, a coerced guilty plea, and material evidence withheld by the prosecutor, are equally in need of prompt attention and are as likely as a third-party confession to need addressing before affirmance. These traditional grounds for a writ are not subject to the time limitation established in *Penn* for a third-party confession. This is not to say that, in a particular case, it might not be concluded that any one of these grounds *should* have been raised before affirmance if it can be determined that the petitioner could have raised the issue before affirmance had he

been diligent. We have before us in the instant case only a claim of a third-party confession, and we look to *Penn* as precedent for when such a claim should be raised.

Petition denied.

NEWBERN and GLAZE, JJ., concurring.

DAVID NEWBERN, Justice, concurring. In the renewed discussion of the writ of error *coram nobis*, which has been stimulated by our divided vote in *Larimore v. State*, 327 Ark. 285, 938 S.W.2d 818 (1997), we are confronted with the classic dilemma presented by the need for finality of legal decisions. At some point, the proceedings must come to a halt despite the prospect of allegations without end that something went wrong.

As I continue to subscribe to the dissenting opinion written by Justice Glaze in the *Larimore* case, I concur in the result reached here on the ground that the petition is untimely, but I cannot agree with the explanation given by the majority. The opinion suggests that there is a good reason for requiring an allegation that someone other than the prisoner has confessed to the crime of which he or she was convicted to be made between the conviction and affirmance on appeal. The reason suggested is that such a claim must be addressed while the facts are within the fresh memories of persons involved and that it is desirable to have it dealt with by the court that tried the case originally. It is thus implied that we allow the other allegations that might support a *coram nobis* petition to be raised after affirmance because there is no such need of immediate memory.

The other permissible bases of a *coram nobis* petition, quoted from *Davis v. State*, 325 Ark. 96, 109, 925 S.W.2d 768, 775 (1996), are, ". . .insanity at the time of trial, a coerced guilty plea or material evidence withheld by the prosecutor, that might have resulted in a different verdict. . . ." Each is as dependent upon the memories of witnesses as is a subsequent confession by someone other than the prisoner. Nor is it any less desirable in each of those instances that the court that tried the case deal with the subsequent allegations. The distinction sought to be made in the majority opinion fails utterly.

In response to this concurring opinion, the majority states, "We made clear in *Penn* [*v. State*, 282 Ark. 571, 670, S.W.2d 426 (1984)] that the time limitation was integral to our recognition of this new ground for a writ of error coram nobis." That statement does not deal with the illogic of the distinction the majority poses. Here is the language from the *Penn* case to which the majority refers:

> We emphasize that we do not open the door to other petitions beyond those that would qualify under the facts in this case, especially the fact that it is presently between trial and appeal and can easily provide for an early hearing before the court that just heard the case.

That statement makes no effort to distinguish among bases for the writ in the context of timeliness and should be taken to apply to all "other petitions." Absent *reasons* for distinguishing among the grounds giving rise to the writ, all should be limited to the time prior to decision on appeal or none of them should be so limited.

GLAZE, J., joins in this opinion.

Larry Darnell INGRAM *v.* STATE of Arkansas

CR 97-1114 955 S.W.2d 186

Supreme Court of Arkansas
Opinion delivered November 20, 1997

D. Kirk Joyce, for appellant.

No response.

PER CURIAM. The appellant, Larry Darnell Ingram, has previously filed a motion for belated appeal. *See Ingram v. State*, 330 Ark. 218, 951 S.W.2d 314 (1997). We denied the motion because Ingram's attorney, D. Kirk Joyce, had not admitted fault for failing to file the record in a timely manner. Mr. Joyce has since submitted an affidavit accepting responsibility for failing to timely file the transcript.

We find that such an error, admittedly made by the attorney for a criminal defendant, is good cause to treat the motion as one for rule on the clerk and grant the motion. *See Harkness v. State*, 264 Ark. 561, 572 S.W.2d 835 (1978). A copy of this opinion will be forwarded to the Committee on Professional Conduct.

W.W. *v.* STATE of Arkansas

97-1305 956 S.W.2d 169

Supreme Court of Arkansas
Opinion delivered November 20, 1997

Alvin Schay, for appellant.

No response.

PER CURIAM. This is a juvenile delinquency proceeding in which, appellant, W.W., by his attorney, Alvin Schay, has filed a motion for rule on the clerk. His attorney admits that the notice of appeal was not filed in a timely manner due to a mistake on his part.

We find that such error, admittedly made by the attorney for a criminal defendant, is good cause to grant the motion, which we will treat as a motion for belated appeal. *See Terry v. State*, 272 Ark. 243, 613 S.W.2d 90 (1981); *In Re: Belated Appeals in Criminal Cases*, 265 Ark. 964 (1979) (per curiam).

The motion for belated appeal is, therefore, granted. A copy of this opinion will be forwarded to the Committee on Professional Conduct.

STATE of Arkansas *v.* John Edward JOHNSON

CR 97-593 956 S.W.2d 181

Supreme Court of Arkansas
Opinion delivered December 4, 1997

Winston Bryant, Att'y Gen., by: *Todd L. Newton*, Asst. Att'y Gen., for appellant.

Jack R. Kearney, for appellee.

W.H. "DUB" ARNOLD, Chief Justice. This is the second interlocutory appeal brought by the State in the same case. In *State v. Johnson*, 326 Ark. 660, 934 S.W.2d 499 (1996), we held that the trial court erred in suppressing appellee John Edward Johnson's confession on the basis that he was denied the right to counsel of his own choosing to be present during an in-custody interrogation and reversed and remanded his case. In the present appeal, the State contends that the trial court erred in dismissing its charges against Johnson on the grounds that double-jeopardy

principles barred state prosecution of an offense where the criminal conduct underlying the offense was utilized to enhance punishment for a separate, but related federal conviction. We agree with the State and reverse and remand Johnson's case for trial.

On August 30, 1995, Johnson was charged in Pulaski County Circuit Court with one count of rape, two counts of aggravated robbery, and two counts of theft of property. The charges stemmed from the June 25, 1995, armed robbery of the Purple Cow restaurant on Cantrell Road in Little Rock, during which an employee of the restaurant was raped. Johnson, a former employee of the restaurant, was developed as a suspect and was questioned by police. On February 22, 1996, the trial court suppressed Johnson's taped confession. The State appealed, and this court reversed and remanded the case on November 25, 1996.

On March 13, 1996, Johnson was indicted in the United States District Court for the Eastern District of Arkansas for interference with commerce by threats of violence, use of a firearm in relation to a crime of violence, and possession of a firearm not registered to him. The three charges all stemmed from the robbery of the Purple Cow restaurant. On September 17, 1996, Johnson pleaded guilty in federal district court to interference with commerce by threats of violence and use of a firearm in relation to a crime of violence. On December 18, 1996, the federal district judge, in imposing Johnson's sentence, found by a preponderance of the evidence that Johnson committed a rape in the course of the robbery, thus warranting enhancement of his sentence by 72 months. Thereafter, the State moved to dismiss the aggravated robbery and theft of property charges in Pulaski County Circuit Court, leaving the rape charge. Johnson filed a motion to dismiss the rape charge on the basis that he had already been punished for this offense in federal district court. According to Johnson, the Double Jeopardy Clause of the Fifth Amendment prohibited the State from pursuing the rape charge. The trial court agreed, and on April 2, 1997, one day before a previously scheduled hearing in the case, dismissed the State's charge. On April 3, 1997, the trial court permitted the State to make a record of its objections, which form the basis for the present interlocutory appeal.

The State appeals the trial court's decision to dismiss the rape charge against Johnson under Ark. R. App. P.—Crim. 3, contending that error was committed to the State's prejudice and that the correct and uniform administration of the criminal law requires our review. In this appeal, we are asked to decide, for the first time, whether double jeopardy prohibits state prosecution of an offense where the offense was considered, for enhancement purposes, in the calculation of punishment for a separate, but related federal conviction. Resolution of this appeal is also important because it involves the doctrine of dual sovereignty discussed in *Heath v. Alabama,* 474 U.S. 83 (1985), and has far-reaching implications in the administration of the criminal law as applied by federal and state authorities simultaneously involved in pursuing similar charges against one suspect. Thus, because we agree with the State that the correct and uniform administration of the criminal law is at issue here, we accept jurisdiction of this appeal.

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution protects a defendant from: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. *Edwards v. State*, 328 Ark. 394, 943, S.W.2d 600 (1997), *citing Schero v. Farley,* 510 U.S. 222 (1994). The issue in this case relates to the third protection. Relying largely on *United States v. Koonce*, 945 F.2d 1145 (10th Cir. 1991), *cert. denied* 112 S.Ct. 1695 (1992), the trial court concluded that, because the federal district court had considered the rape in setting Johnson's punishment for his convictions for interference with commerce by threats of violence and use of a firearm in relation to a crime of violence, Johnson would be subjected to multiple punishments for the same offense if the State were allowed to proceed on the rape charge. In *Koonce*, the Tenth Circuit Court of Appeals held that a subsequent conviction for possession of methamphetamine subjected Koonce to double jeopardy where the same possession was used to enhance an earlier sentence for distributing methamphetamine.

The State claims that the holding in *Koonce* was abrogated by the United States Supreme Court's decision in *Witte v. United States*, 515 U.S. 389 (1995). We agree. In that case, Witte

pleaded guilty in the United States District Court for the Southern District of Texas to attempted possession of marijuana. In calculating his sentence, the federal district court considered Witte's previous involvement in connected, but uncharged, activities involving the importation of cocaine and marijuana. When Witte was subsequently indicted for the importation of the drugs, the federal district court dismissed the charges on the basis that punishment for the importation offenses would violate the Double Jeopardy Clause's prohibition against multiple punishments. The Fifth Circuit Court of Appeals reversed the dismissal of the indictments, holding that Witte had not been punished for the importation offenses in the first prosecution, and thus double jeopardy did not bar the later action. The United States Supreme Court, noting that the Fifth Circuit had "expressly disagreed" with the Tenth Circuit's holding in *Koonce, supra,* granted certiorari "to resolve the conflict among the circuits." *Witte,* 515 U.S. at 395. The Court affirmed the Fifth Circuit, holding that:

> use of evidence of related criminal conduct to enhance a defendant's sentence for a separate crime within the authorized statutory limits does not constitute punishment for that conduct within the meaning of the Double Jeopardy Clause.

Id. at 399.

Johnson defends the trial court's dismissal on the basis that the facts in *Witte* are distinguishable from those in his case. Specifically, he points to the fact that the related conduct used to enhance Witte's federal sentence was the basis for a subsequent federal charge, not a state charge. The problem with his argument is that it ignores the doctrine of dual sovereignty:

> When a defendant in a single act violates the "peace and dignity" of two sovereigns by breaking the laws of each, he has committed two distinct "offences." Consequently, when the same act transgresses the laws of two sovereigns, it cannot be truly averred that the offender has been twice punished for the same offence, but only that by one act he has committed two offences, for each of which he is justly punished.

Heath v. Alabama, 474 U.S. at 88 (other citations omitted). Thus, even if the enhancement of Johnson's federal sentence constituted

punishment, because the State is clearly a separate sovereign with respect to the federal district court, *see id.* at 89, the State's prosecution of the rape charge would not have been barred.

In his brief, Johnson contends that the trial court's dismissal of the rape charge was proper because Arkansas law provides greater protection from double jeopardy than does the United States Constitution. In support of his argument, he cites, for the first time, Ark. Code Ann.§§ 5-1-114 (Repl. 1993) and 16-85-712(b) (1987), and maintains that they prohibit the State from prosecuting him for rape. Even if we were to agree with Johnson that these statutes, which relate to the protection from a second prosecution after a *conviction* for the same offense, applied to his case, he did not present his argument to the trial court, so we decline to consider it for the first time on appeal. Based on the Supreme Court's holding in *Witte* and the doctrine of dual sovereignty, we conclude that the trial court's dismissal of the rape charge was error and reverse and remand Johnson's case for trial.

Reversed and remanded.

NEWBERN, J., not participating.

Charles B. STANLEY *v.* STATE of Arkansas

CR 97-639 956 S.W.2d 170

Supreme Court of Arkansas
Opinion delivered December 4, 1997

Alvin Schay, for appellant.

Winston Bryant, Att'y Gen., by: *Kelly S. Terry*, Asst. Att'y Gen., for appellee.

TOM GLAZE, Justice. Appellant Charles B. Stanley brings this appeal from his conviction of theft of property and a sentence of forty years' imprisonment. His sole point for reversal is that the trial court erred in denying his motion to suppress evidence.

The pertinent facts began on December 30, 1992, when Officer Bob Paxton stopped a red 1979 Ford Thunderbird vehicle for a traffic violation in DeWitt. Charles Stanley was a passenger, and his brother, Lawrence Stanley, was the driver. During the stop, Paxton saw two large speakers in the back seat of the car, and he also observed a yellow flashlight, boxes of tools, and other small items. Paxton, who had knowledge of some prior residential and church burglaries involving stolen speakers and tools, sought a warrant to search the vehicle after having it impounded. Apparently Paxton and Patrolman Jim Miller prepared an affidavit and search warrant, and Miller appeared before the DeWitt Municipal Judge. The affidavit reflects that Patrolman Miller had been sworn by the municipal judge, and Miller averred that the impounded 1979 Ford Thunderbird was owned by Elizabeth Ann Hill, and that it concealed certain property. Miller further said that the facts tended to establish the grounds for issuance of a search warrant. It is this affidavit that Charles challenged below, and now on appeal, as being deficient because it failed to provide any facts to show reasonable cause existed for the issuance of a search warrant.[1]

Charles's argument is meritless for two reasons. First, he has failed to abstract the order showing that the trial court denied his motion to suppress. An appellant's failure to abstract the order appealed from and other critical documents precludes this court from considering issues concerning them. *King v. State*, 325 Ark. 313, 925 S.W.2d 159 (1996).

Second, Charles had no standing to challenge the vehicle's search because he had no property or possessory interest in

[1] The record reflects that, in addition to the affidavit, the municipal judge had recorded Miller's oral testimony bearing on facts and reasons for Miller's seeking a search warrant, but the tape was missing and most likely had been erased.

the 1979 Ford Thunderbird. An appellant must have standing to challenge a search on Fourth Amendment grounds because the rights secured by the Fourth Amendment are personal in nature. *Dixon v. State*, 327 Ark. 105, 937 S.W.2d 642 (1997) [citing *Rakas v. Illinios*, 439 U.S. 128 (1978)]. Whether an appellant has standing depends on whether he manifested a subjective expectation of privacy in the area searched and whether society is prepared to recognize that expectation as reasonable. *Id.* Here, Stanley bore the burden of proving that he had a legitimate expectation of privacy in the car, and he failed to meet that burden.

This court has repeatedly held that a defendant has no standing to question the search of a vehicle owned by another person. *State v. Barter*, 310 Ark. 94, 833 S.W.2d 372 (1992). In order to establish a legitimate expectation of privacy in an automobile owned by another person, a defendant must show that he gained possession of the vehicle from the owner or from someone who had authority to grant possession. *Littlepage v. State*. 314 Ark. 361, 863 S.W.2d 276 (1993).

Here, it was undisputed that, at the time the search warrant was issued, Elizabeth Hill, Charles's mother, owned the vehicle, and Charles was only a passenger when the vehicle was stopped by Officer Paxton. Because Charles had neither a property interest nor a possessory one, he had no legitimate expectation of privacy in the vehicle. *Koonce v. State*, 269 Ark. 96, 598 S.W.2d 741 (1980). Accordingly, he failed to establish that he had standing to object to the vehicle search.

For the foregoing reasons, the trial court's decision is affirmed.

Adrian REED *v.* STATE of Arkansas

CR 97-661 957 S.W.2d 174

Supreme Court of Arkansas
Opinion delivered December 4, 1997

[redacted]

Young & Finley, by: *Richard H. Young*, for appellant.

Winston Bryant, Att'y Gen., by: *Brad Newman*, Asst. Att'y Gen., for appellee.

DONALD L. CORBIN, Justice. Appellant Adrian Reed appeals the judgment of the Pope County Circuit Court convicting him of driving while intoxicated (DWI), second offense, and sentencing him to nine months in jail, suspending his driver's license for twelve months, and assessing a fine of $2,500. This appeal was certified to us from the court of appeals on the basis that it presents a question requiring statutory interpretation; hence, our jurisdiction is pursuant to Ark. Sup. Ct. R. 1-2(d). Appellant's sole point for reversal is that the trial court erred in failing to suppress the evidence obtained as a result of an illegal stop and arrest. We find no error and affirm.

Appellant was arrested for DWI on June 15, 1996. He was initially stopped and detained by Constable Bill Parks in Pope County near Pea Ridge, which is outside the constable's jurisdiction of Jackson Township. Appellant moved to suppress the evidence that resulted from his arrest on the ground that the constable lacked the authority to pursue a criminal suspect beyond his jurisdiction without first having a reasonable belief that the suspect had committed a felony. The trial court concluded that Constable Parks was a peace officer and that Ark. Code Ann. § 16-81-301 (1987) authorized him to stop and detain Appellant under the circumstances, even though the constable admittedly did not suspect that Appellant had committed a felony. The trial court accordingly denied Appellant's motion to suppress, and he was found guilty of the charge by a jury.

On appeal, Appellant challenges Constable Parks's authority to arrest him outside the constable's jurisdiction. He contends that pursuant to Ark. Code Ann. § 16-19-301 (Repl. 1994) a constable is not permitted to arrest a person for a misdemeanor offense outside the jurisdiction of his township. He asserts that such an arrest is only permitted if the constable reasonably believes that a felony has been committed within his jurisdiction.

Section 16-19-301, titled "Peacekeeping duties and authority — Neglect of duty," provides in pertinent part:

> (a) Each constable shall be a conservator of the peace in his township and shall suppress all riots, affrays, fights, and unlawful assemblies, and shall keep the peace and cause offenders to be arrested and dealt with according to law.
>
> . . . .
>
> (d) *Nothing in this section shall prevent the fresh pursuit by a constable of a person suspected of having committed a supposed felony in his township, though no felony has actually been committed, if there are reasonable grounds for so believing.* "Fresh pursuit" as used in this section shall not necessarily imply instant pursuit, but pursuit without unreasonable delay. [Emphasis added.]

Appellant asserts that the language in subsection (d) prohibits a constable from engaging in the fresh pursuit of any person unless that person is suspected of having committed a felony.

The State argues that the trial court correctly ruled that a constable's authority to freshly pursue a suspect beyond his jurisdiction is derived from section 16-81-301. The State argues that because section 16-81-301 was passed subsequent to the passage of section 16-19-301, this court should conclude that the later act controls.

Section 16-81-301, which is part of the Uniform Act on Intrastate Fresh Pursuit, provides:

> Any peace officer of this state in fresh pursuit of a person who is reasonably believed to have committed a felony in this state or has committed, or attempted to commit, any criminal offense in this state in the presence of such officer, or for whom the officer holds a warrant of arrest for a criminal offense, shall have the authority to arrest and hold in custody such person anywhere in this state.

The State contends that a constable is included within the definition of the term "peace officer" as used in section 16-81-301. As such, the State asserts that Constable Parks had the authority to pursue Appellant beyond the jurisdiction of his township for a misdemeanor offense that was committed in the officer's presence.

The sole issue for our resolution is whether a constable's authority to engage in the fresh pursuit of a person suspected of committing a misdemeanor beyond the limits of the constable's jurisdiction originates from section 16-19-301 or from section 16-81-301. Both statutes were passed during the same legislative session; the act containing section 16-81-301 was passed one day after the act containing section 16-19-301. Appellant contends that because section 16-19-301 specifically addresses the powers and duties of constables, it should prevail over section 16-81-301, which, Appellant asserts, only generally addresses the authority of "peace officers" to engage in fresh pursuit. We disagree.

Statutes relating to the same subject should be read in a harmonious manner if possible. *City of Ft. Smith v. Tate*, 311 Ark. 405, 844 S.W.2d 356 (1993). All legislative acts relating to the same subject are said to be *in pari materia* and must be construed together and made to stand if they are capable of being reconciled. *Id.* We adhere to the basic rule of statutory construction, which gives effect to the intent of the legislature, making use of common sense and giving the words their usual and ordinary meaning. *Kyle v. State*, 312 Ark. 274, 849 S.W.2d 935 (1993). In attempting to construe legislative intent, we look to the language of the statute, the subject matter, the object to be accomplished, the purpose to be served, the remedy provided, legislative history, and other appropriate matters that throw light on the subject. *Tate*, 311 Ark. 405, 844 S.W.2d 356. The commentary to a statute is a highly persuasive aid to construction, although it is not controlling over the clear language of the statute. *Kyle*, 312 Ark. 274, 849 S.W.2d 935.

In construing two acts on the same subject, we first must presume that when the General Assembly passed the later act, it was well aware of the prior act. *Salley v. Central Arkansas Transit Auth.*, 326 Ark. 804, 934 S.W.2d 510 (1996). We must also presume that the General Assembly did not intend to pass an act without purpose. *See Clark v. State*, 308 Ark. 84, 824 S.W.2d 345 (1992). Furthermore, the General Assembly is presumed to have enacted a law with the full knowledge of court decisions on the subject and with reference to those decisions. *See, e.g., Scarbrough v. Cherokee Enter.*, 306 Ark. 641, 816 S.W.2d 876 (1991);

Tovey v. City of Jacksonville, 305 Ark. 401, 808 S.W.2d 740 (1991); *J.L. McEntire & Sons, Inc. v. Hart Cotton Co., Inc.*, 256 Ark. 937, 511 S.W.2d 179 (1974).

Section 16-81-301 does not contain a definition of "peace officer." Nor is that term defined within the other provisions of the Uniform Act on Intrastate Fresh Pursuit. Be that as it may, Arkansas has long recognized that constables are peace officers. *See Winkler v. State*, 32 Ark. 539 (1877). Additionally, Ark. Code Ann. § 16-81-104 (1987), which establishes the procedures for issuing and executing arrest warrants, refers to constables as peace officers. Specifically, section 16-81-104(a)(1) provides in pertinent part that "[a] warrant of arrest may be executed by the following officers, *who are called peace officers in this code*: Sheriffs, *constables*, coroners, jailers, marshals, and police officers." (Emphasis added.) Hence, we can discern from this provision that the legislature was aware of our previous holding and intended to include constables within the definition of "peace officer."

Moreover, we are not convinced by Appellant's contention that these two provisions are necessarily in conflict with one another. Instead, we view the two statutory provisions as complementary of one another, with section 16-81-301 merely broadening or enhancing the authority described in section 16-19-301(d). The plain language of section 16-19-301(d) demonstrates that this provision is not an affirmative grant of the power of fresh pursuit to constables. Rather, that section is written in the negative — that nothing in that section shall be viewed as *preventing* a constable's authority to engage in the fresh pursuit of suspected felons. Section 16-81-301, on the other hand, specifically provides to all peace officers in this state the authority to engage in the fresh pursuit of suspects beyond their particular jurisdictions. The legislative commentary on the Uniform Act on Intrastate Fresh Pursuit demonstrates that the General Assembly intended this Act to be a comprehensive statement of the law on fresh pursuit within the geographical boundaries of this state. The prefatory note to the Act reflects:

> A great need was filled by the Interstate Fresh Pursuit Act, drafted by the Interstate Commission on Crime, to prevent criminals from utilizing state lines to handicap the police. This is

> proven by its almost instant enactment in some two thirds of the states. Furthermore, there have been repeated requests from the police to extend the principles of the interstate act to permit fresh pursuit of criminals across county and municipal lines.
>
> The Act on Interstate Fresh Pursuit is the result. This act follows the sovereignty into another, it applies not only to felonies, but to any criminal offense committed in the presence of the officer, or to a person for whom an officer holds a criminal warrant. Simple provisions, as in the case of the interstate act, are made to safeguard the rights of the person arrested. The requests of law enforcement authorities themselves prove the need for this new, simple, and sensible law.

Considering the language of both statutes, the respective subject matters, and the objectives sought to be accomplished by the legislature in passing them, we conclude that although a constable's general powers and duties are established by section 16-19-301, a constable's authority to engage in the fresh pursuit of criminal suspects, whether suspected of committing felonies or misdemeanors, is derived from section 16-81-301. Were we to hold that a constable is not included within the definition of the term "peace officer" found in section 16-81-301, the Act's clearly expressed purpose of preventing criminal suspects from taking advantage of jurisdictional boundaries would surely be thwarted. Given that section 16-19-301 does not affirmatively establish a constable's authority to engage in fresh pursuit, but merely provides that the authority to pursue suspected felons should not be taken from such officers, these two related statutes are capable of being reconciled and, therefore, both should stand.

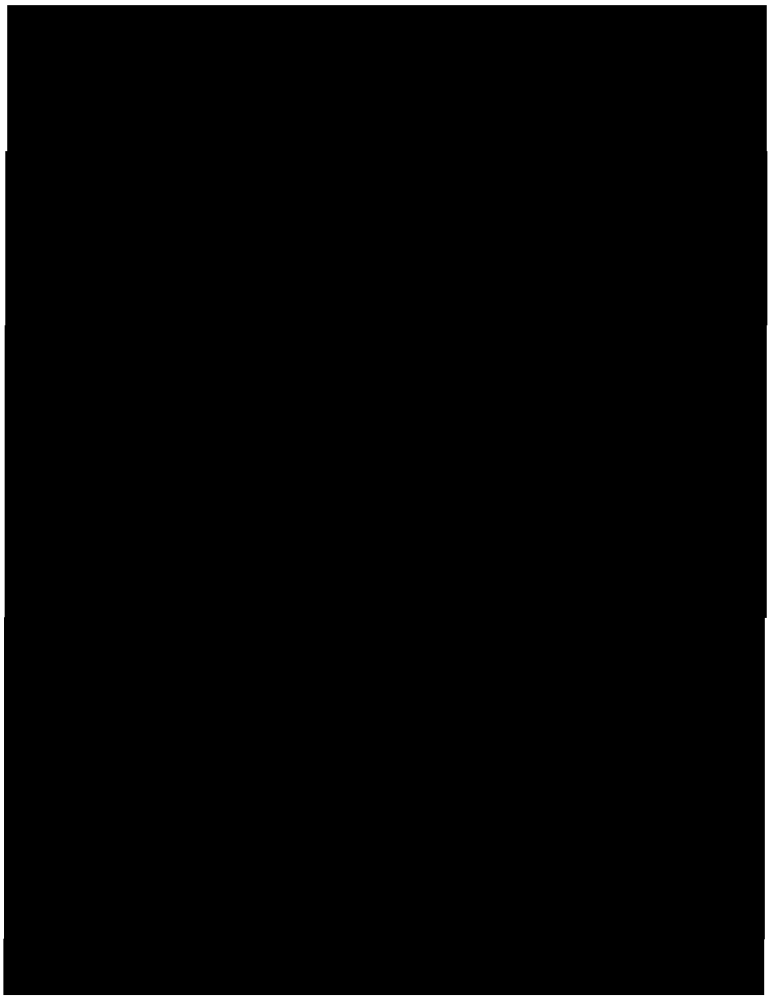
Accordingly, we conclude that the trial court did not err in determining that, under the circumstances of this case, Constable Parks was acting as a peace officer and, as such, had the authority to pursue Appellant beyond the limits of his township on the ground that Appellant had committed an offense in the constable's presence.

Affirmed.

Leslie Lee WALKER *v.* STATE of Arkansas

CR 97-172 955 S.W.2d 905

Supreme Court of Arkansas
Opinion delivered December 4, 1997



Sharon Carden Streett and *Cheryl Vogelpohl Upshaw*, for appellant.

Winston Bryant, Att'y Gen., by: *Vada Berger*, Asst. Att'y Gen., for appellee.

DONALD L. CORBIN, Justice. Appellant Leslie Lee Walker appeals the order of the Sevier County Chancery Court, Juvenile Division, adjudicating him delinquent and placing him in the custody of the Division of Youth Services, with the recommendation that he be placed in the training school. Our jurisdiction of this appeal is pursuant to Ark. Sup. Ct. R. 1-2(a)(17)(iv) & (v). Appellant raises four points for reversal. We affirm.

On April 11, 1996, a petition was filed in juvenile court alleging that Appellant had committed second-degree assault against a teacher's aide at the Lockesburg school. Prior to the hearing, the juvenile court granted Appellant's motion for a mental evaluation to determine his mental competency to stand trial and to appreciate the wrongfulness of his conduct. A psychological report dated October 3, 1996, reflected that Appellant understood the proceedings against him, was able to assist in his own defense, was aware of the criminality of his conduct, and could have conformed his conduct to the requirements of the law

at the time of the alleged incident. Appellant was diagnosed as having attention deficit hyperactivity disorder of mixed type, arithmetic learning disability, learning disorder of written expression, and conduct disorder of oppositional type.

A hearing was held on October 29, 1996, and Appellant was adjudicated delinquent for having committed the offense of second-degree assault. Appellant was placed on probation for a period of one year and was ordered to enroll in and complete the Arkansas National Guard's Civilian Student Training Program (CSTP). Additionally, Appellant was ordered to stay away from the Lockesburg school campus and to pay thirty-five dollars court costs. The juvenile judge noted in the order that if Appellant should commit any offenses in the future, he should be charged as an adult in circuit court.

Subsequent to the hearing, the trial court became aware that Appellant's mother had refused to sign the necessary Power of Attorney for Appellant's placement in CSTP. Upon motion of the prosecutor, the trial court set a show cause hearing for Appellant's mother for November 21, 1996. A hearing was held and the resulting order reflected that the trial court resentenced Appellant at the request of his mother and his attorney, placing him in the custody of the Division of Youth Services. The order reflected further that upon his release from the Division of Youth Services, Appellant was to be placed in the custody of the Department of Human Services, with the recommendation that he be placed in the training school. It is from this order that Appellant appeals.

We first consider Appellant's argument regarding the sufficiency of the evidence, as the double jeopardy clause precludes a second trial when a judgment of conviction is reversed for insufficiency of the evidence. *Welch v. State*, 330 Ark. 158, 955 S.W.2d 181 (1997). Although Appellant did not move for a directed verdict below, his challenge to the sufficiency of the evidence is preserved for appeal, as it is not necessary to make such a motion during a nonjury trial. *See Mackey v. State*, 329 Ark. 229, 947 S.W.2d 359 (1997); *Strickland v. State*, 322 Ark. 312, 909 S.W.2d 318 (1995). In reviewing a challenge to the sufficiency of the evidence, we view the evidence in a light most favorable to

the State and consider only that evidence which supports the verdict. *Rains v. State*, 329 Ark. 607, 953 S.W.2d 48 (1997). Evidence, whether direct or circumstantial, is sufficient to support a conviction if it is forceful enough to compel reasonable minds to reach a conclusion one way or the other. *Id.* This court does not, however, weigh the evidence presented at trial, as this is a matter for the factfinder. *Id.* Nor will this court weigh the credibility of the witnesses. *Id.* Appellant argues that there was insufficient evidence to support the trial court's determination that he had committed second-degree assault. We disagree.

During the hearing below, the State presented the testimony of two witnesses: Sandra McWhorter and Wanda Bishop. McWhorter, a teacher's aide at Lockesburg school, testified that on March 5, 1996, she was trying to leave school when Appellant blocked the double doorway. She stated that she was trying to go out the left side of the door when Appellant blocked her path. She stated that she then proceeded to go out the right side of the door when Appellant pushed her from the back. She stated that she stumbled for a couple of steps on the concrete sidewalk, but that she did not actually lose her balance and fall to the ground. She stated that she was both surprised and scared by the incident.

Bishop, a teacher at Lockesburg school, testified that she had witnessed the pushing incident. She stated that Appellant was inside the double doorway and that he had the door blocked with his arms spread. She stated that McWhorter tried to exit the building on the first side, but that Appellant would not let her pass. She stated that McWhorter then went to the right side of the door and barged through, and that Appellant then turned around and pushed McWhorter with his right hand. She stated that McWhorter stumbled, but caught her balance. She stated that she saw no indication as to why Appellant had pushed McWhorter.

Arkansas Code Annotated § 5-13-206(a) (Repl. 1993) provides that a person commits second-degree assault if he "recklessly engages in conduct which creates a substantial risk of physical injury to another person." Ark. Code Ann. § 5-2-202(3) (Repl. 1993) provides that a person acts recklessly when he "consciously

disregards a substantial and unjustifiable risk. . . . The risk must be of a nature and degree that disregard thereof constitutes a gross deviation from the standard of care that a reasonable person would observe in the actor's situation[.]"

■ ■ In viewing the evidence presented below in a light most favorable to the State, we are satisfied that there was sufficient evidence to support the trial court's conclusion that Appellant had committed the act of second-degree assault. Appellant's actions in pushing McWhorter from behind were, at the very least, reckless, and they created a substantial risk that McWhorter would be physically injured. It is of no consequence to Appellant's argument that McWhorter was able to regain her balance before falling on the concrete sidewalk. The fact that Appellant's actions created a substantial risk that she could have fallen on the concrete and injured herself is sufficient to sustain the trial court's findings.

For the second point for reversal, Appellant argues that his trial counsel was ineffective in failing to present evidence concerning his disabilities and in failing to seek a prior federal administrative determination under the Individuals with Disabilities in Education Act. Appellant argues that A.R.Cr.P. Rule 37 does not apply to delinquency proceedings in juvenile court and that, consequently, juvenile delinquents have no recourse in which to raise the issue of the ineffective assistance of counsel. We disagree.

■ We first observe that the Arkansas Rules of Criminal Procedure apply to juvenile delinquency proceedings. Ark. Code Ann. § 9-27-325(f) (Supp. 1995); *Mason v. State*, 323 Ark. 361, 914 S.W.2d 751 (1996). Additionally, we point out that Rule 37 is applicable to juvenile proceedings pursuant to section 9-27-325(f), but that the remedy under that rule is available to such juvenile defendants only when they are in custody. *Id.* Notwithstanding that condition precedent for proceeding under Rule 37, this court has generally recognized that claims of ineffective assistance of counsel are cognizable on direct appeal, providing that the appellant first presented the claim to the trial court during the trial or in a motion for a new trial. *Smith v. State*, 328 Ark. 249, 943 S.W.2d 234 (1997); *Johnson v. State*, 325 Ark. 44, 924 S.W.2d 233 (1996); *Missildine v. State*, 314 Ark. 500, 863 S.W.2d 813 (1993).

We will not, however, consider such a claim unless the surrounding facts and circumstances were fully developed either during the trial or during other hearings conducted by the trial court. *Chavis v. State*, 328 Ark. 251, 942 S.W.2d 853 (1997). Thus, as these cases reveal, Appellant's argument that juveniles who are not in custody have no avenue in which to pursue claims of ineffective assistance of counsel is without merit.

In the present case, however, we do not review Appellant's claim of counsel's ineffectiveness because he failed to raise the issue in the trial court, either at the time of the adjudication or in a subsequent motion for new trial. Because of this failure, the facts and circumstances surrounding the claim were not fully developed by the trial court. Without the benefit of such facts and circumstances, this court cannot assess whether trial counsel's performance fell below that standard required by the Sixth Amendment to the United States Constitution. "As the trial court is in the best position to evaluate trial counsel's performance and competency, an order reciting its findings is necessary to enable us to conduct a meaningful review of the claim." *Dodson v. State*, 326 Ark. 637, 644, 934 S.W.2d 198, 202 (1996).

For the third point for reversal, Appellant argues that the trial court exceeded its authority by: (1) turning the show cause hearing for his mother into a revocation hearing without prior notice to Appellant; (2) making prejudicial comments on the record; and (3) ordering the prosecutor to file all future charges against Appellant as an adult. We do not reach the merits of any of these arguments, as Appellant failed to raise them in the trial court. This court has repeatedly stated that we will not address any claims, even constitutional claims, raised for the first time on appeal. *McGhee v. State*, 330 Ark. 38, 954 S.W.2d 206 (1997); *Travis v. State*, 328 Ark. 442, 944 S.W.2d 96 (1997); *Dulaney v. State*, 327 Ark. 30, 937 S.W.2d 162 (1997). Even a constitutional claim of lack of notice will not be considered by this court for the first time on appeal. *In re Adoption of K.F.H. and K.F.H.*, 311 Ark. 416, 844 S.W.2d 343 (1993).

Additionally, as to Appellant's first assertion, that he was not given proper notice that revocation would be considered

before he was resentenced, the record demonstrates that Appellant's counsel not only failed to object, he agreed with the court's decision to resentence Appellant at that time. Moreover, the trial court's order reflects that Appellant was resentenced at the request of his mother and his attorney. A defendant may not agree with a ruling by the trial court and then attack that ruling on appeal. *McGhee*, 330 Ark. 38, 954 S.W.2d 206; *Goston v. State*, 326 Ark. 106, 930 S.W.2d 332 (1996); *Meadows v. State*, 324 Ark. 505, 922 S.W.2d 341 (1996).

Appellant's final point for reversal is that the trial court abused its authority in sentencing Appellant to the training school. Appellant argues that this disposition was excessive because he was a first-time offender and because the punishment does not fit the crime. The State contends that because Appellant does not challenge the trial court's authority to impose such a sentence, his argument should not be reached on appeal because he failed to raise it in the trial court. We agree with the State's contention.

This court treats allegations of void or illegal sentences similar to problems of subject-matter jurisdiction in that we review such allegations whether or not an objection was made in the trial court. *Bangs v. State*, 310 Ark. 235, 835 S.W.2d 294 (1992). A sentence is void when the trial court lacks the authority to impose it. *Id.* Here, Appellant does not assert that the trial court was without authority to order that Appellant be sent to the training school; rather, he argues only that the trial court's sentence was excessive for a first offender. Thus, because Appellant does not challenge the legality of his sentence, it was necessary that he first raise the issue with the trial court in order to preserve the argument for appeal.

Affirmed.

Jerry G. NOLAND and Anita Delores Shaver, Trustees of the Wesley E. Noland Irrevocable Trust, and Jerry G. Noland, Anita Delores Shaver, and Helen Lorraine Hooten, Beneficiaries of the Wesley E. Noland Irrevocable Trust *v.* Claude NOLAND

96-1555 956 S.W.2d 173

Supreme Court of Arkansas
Opinion delivered December 4, 1997

[redacted]

[redacted]

Lingle Law Firm, by: *James G. Lingle*, for appellants.

Davis & Watson, P.A., by: *Charles E. Davis*, for appellee.

ROBERT L. BROWN, Justice. This case raises two issues: (1) whether the trial court erred in shifting the burden of proof to appellants Jerry G. Noland, Anita Delores Shaver, and Helen Lorraine Hooton in an undue-influence case for the reason that they were beneficiaries of a trust and procured its creation; and (2) if so, whether the appellants proved beyond a reasonable doubt that the settlor of the trust, Wesley E. Noland, was of sound mind and free of undue influence when he created the trust. The trial court found that Wesley Noland was of unsound mind and not a free agent when he executed the trust. Because we conclude that the trial court clearly erred in its finding, we reverse the court's order and remand for appropriate orders to be entered.

On January 21, 1974, Wesley E. Noland, and his wife, Elsie Noland, established by deed a joint tenancy with right of survivorship in eighty-five acres of farmland (the farm) located in Benton County. Under the joint tenancy, Wesley Noland, Elsie Noland, Jerry Noland, and Claude Noland each held an undivided interest in the farm. Subsequent to Elsie Noland's death in June 1990, Wesley Noland, Jerry Noland, and Claude Noland each held an undivided one-third interest in the remaining eighty-two-and-one-half acres.[1]

On September 27, 1991, at the age of 86, Wesley Noland created the Wesley E. Noland Irrevocable Trust and named Jerry Noland and one of his two daughters, appellant Anita Shaver, as trustees. Wesley Noland funded the trust by deeding his undivided one-third interest in the farm to the trust and by conveying all of his personal property located in his residence on the farm to the trust. That same day, Jerry Noland also deeded his undivided

[1] After the original conveyance, two-and-one-half acres were condemned for the construction of a state highway.

one-third interest in the farm to the trust. The trust instrument provided that the trust would care for Wesley Noland for the balance of his life, and upon his death, the remainder of the trust property was to be distributed, in equal shares, to Jerry Noland, Anita Shaver, and his remaining daughter, appellant Helen Hooton subject to Claude Noland's life estate in part of the property. The trust provided that in the event Wesley Noland predeceased Claude Noland, Claude Noland would receive a life estate in the residence, barn, and corral located on the farm. The effect of the trust's creation and the two deeds on Jerry Noland was that his undivided one-third interest in the farm with right of survivorship to the whole was converted into a two-ninths interest in fee, as a beneficiary of the trust. Anita Shaver and the remaining daughter, Helen Hooton, would also be beneficiaries of a two-ninths interest in the farm, subject to the two life estates. Wesley Noland died on August 12, 1992.

On January 29, 1993, Claude Noland filed a petition to set aside the trust and warranty deed executed by his father. The petition alleged that Wesley Noland lacked the mental capacity to execute the trust and warranty deed and that he was unduly influenced by Jerry Noland and Anita Shaver because they caused the trust and warranty deed to be prepared and took their father to an attorney for the purpose of signing the documents. The petition also alleged that the conveyance was invalid because his father only owned an undivided one-third interest in the farm as a joint tenant with right of survivorship and that he could not destroy the joint tenancy.

On September 20, 1994, after hearing a considerable amount of conflicting testimony on the subject of undue influence and Wesley Noland's mental capacity, the trial court issued its order. The court found that Jerry Noland caused the irrevocable trust and deed to be prepared and, because of this, the burden shifted to the appellants to prove beyond a reasonable doubt that Wesley Noland had the mental capacity and free will to execute the trust and warranty deed. The court then stated:

> Though the testimony is in considerable dispute, there is certainly evidence to indicate that Wesley's physical strength and

> mental condition were such as to put folks who knew him on notice that he had some problems both mentally and physically.
>
> The Court is of the opinion that the defendants Jerry Noland and Anita Shaver are fine people, fine citizens and probably did not set out to procure the making of the trust and warranty deed, but in my opinion, in view of the law cited above, it must be found that the defendants did not carry their burden of proof by showing beyond a reasonable doubt that Wesley had both such mental capacity and such freedom of will and action as are requisite to render the trust and warranty deed legally valid.

The court concluded that the trust and warranty deed executed by Wesley Noland should be set aside.

The Court of Appeals affirmed the trial court's order by a tie vote. *Noland v. Noland,* 55 Ark. App. 232, 934 S.W.2d 940 (1996). We granted appellants' petition to review pursuant to Ark. Sup. Ct. R. 1-2(e)(i).

I. Mental Capacity

Because we reverse this case on the basis of Wesley Noland's mental capacity and free agency, we need not address the issue of whether the burden of proof was improperly shifted to the appellants. We assume for purposes of this analysis, as the trial court found, that at least one of the appellants, Jerry Noland, procured the Wesley E. Noland Trust and that the appellants all benefitted from this procurement. With this assumption, a presumption that the trust was the result of undue influence arises under our caselaw and the burden of proof then shifts to the proponents of the trust to prove beyond a reasonable doubt that Wesley Noland had both the mental capacity and freedom of will to render the trust legally valid. *See Looney v. Estate of Wade*; 310 Ark. 708, 839 S.W.2d 531 (1992); *Rose v. Dunn*, 284 Ark. 42, 679 S.W.2d 180 (1984); *Park v. George*, 282 Ark. 155, 667 S.W.2d 644 (1984); *Abel v. Dickinson*, 250 Ark. 648, 467 S.W.2d 154 (1971); *Short v. Stephenson,* 238 Ark. 1048, 386 S.W.2d 501 (1965); *Orr v.*

Love, 225 Ark. 505, 283 S.W.2d 667 (1955); *McDaniel v. Crosby*, 19 Ark. 533 (1858).[2]

The trial court concluded that the appellants did not meet their burden and specifically found that Wesley Noland "had some problems both mentally and physically." Thus, the issue for this court to decide on *de novo* review is whether the trial court's finding on mental capacity and undue influence was clearly erroneous. *Holaday v. Fraker*, 323 Ark. 522, 915 S.W.2d 280 (1996); *Welchman v. Norman*, 311 Ark. 52, 841 S.W.2d 614 (1992). We note in this connection that deference is generally accorded to the superior position of the chancellor to judge the credibility of the witnesses. *Holaday v. Fraker, supra; Riddick v. Street*, 313 Ark. 706, 858 S.W.2d 62 (1993).

We turn first to the proof offered by the appellants that Wesley Noland was mentally competent for purposes of executing the trust on September 27, 1991. In *Daley v. Boroughs,* 310 Ark. 274, 283-84, 835 S.W.2d 858, 864 (1992), this court discussed at length the test for determining mental capacity:

> The rule has been generally expressed that sound mind and disposing memory, constituting testamentary capacity, is (a) the ability on the part of the testator to retain in memory without prompting the extent and condition of property to be disposed of; (b) to comprehend to whom he is giving it; and (c) to realize the deserts and relations to him of those whom he excludes from his will.
>
> Testamentary capacity means that the testator must be able to retain in his mind, without prompting, the extent and condition of his property, to comprehend to whom he is giving it, and relations of those entitled to his bounty.

Id. (citations omitted), *quoting Hiler v. Cude*, 248 Ark. 1065, 1076, 455 S.W.2d 891, 897-98 (1970).

Complete sanity in the medical sense is not required if the power to think rationally existed at the time the will was

[2] We draw no distinction between the mental competency and free will necessary to execute either a will or a trust which takes effect, in part, at date of death. *Rose v. Dunn, supra.*

made. *Daley v. Boroughs, supra; Abel v. Dickinson, supra; Hiler v. Cude, supra.* Furthermore, our own law is clear that despite any mental impairment, the testator may execute a will if he is experiencing a lucid interval. *Daley v. Boroughs, supra; Hiler v. Cude, supra.* The time to look at a testator's mental capacity is at the time the will is executed. However, proof may be taken as to the testator's condition both before and after the will's execution as being relevant to his condition at the time the will was executed. *Daley v. Boroughs; Rogers v. Crisp*, 241 Ark. 68, 406 S.W.2d 329 (1966).

This court has upheld mental competency at the time of the execution of a will even in the wake of evidence of some mental deterioration. *See, e.g., Daley v. Boroughs, supra* (affirming trial court's finding of capacity despite medical records providing that testator was confused, disoriented, and needed to be restrained during the three days prior to the execution of the will); *Abel v. Dickinson, supra* (affirming trial court's decision to probate will made by an elderly testatrix; the attorney and her physician testified as to competence despite the fact her physical condition had been "going downhill" at the same time); *Thiel v. Mobley*, 223 Ark. 167, 265 S.W.2d 507 (1954)(reversing trial court's finding of a lack of capacity despite proof that testatrix was often under the influence of opiates that she had been taking in connection with pain from cancer). *But see, e.g., Short v. Stephenson, supra*, (reversing trial court's finding of competency when, months prior to execution of the will, testator failed to recognize his only living relative on one occasion and developed problems with his memory).

In reaching our decision in this case, three pieces of evidence seem particularly significant. The first is the deposition testimony of Dr. John Huskins, Wesley Noland's physician at Rogers Memorial Hospital, who opined that Wesley was mentally competent on September 27, 1991, because he had sufficient mental capacity to know the extent and condition of his property; to know his children; and to know that he was disposing of his property to them. Secondly, on September 7, 1991, Jerry Noland videotaped an interview with his father, during which time Wesley Noland identified his four children and expressed a desire that

each child share equally in his farm property. Wesley Noland also stated that he would be willing to sign a new deed that would give his daughters, Anita Shaver and Helen Hooton, an interest in the farm, and that he would not have signed the 1974 deed had he understood that they would never receive any interest. He further stated that he wanted Jerry Noland to disburse the funds taken from his bank account and his certificates of deposit equally among his children after his death.

Finally, Jerry Noland videotaped Wesley Noland's execution of the trust and deed on September 27, 1991, in the lawyer's office. Jerry Noland testified that he contacted an attorney, Ernest Lawrence, and that he received a copy of the trust and deed directly from Lawrence's law office. He then explained the documents to his father before the September 27, 1991 meeting. Ernest Lawrence also testified that he prepared the trust and deed in question and that he had had no contact with Wesley Noland prior to September 27, 1991. However, after interviewing Wesley Noland on that date, he concluded that Wesley Noland possessed the requisite mental competency and free will to execute the documents.

The following colloquy between Ernest Lawrence and Wesley Noland on September 27, 1991, as abstracted by the appellants, is illustrative of Wesley Noland's mental ability and understanding at the time he executed the trust and deed. After Wesley Noland identified his children for the lawyer, the interview continued:

> LAWRENCE: What we're doing today, Mr. Wesley, is how we can figure out — how we can get the girls included. Now is that what you want to do?
>
> WESLEY: Yes. I want every kid to have its part, whatever is coming to them.
>
> . . . .
>
> LAWRENCE: What kind of property do you have, Wesley?
>
> WESLEY: I own 82 1/2 acres, I guess. The road over here took out 2 1/2 acres. I had 85 acres. But there was more than that. I borrowed the money off you and somebody else to get that. That's where I stay.

. . . .

> I told you that I remember signing that deed sometime back but that I really didn't realize what I was doing. We discussed that the deed placed title to the 82 1/2 acres in the names myself and my two sons. There was 85 whenever I signed that. That really was not what I wanted to have happen. I want my kids to have equal share after I'm gone from here.

Other questioning by the lawyer emphasized that Claude Noland would keep his undivided one-third interest in the farm and that the remaining two-thirds interest in the trust would be used for the care and benefit of Wesley Noland for life. He further explained that Claude Noland would have a life estate in the home, barn, and corral after his father's death. Wesley Noland indicated that he understood the basic arrangement and reiterated that he wanted his two daughters to share in the farm.

On the other hand, Claude Noland challenges his father's competency and points to the fact that Wesley Noland signed the first copy of the trust agreement as "Wesley E. Wesley." He also testified that on the evening of September 27, 1991, his father told him he had made out a "will" that day. In addition, Wesley Noland apparently told his brother, Austin Noland, during this same time period that he did not know what he had signed.

Much testimony was presented by both parties about Wesley Noland's actions before and after he signed the trust as bearing on the soundness of his mind. Claude Noland, for example, testified to numerous events that, to his mind, brought his father's mental capacity into question. A compendium of those events follows: Wesley Noland would leave the water hydrant running and forget to water the dogs; he once purportedly caught himself on fire while attempting to thaw out a frozen water tank in 1989; he had difficulty dialing telephone numbers properly in connection with the family business for the last five to seven years of his life; he would wander off and be found alone in the woods or sitting by the road; he would forget to turn off the burners on the stove after making oatmeal or coffee; he would do laundry at 2:00 in the morning; he expressed a desire to be with another woman during his wife's funeral; and he would urinate in the front yard in front

of passing vehicles. Claude Noland also testified that he found feces on the bathroom floor in August or September 1991 and that his father had difficulty dressing himself. On cross-examination, Claude admitted that he believed his father spent too much time gambling and playing dominoes in the local pool hall and not working.

Other witnesses, including a home-care nurse, confirmed that Wesley Noland had proposed marriage to them following his wife's death. Some witnesses confirmed that he would wander off looking for Claude and that he often repeated himself and once told a tale about wild dogs being in the area.

The appellants countered with testimony about Wesley Noland's sound mind. Neighbors who brought lunch to Wesley Noland after his colon surgery in December 1991 testified to his mental competency and to the fact that Claude verbally abused his father. Appellant Helen Hooton recorded on audiotape one occasion when Claude appeared to be cursing his father. Jerry Noland testified that Wesley Noland was interested in conveying an interest in the farm to his two daughters as early as the mid-eighties. Because of this, he and his two sisters contacted an attorney, John Scott, in 1984. Anita Shaver confirmed this and stated that John Scott told them nothing could be done to sever the joint tenancy created in 1974 without Claude Noland's involvement.

We begin by focusing on the date of execution of the deed and trust, which was September 27, 1991. On that date, it is clear, as the videotape substantiates, that Wesley Noland knew his property and his heirs and further knew that he was signing documents to treat his children equally. *See Daley v. Boroughs, supra.* True, he may not have understood the niceties of the operation of a trust versus that of a will or precisely how the trust agreement would be carried out. His formal education was minimal; testimony was that he was not educated beyond the third grade. But we do not view those factors as evidence of an unsound mind. Nor do we consider the fact that he first signed his name in error as bearing on his lucidity. There is no question that at age 86 Wesley Noland was failing in some respects. Still, again, we are convinced that he knew he was taking steps to include his daugh-

ters as beneficiaries of the farm at the time of his death when he created the trust on September 27, 1991. Indeed, Claude Noland offers nothing to counter this pivotal point, other than to emphasize the laundry list of Wesley Noland's eccentricities.

■ We acknowledge that proof of Wesley Noland's condition before and after the trust's execution may be relevant to his condition at the time the trust and deed were signed. *Daley v. Boroughs, supra*; *Rogers v. Crisp, supra*. Nonetheless, proof of Wesley Noland's eccentric behavior and deterioration of his bodily functions do not equate to incompetency. Much of what was offered as evidence of incompetency falls more readily into the category of weakened faculties perhaps, but not unsoundness of mind. We are mindful in this regard of commentary in THOMPSON ON WILLS, which we have quoted in the past with approval:

> Mere age is not necessarily inconsistent with testamentary capacity. "Indeed, the mental faculties may be weakened and impaired by old age without destroying such capacity. The mere fact that an aged testator's memory is failing, or that his judgment is vacillating, or that he is becoming eccentric, or that his mind is not as active as formerly — these things do not invalidate his will if it was fairly made and he was free from undue influence. While age is not of itself a disqualification, yet it excites vigilance to see if it is accompanied with capacity." — THOMPSON ON WILLS, § 62, pp. 88-89.

Pernot v. King, 194 Ark. 896, 910, 110 S.W.2d 539, 545 (1937). Again, the videotaped event on September 27, 1991, manifestly depicts a man who essentially knew what he was doing in signing the documents. *Daley v. Boroughs, supra*; *Hiler v. Cude, supra*. As in the case of *Thiel v. Mobley, supra*, here there is a complete absence of proof that Wesley Noland was not lucid at the time he signed the trust and deed. In the *Thiel* case, as in the instant case, we reversed the trial court and upheld the will on grounds of both soundness of mind and free agency.

■ We conclude that the trial court clearly erred in finding that the appellants failed to establish soundness of mind beyond a reasonable doubt.

II. Free Will

We turn next to the issue of whether the appellants met their burden of proof concerning Wesley Noland's free agency on September 27, 1991.

This court has stated that the questions of undue influence and mental capacity are so closely interwoven that they are sometimes considered together. *In Re Conservatorship of Kueteman,* 309 Ark. 546, 832 S.W.2d 234 (1992); *Rose v. Dunn, supra.* In *Orr v. Love, supra,* we described the requisite proof to establish undue influence:

> The influence which the law condemns is not the legitimate influence which springs from natural affection, but the malign influence which results from fear, coercion or any other cause that deprives the testator of his free agency in the disposition of his property.

Orr v. Love, 225 Ark. at 510, 283 S.W.2d at 670. *See also In Re Estate of Davidson,* 310 Ark. 639, 839 S.W.2d 214 (1992).

The converse of this is also true. For the appellants to prove free agency, they must show that Wesley Noland executed the trust and deed on September 27, 1991, without fear or coercion or any intimidation that would deprive him of free agency. The videotape of the signing of the instruments in the lawyer's office lasts approximately 45 minutes. It depicts Ernest Lawrence explaining in detail to Wesley Noland what is transpiring with the trust and deed and his steps to make certain that this is what Wesley Noland wants to do. Also present at the meeting in Lawrence's office are a staff person who witnessed the signing; Jerry Noland, who videotaped the session; and Anita Shaver. There is no question but that Jerry Noland and Anita Shaver contacted Ernest Lawrence about drafting the instruments, briefed their father on what would occur, and brought him to the lawyer on September 27, 1991. The issue for us to address, however, is not whether there were suggestions made to Wesley Noland by his heirs, but whether there was *undue* influence.

Viewing the videotape, we can ascertain nothing that denigrates Wesley Noland's freedom to act in Ernest Lawrence's office.

He appears to know what he wanted to accomplish — equality among his children, which meant including his daughters as heirs to the farm. Steps were taken to prove that everything was done according to Hoyle, with attorney explanations and a visual and audio record of what transpired. Moreover, this is not a case where a new will disinherits one heir and benefits others. Here, Claude Noland maintained an undivided one-third interest in the farm and acquired as well a life interest in the residence, barn, and corral, although his right of survivorship in the farm was lost.

The dissenting opinion makes much of the heavy burden of proof and our standard of review while acknowledging that, in some cases, reversals are appropriate. This is such a case, as was *Thiel v. Mobley, supra.* While, admittedly, in *Thiel* the shifting burden of proof was not addressed by this court, we reversed the trial court's twin findings that the testatrix's will in favor of her children and not her husband was executed without the requisite capacity and was the result of undue influence. In doing so, we emphasized that despite conflicting proof of her capacity, there was no evidence that she did not sign the will during a lucid moment or that she was the victim of a malign influence. Those are precisely the issues confronting us in the case at hand.

We have stated that a finding is clearly erroneous when, although there is evidence to support it, the appellate court after reviewing the entire evidence is left with the definite and firm conviction that a mistake has been committed. *Nichols v. Wray*, 325 Ark. 326, 925 S.W.2d 785 (1996); *RAD-Razorback Ltd. Partnership v. B.G. Coney Co.*, 289 Ark. 550, 713 S.W.2d 462 (1986). Such is the situation in the case at hand. We conclude that the trial court clearly erred in its finding that Wesley Noland did not act freely and with sound mind when he signed the deed and trust. We reverse the order of the trial court and remand for orders consistent with this opinion.

Reversed and remanded.

NEWBERN, CORBIN, and IMBER, JJ., dissent.

ANNABELLE CLINTON IMBER, Justice, dissenting. While the majority does not decide whether the trial court correctly shifted

the burden to the trust's proponent, it nonetheless concludes that if the burden of proof did shift, the trial court was clearly erroneous in finding that the proponent failed to meet his burden to prove Wesley Noland's mental capacity beyond a reasonable doubt. I cannot join this conclusion.

Assuming for purposes of capacity analysis, as does the majority, that Jerry Noland procured and benefitted from the 1991 trust instrument, the burden shifted to him to prove beyond a reasonable doubt that Wesley Noland possessed the requisite testamentary capacity. This shifting burden marks a significant departure from what is required from a proponent in a "typical" will-contest case:

> Obviously, a proponent of a will, who is a beneficiary and who drafted or caused to be drafted a will, does not enjoy the usual legal advantages given to a document otherwise drawn.
>
> * * *
>
> [B]ecause proof of mental capacity and the lack of undue influence must be proved beyond a reasonable doubt, those advantages, which make it relatively easy to admit a will to probate, obviously do not exist.

Greenwood v. Wilson, 267 Ark. 68, 588 S.W.2d 701 (1979). While capacity at the time of the will's execution is the extent of our inquiry, the testator's condition either before or after the time of making the will is relevant as indicating the testator's condition at the time of signing the instrument. *Daley v. Boroughs*, 310 Ark. 274, 835 S.W.2d 858 (1992). One commentator has explained that "[i]n order to place the condition of testator's mind clearly before a jury or a court it is necessary to receive evidence of his condition before and after the time of the execution of the will. . .[t]his can, as a matter of fact, often be determined only from a consideration of his conduct, behavior, methods of thinking, and the like, extending over a period of time." 3 *Page on the Law of Wills* § 29.58 (1961 & Supp. 1997).

Here, the majority acknowledges that the trial court heard "a considerable amount of conflicting testimony" on the subject of Wesley Noland's mental capacity. However, the majority primarily emphasizes that, in its view, the videotaped execution of the

trust and deed demonstrates that Wesley Noland possessed the requisite capacity on September 27, 1991. In support of its position that this videotape shows a man "who essentially knew what he was doing," and that there was "was a complete absence of proof that Wesley Noland was not lucid" at the time of execution, the majority provides citations to cases where the burden had not shifted to the proponents to prove capacity beyond a reasonable doubt. *See Daley v. Boroughs*, 310 Ark. 274, 835 S.W.2d 858 (1992) (affirming trial court's determination that the *contestant* failed to meet his burden of proving lack of capacity by a preponderance of the evidence); *Hiler v. Cude*, 248 Ark. 1065, 455 S.W.2d 891 (affirming trial court's finding that the *contestant* failed to prove lack of capacity; trial court did not err in declining to shift burden to proponents); *Thiel v. Mobley*, 223 Ark. 167, 265 S.W.2d 507 (1954) (reversing trial court's finding that the *contestant* had established lack of capacity). By contrast, in cases where the burden shifted (or should have shifted) to the proponent to prove capacity and lack of undue influence beyond a reasonable doubt, I can find no reported case where this court has ever reversed the trial court's finding that the proponent failed to meet her burden. *See Looney v. Estate of Wade*, 310 Ark. 708, 839 S.W.2d 531 (1992) (affirming trial court's finding that proponent failed to establish capacity and lack of capacity and undue influence beyond a reasonable doubt); *Park v. George*, 282 Ark. 155, 667 S.W.2d 644 (1984) (trial court erred in failing to shift burden to proponents; will under consideration declared void); *Smith v. Welch*, 268 Ark. 510, 597 S.W.2d 593 (1980) (proponents failed to meet burden of proving capacity and lack of undue influence beyond a reasonable doubt); *Greenwood v. Wilson*, 267 Ark. 68, 588 S.W.2d 701 (1979) (proponents failed to meet burden of proving capacity beyond a reasonable doubt); *Orr v. Love*, 225 Ark. 505, 283 S.W.2d 667 (1955) (reversing trial court's determination that proponents had rebutted presumption of undue influence beyond a reasonable doubt); *Warner v. Warner*, 14 Ark. App. 257, 687 S.W.2d 856 (1985) (affirming trial court's finding that proponent failed to prove lack of undue influence beyond a reasonable doubt); *Oliver v. Griffe*, 8 Ark. App. 152, 649 S.W.2d 192 (1983) (affirming trial court's finding that proponent failed to prove capacity and lack of undue influence beyond a reasonable doubt);

Neal v. Jackson, 2 Ark. App. 14, 616 S.W.2d 746 (1981) (proponents failed to meet burden of proving capacity and lack of undue influence beyond a reasonable doubt).

While not intimating that this court could never reverse a trial court's determination in this regard, I think that the trial court had considerable evidence before it concerning Wesley Noland's deteriorating mental state, both before and after the execution of the trust, from which to glean a reasonable doubt as to his capacity at the time of execution. At the very least, I am not prepared to say that this determination was clearly erroneous. In my opinion the majority has substituted its view of the evidence for that of the trial court's, without due consideration to the proponent's heavy burden of proof, the trial court's superior position to weigh evidence and evaluate credibility, and our applicable standard of review. For these reasons, I respectfully dissent.

NEWBERN and CORBIN, JJ., join this dissent.

Janette SANDERS and Jerry Sanders d/b/a Sanders-2 *v.* BRADLEY COUNTY HUMAN SERVICES PUBLIC FACILITIES BOARD and Bradley County, Arkansas

97-110 956 S.W.2d 187

Supreme Court of Arkansas
Opinion delivered December 4, 1997

Michael R. Davis, for appellants.

Haley, Claycomb, Roper & Anderson, by: *Bruce Anderson*, for appellees.

ROBERT L. BROWN, Justice. Appellants in this case, Janette Sanders and Jerry Sanders d/b/a Sanders-2 (the Sanderses), appeal a summary-judgment order in favor of appellee Bradley County, Arkansas. Bradley County had denied liability on a contract where architectural services had been rendered by the Sanderses. The amount claimed by them was $24,025.00. The Sanderses contend that the Bradley County Human Services Public Facilities

Board, with whom their contract was made, is not a separate body politic but rather is an agent of Bradley County. Moreover, they argue that Bradley County is estopped from denying liability on the contract and that, in any event, Bradley County has been unjustly enriched by the Sanderses' work. We hold that the points raised by the Sanderses are without merit, and we affirm.

On April 17, 1996, the Sanderses filed a complaint in Bradley County Circuit Court against the Bradley County Human Services Public Facilities Board (Facilities Board) and appellee Bradley County. The complaint alleged that the Facilities Board, which had been created by the Bradley County Quorum Court, solicited bids from architects in May 1994 for the purpose of designing a proposed building in Bradley County that would provide office space for the Department of Human Services. According to the complaint, the Facilities Board accepted the Sanderses' bid, and on June 1, 1994, the Facilities Board and the Sanderses signed a written agreement for architectural services.

The Sanderses alleged that after they performed the work, Bradley County was unsuccessful in its efforts to obtain financing for construction of the building. They asserted that, although they demanded payment from both the Facilities Board and Bradley County, payment was not forthcoming. They acknowledged, however, that payment in the amount of $1,180.00 was received from Bradley County as a reimbursement for costs. They asked for judgment against both Bradley County and the Facilities Board in the amount of $24,025.00 plus attorney fees.

In its answer, the Facilities Board admitted that it was created by the Bradley County Quorum Court pursuant to Ordinance No. 262. The Facilities Board also admitted that it entered into a contract with the Sanderses but asserted that the Sanderses knew the contract was contingent on funding for the proposed project, which never occurred. The Facilities Board further stated that the Sanderses were aware that the Facilities Board had no income or assets and that the ability of the Facilities Board to pay was based on its ability to obtain financing through a direct loan or bond issue. The Facilities Board acknowledged that the Sanderses performed certain architectural services. The answer finally stated

that the Facilities Board was dissolved by Ordinance No. 294 of the Bradley County Quorum Court on October 10, 1995.

In its separate answer, Bradley County admitted that the Quorum Court created the Facilities Board and further admitted that the Sanderses entered into a contract with the Facilities Board. Bradley County asserted, however, that the contract was entered into in the name of the Facilities Board, not the County, and that the County did not incur any liability as a result of the Facilities Board's action.

Bradley County next moved for summary judgment on the same ground — that it did not enter into the architectural agreement with the Sanderses. The County claimed that the Facilities Board was a body politic separate and apart from the Quorum Court and that the Facilities Board, which had been dissolved, did not have the authority to obligate the County to a contract. Attached to the summary-judgment motion was an affidavit from LaVern Rice, the Bradley County Judge. In the affidavit, Judge Rice averred that the Facilities Board was indeed a body politic separate and apart from the Quorum Court; that the members of the Facilities Board were not members of the Quorum Court; that Ordinance No. 262 did not empower the Facilities Board with the ability to obligate the County; that the Quorum Court was not consulted about the contract; and that the County Judge did not become aware of the contract until the Sanderses made demand on the County for payment.

In their response to the motion for summary judgment, the Sanderses offered no countervailing proof. Rather, they contended only that the Facilities Board was a creation of Bradley County and that, if it was dissolved, the Board's actions should be imputed to the County.

A hearing was held, and the trial court granted Bradley County's motion for summary judgment. The trial court noted that it was undisputed that Bradley County did not make an appropriation to cover the additional services sued for by the Sanderses, and that pursuant to Ark. Code Ann. § 14-20-106 (1987), the County could not be held liable for a contract under such circumstances. The trial court also explicitly rejected the

Sanderses' arguments for a recovery on the basis of either quantum meruit or unjust enrichment.

The trial court later entered an order acknowledging that the claim against the Facilities Board had not been resolved by its previous order and ruled that there was no just reason for delaying the Sanderses' appeal with respect to the liability of Bradley County under Ark. R. Civ. P. 54(b).

The standard of review for appealing the grant of summary judgment is well established:

> In these cases, we need only decide if the granting of summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of the motion left a material question of fact unanswered. The burden of sustaining a motion for summary judgment is always the responsibility of the moving party. All proof submitted must be viewed in a light most favorable to the party resisting the motion, and any doubts and inferences must be resolved against the moving party. Our rule states, and we have acknowledged, that summary judgment is proper when a claiming party fails to show that there is a genuine issue as to a material fact and when the moving party is entitled to summary judgment as a matter of law.

Sublett v. Hipps, 330 Ark. 58, 62, 952 S.W.2d 140, 142 (1997), *quoting Milam v. Bank of Cabot*, 327 Ark. 256, 261-62, 937 S.W.2d 653, 656 (1997). Furthermore, "[o]nce a party establishes *prima facie* entitlement to summary judgment by affidavits, depositions, or other supporting documents, the opposing party must meet proof with proof and demonstrate the existence of a genuine issue of material fact." *Id.*

The General Assembly created public facilities boards by the Public Facilities Boards Act, now codified at Ark. Code Ann. §§ 14-137-101 to -123 (1987 & Supp. 1995). This legislation provides in part that any county is authorized to establish one or more public facilities boards to construct health-care facilities. Ark. Code Ann. § 14-137-106(a)(1) (Supp. 1995). The General Assembly authorized and empowered the boards "[t]o do any and all . . . things necessary or convenient to accomplish the purposes of this chapter[,]" including the ability to succeed perpetually as a

body politic that could sue and be sued in its own name. Ark. Code Ann. § 14-137-111 (Supp. 1995).

The Sanderses urge two reasons why this court should reverse the trial court and hold that the actions of the Facilities Board are imputed to Bradley County: (1) the Facilities Board was created by ordinance of the Quorum Court; and (2) the County Judge was responsible for appointing the initial members of the Facilities Board under Ark. Code Ann. § 14-137-108 (Supp. 1995). We view these reasons as essentially a contention that the Facilities Board acted as an agent for Bradley County. Thus, the initial question to be addressed is whether a principal-agent relationship existed between the Facilities Board and Bradley County. In *Taylor v. Gill*, 326 Ark. 1040, 1042-43, 934 S.W.2d 919, 921 (1996), this court said that the two essential elements of an agency relationship are (1) that an agent have the authority to act for the principal and (2) that the agent act on the principal's behalf and be subject to the principal's control. *Id., citing Pledger v. Troll Book Clubs, Inc.*, 316 Ark. 195, 200, 871 S.W.2d 389, 392 (1994).

Bearing these elements in mind, we turn to section 14-137-104(c) of the Arkansas Code, which limits the ability of the counties to control the actions of the facilities boards:

> Notwithstanding any other provisions of state law or ordinance of any municipality or county to the contrary, except as otherwise expressly provided in this chapter, none of the powers granted to a board under the provisions of this chapter shall be subject to the supervision or regulation or require the approval or consent of the state, or of any municipality, *county*, or political subdivision of the state, or of any commission, board, body, bureau, official, or agency of the state or any municipality, county, or political subdivision.

Ark. Code Ann. § 14-137-104(c) (1987)(emphasis added). Based on this statutory language, we conclude that the General Assembly has mandated independence between the facilities boards and the counties. This statutory separation is consistent with other provisions of the Public Facilities Board Act. *See, e.g.,* Ark. Code Ann. § 14-137-120(a) (Supp. 1995) (bonds issued by a public facilities board do not obligate the faith and credit of the creating municipality or county); Ark. Code Ann. § 14-137-106(a)(2) (Supp.

1995) (public facilities boards are not administrative boards under the County Government Code).

Moreover, we agree with the trial court that there was no appropriation to support the contract. *See* Ark. Code Ann. § 14-20-106 (1987). This fact alone would render the contract unenforceable. *See, e.g., Lyons Machinery Co. v. Pike County*, 192 Ark. 531, 93 S.W.2d 130 (1936); *American Disinfecting Co. v. Franklin County*, 181 Ark. 659, 27 S.W.2d 95 (1930). *Cf. State use Prairie County v. Leathem & Co.*, 170 Ark. 1004, 282 S.W. 367 (1926)(holding warrants issued in excess of appropriations void). Also, the Sanderses failed to abstract Bradley County Ordinance No. 262, leaving this court in the dark as to what powers the Quorum Court conferred on the Facilities Board. *See* Ark. Code Ann. § 14-137-107(2)(A) (1987) (ordinance shall specify powers granted to the facilities board). Hence, we can only speculate about whether the Facilities Board was acting within its conferred powers. This we will not do.

We turn next to the Sanderses' claims of unjust enrichment and quantum meruit. Under Arkansas law, a claim for quantum meruit is generally made under the legal theory of unjust enrichment and does not involve the enforcement of a contract. *Sisson v. Ragland*, 294 Ark. 629, 745 S.W.2d 620 (1988); *Dews v. Halliburton Industries, Inc.*, 288 Ark. 532, 708 S.W.2d 67 (1986). Nonetheless, a quantum meruit claim can succeed even when it is argued, in the alternative, to a contract that has been declared void. *Sisson v. Ragland, supra; City of Damascus v. Bivens*, 291 Ark. 600, 726 S.W.2d 677 (1987). The amount of a quantum meruit recovery is measured by the value of the benefit conferred upon the party unjustly enriched. *City of Damascus v. Bivens, supra*; *Yaffe Iron & Metal Co. v. Pulaski County*, 188 Ark. 808, 67 S.W.2d 1017 (1934).

In previous decisions, this court has permitted a quantum meruit recovery after a contract with a government entity was declared invalid. *See, e.g., City of Damascus v. Bivens, supra* (city obtained the benefit of physical improvements in the form of resealed streets as a result of an invalid services contract); *Yaffe Iron & Metal Co. v. Pulaski County, supra* (county kept purchase money

even though it did not deliver two bridges that were the subject of a sales contract). Yet, it is clear from our decisions that in order for the legal theory of unjust enrichment to pertain, there must be some enrichment or benefit to the party against whom the claim is made. *See, e.g., City of Damascus v. Bivens, supra.* In *Lyons Machinery Co. v. Pike County, supra,* we defined benefit in terms of whether the county made any *use* of the concrete forms at issue.

In the instant case, there is no proof whatsoever offered by the Sanderses that Bradley County received the architectural plans or made use of them or even knew about the contract with the Sanderses to provide the services. Indeed, according to the County Judge's affidavit, he was not aware of the contract. Thus, the Sanderses failed to meet proof with proof to establish that Bradley County did indeed benefit from the architectural services. A mere allegation that this is the case is not enough to offset summary judgment. *See Sublett v. Hipps, supra.* It is true that counsel for the Sanderses mentioned at oral argument that the County Judge sat as an *ex officio* member of the Facilities Board, which would suggest knowledge. That statement, however, hardly constitutes proof. Moreover, the County Judge specifically averred in his filed affidavit that that was not the case. Given the lack of any proof that the Sanderses' architectural plans have been used, or that Bradley County has been benefitted in any way by them, we reject the quantum meruit claim.

For their final point, the Sanderses argue that Bradley County should be estopped from claiming it did not know what was occurring with regard to the architectural contract. A review of the trial court's order reveals that no ruling was obtained on this theory of relief. The point is, therefore, procedurally barred. *See, e.g., Oglesby v. Baptist Medical Sys.*, 319 Ark. 280, 891 S.W.2d 48 (1995).

Affirmed.

Craig BURKHALTER *v.* STATE of Arkansas

CR 96-278 956 S.W.2d 171

Supreme Court of Arkansas
Opinion delivered December 4, 1997

John I. Purtle. P.A., for appellant.

Winston Bryant, Att'y Gen., by: *Brad Newman*, Asst. Att'y Gen., for appellee.

ANNABELLE CLINTON IMBER, Justice. The appellant, Craig Henry Burkhalter, was convicted of rape, sexual abuse in the first degree, and violation of a minor in the first degree. On appeal, Burkhalter contends that his convictions must be reversed due to juror misconduct. We find no merit to this argument, and accordingly, we affirm.

During the trial, the victim testified that starting when she was seven years old until she reached the age of fifteen, Burkhalter performed various sexual acts on her. Portions of the victim's testimony were corroborated by a neighbor who witnessed and participated in some of the acts. Based on this evidence, the jury found Burkhalter guilty of rape, sexual abuse in the first degree,

and violation of a minor in the first degree. Burkhalter does not challenge the sufficiency of the evidence to support these convictions.

During the sentencing phase of the trial, the court gave the jury AMI Crim. 2d 9401, which says:

> In your deliberations on the sentence to be imposed, you may consider the possibility of the transfer of Craig Burkhalter from the Department of Correction to the Department of Community Punishment. After he serves one-third (1/3) of any term of imprisonment to which you may sentence him, he may be eligible for transfer from the Department of Correction to the Department of Community Punishment. If transfer is granted, he will be released from prison and placed under post-prison supervision. The term of imprisonment may be reduced further to one-sixth (1/6) of any period you impose, if he earns the maximum amount of meritorious good time during his imprisonment.

The court also gave the jury AMI Crim. 2d 9402, which says:

> Rape is punishable by life imprisonment or a term of years. Persons under sentence of life imprisonment are not eligible for transfer. If you sentence Craig Burkhalter to imprisonment for a term of years, after he serves one-half (1/2) of the term you impose he will be eligible for transfer from the Department of Correction to the Department of Community Punishment. If transfer is granted, he will be released from prison and placed under post-prison supervision. The term of imprisonment may be reduced further to one-fourth (1/4) of any period you impose, if he earns the maximum amount of meritorious good time during his imprisonment. However, persons under sentence of life imprisonment are not eligible for meritorious good time.

The jury then retired to the deliberation room to decide on Burkhalter's sentence. After they deliberated for twenty minutes, the jury sent the judge a note saying: "What's life? Fractional breakdown. Consecutive or concurrent." The judge sent back a note stating: "Life means life. I cannot answer the other questions." Approximately twenty minutes later, the jury sent the judge a second note saying: "We want to give him 20 years before

parole. How do we do this?" The judge replied: "I cannot answer this. Sorry."

Approximately three hours later, the jury announced that they were deadlocked eight to four on a sentencing decision. The court asked the jurors if further deliberations would prove futile. Several jurors nodded their heads affirmatively, but three jurors said that further deliberations would be helpful. The jury resumed deliberations and returned approximately thirty minutes later with the following sentencing decision: ten years' imprisonment for sexual abuse in the first degree, ten years' imprisonment for violation of a minor in the first degree, and life imprisonment for rape.

Burkhalter timely filed a motion for a new trial alleging that there had been a "manifest injustice" because the jury intended to sentence him to twenty years' imprisonment instead of life. Burkhalter did not attach an affidavit or present any other evidence to substantiate the allegations contained in the motion. The motion was deemed denied thirty days after it was filed, and this appeal followed.

For his sole argument on appeal, Burkhalter contends that he should have been granted a new trial due to juror misconduct. In his motion for a new trial, Burkhalter claimed that the jury was confused about the sentencing procedure and thus rendered a sentence of life imprisonment instead of a sentence of twenty years. On appeal, Burkhalter has changed his argument and claims that a juror said during deliberations that Burkhalter would serve only seven years if sentenced to life imprisonment. As we have said on numerous occasions, we will not consider an argument raised for the first time on appeal. *McGhee v. State*, 330 Ark. 38, 954 S.W.2d 206 (1997); *State v. Bell*, 329 Ark. 422, 948 S.W.2d 557 (1997); *Jones v. State*, 327 Ark. 85, 937 S.W.2d 633 (1997).

Furthermore, the only evidence Burkhalter provided in support of his allegation of juror misconduct was an affidavit signed by his attorney. This affidavit, however, was not included in the record. It is well settled that the appellant bears the burden of producing a record that demonstrates error, and thus we have consistently refused to consider on appeal matters outside of the

record. *See, e.g.*, *Winters v. Elders*, 324 Ark. 246, 920 S.W.2d 833 (1996) (excluding the chancellor's letter opinion); *Miller v. State*, 328 Ark. 121, 942 S.W.2d 825 (1997) (omitting the transcript of the hearing); *Odum v. State*, 311 Ark. 576, 845 S.W.2d 524 (1993) (failing to include portions of the first trial). Because the affidavit Burkhalter presents in support of his contention of juror misconduct was not contained in the record, we are precluded from considering it upon appeal.

In accordance with Ark. Sup. Ct. R. 4-3(h), the record has been reviewed for rulings decided adversely to Burkhalter but not argued on appeal, and no reversible errors were found.

Affirmed.

O'Neal WILSON *v.* REBSAMEN INSURANCE, INC. d/b/a Insurisk Insurance Services, Jim Moorhead, and John Doe

97-14 957 S.W.2d 678

Supreme Court of Arkansas
Opinion delivered December 4, 1997

Trafford Law firm, by: *G. Ray Howard* and *Duncan & Rainwater, P.A.*, by: *Michael R. Rainwater*, for appellant.

Anderson & Kilpatrick, by: *Mariam T. Hopkins*, for appellee.

ANNABELLE CLINTON IMBER, Justice. This is a tort case in which the appellant, O'Neal Wilson, sued the appellees, Rebsamen Insurance, d/b/a Insurisk Insurance Services, and Jim Moorhead, for injuries he sustained while working for his employer. The trial court granted the appellees summary judgment because it ruled that they were immune from suit under the exclusive remedy provision of the workers' compensation statute, and because they did not owe a duty of care to Wilson. We disagree with both of these rulings, and accordingly we reverse and remand.

Insurisk Insurance Services, a company owned and operated by Rebsamen Insurance, conducts loss-control surveys and recommends safety improvements for its customers. In the late 1970's, Arkansas Oak Flooring hired Insurisk to conduct loss-control surveys of its facilities in an effort to contain the rising costs of workers' compensation insurance coverage. Specifically, Insurisk contractually agreed to make inspections and provide recommendations regarding safety. Insurisk did not have the authority to implement the program or to make the suggested safety improvements. Jim Moorhead, Insurisk's vice-president of management services, was in charge of the project.

On September 16, 1988, O'Neal Wilson was injured while he was working for his employer, Arkansas Oak Flooring, when he fell from a catwalk that did not have safety rails. Sometime after the accident, Arkansas Oak's workers' compensation carrier,

Home Insurance Company, paid Wilson permanent and total disability benefits.

On April 23, 1993, Wilson[1] filed a complaint against Insurisk and Jim Moorhead alleging that they were negligent in failing to discover, warn about, and correct the safety hazard posed by the unguarded catwalk. Wilson also claimed that Moorhead and Insurisk affirmatively hid the existence of the defect from Arkansas Oak by giving the company a clearance on overall safety when it knew or should have known of the unsafe condition of the catwalk. Finally, Wilson asserted that Moorhead and Insurisk had a "silent agreement" with Arkansas Oak to ignore safety violations so that Arkansas Oak could obtain "favorable insurance treatment."

On May 30, 1995, Insurisk and Moorhead filed a motion for summary judgment contending that they did not owe a duty of care to Wilson, and that Wilson's lawsuit was barred by the exclusive remedy provision of the workers' compensation statute. Insurisk and Moorhead attached to their motion the affidavits of John Fox, Jr., the President of Arkansas Oak, Glenn Richards, Arkansas Oak's plant supervisor from 1978 to 1980, and Jim Moorhead. In all three affidavits, the affiants declared that prior to Wilson's accident Jim Moorhead recommended both orally and in writing that Arkansas Oak install guardrails on the catwalk to remedy the potentially dangerous condition. In addition, the affiants declared that Moorhead and Insurisk had no authority to implement their suggested changes. Finally, John Fox explained in his affidavit that Arkansas Oak decided against making the changes recommended by Moorhead and Insurisk "due to cost and feasibility considerations."

In his response, Wilson produced the affidavits of William Fish, Larry Borecky, and Boulter Kelsey. William Fish witnessed Wilson's fall, and testified that there were no guardrails on the catwalk at the time of the accident. Larry Borecky, Arkansas

[1] Wilson died on September 5, 1993, as a result of a heart attack that was not associated with the injuries he sustained from his fall at Arkansas Oak's facility. Simmons First National Bank, the special administrator of Wilson's estate, was allowed to pursue this case on Wilson's behalf.

Oak's safety manager who was hired one month before the accident, declared in his affidavit that Insurisk and Moorhead failed to notify him about the safety problem created by the unguarded catwalk. Finally, H. Boulter Kelsey, Jr., a professional engineer, declared in his affidavit that the unguarded catwalk created an unreasonably dangerous condition that should have been detected by Moorhead and Insurisk.

On September 20, 1996, the trial court ruled that Insurisk and Moorhead were immune from suit under the exclusive remedy provision of the workers' compensation statute, and that they did not owe a duty of care to Wilson. Accordingly, the court granted summary judgment to Insurisk and Moorhead. From the order of summary judgment, Wilson filed a timely notice of appeal.

As we have stated on numerous occasions, summary judgment is appropriate only when there is no genuine issue of material fact, and the moving party is entitled to a judgment as a matter of law. *Wheeler v. Phillips Dev. Corp.*, 329 Ark. 354, 947 S.W.2d 380 (1997); *Porter v. Harshfield*, 329 Ark. 130, 948 S.W.2d 83 (1997). In making this determination, we review the evidence in the light most favorable to Wilson, as the party resisting the motion, and resolve all doubts and inferences in his favor. *Wheeler, supra*; *Porter, supra.*

I. Immunity under the Workers' Compensation Act

For his first argument on appeal, Wilson contends that the trial court erred when it ruled that Insurisk and Moorhead were immune from liability under the Workers' Compensation Act. Whether a safety consultant, which does not provide workers' compensation coverage to the employer, is immune from tort liability under the Workers' Compensation Act is an issue of first impression in Arkansas.

A. Ark. Code Ann. § 11-9-409

Insurisk and Moorhead contend that they are immune from Wilson's tort action under Act 796 of 1993, codi-

fied at Ark. Code Ann. § 11-9-409(e) (Repl. 1996), which states that:

> the insurance company, the agent, servant, or employee of the insurance company or self-insured employer, or a safety consultant who performs a safety consultation under this section shall have no liability with respect to any accident based on the allegation that such accident was caused or could have been prevented by a program, inspection, or other activity or service undertaken by the insurance company or self-insured employer for the prevention of accidents in connection with operations of the employer.

The emergency clause of Act 796, however, specifically states that it "shall apply only to injuries which occur after July 1, 1993." 1993 Ark. Acts 796, § 41. In this case, Wilson was injured on September 16, 1988, which is well before the applicable date of Act 796. In addition, Insurisk and Moorhead did not argue before the trial court that they were immune under Ark. Code Ann. § 11-9-409(e), and thus they are precluded from raising this issue for the first time on appeal. *See, McGhee v. State*, 330 Ark. 38, 954 S.W.2d 206 (1997); *Ouachita Wilderness Inst., Inc. v. Mergen*, 329 Ark. 405, 947 S.W.2d 780 (1997).

B. Ark. Code Ann. §§ 11-9-105 and 410

Instead of arguing that they were immune under Ark. Code Ann. § 11-9-409(e), Insurisk and Moorhead argued before the trial court that they were immune from Wilson's tort action under Ark. Code Ann. § 11-9-105(a) (Repl. 1996), which states that:

> The rights and remedies granted to an employee subject to the provisions of this chapter, on account of injury or death, shall be exclusive of all other rights and remedies of the employee, his legal representative, dependents, next of kin, or anyone otherwise entitled to recover damages from the employer . . . on account of the injury or death, and the negligent acts of a coemployee shall not be imputed to the employer.

Although Ark. Code Ann. § 11-9-105(a) provides that workers' compensation is the employee's exclusive remedy against the employer, the employee may sue a "third-party" who negligently

causes his injuries under Ark. Code Ann. § 11-9-410(a)(1)(A) (Repl. 1996), which provides that:

> The making of a claim for compensation against any employer or carrier for the injury or death of an employee shall not affect the right of the employee, or his dependents, to make a claim or maintain an action in court against any *third party* for the injury, but the employer or his carrier shall be entitled to reasonable notice and opportunity to join in the action.

(Emphasis added.) On appeal, Wilson argues that Insurisk and Moorhead are not immune under the exclusive remedy provision of section 105 because they are "third parties" as defined by section 410. We agree.

In *Neal v. Oliver*, 246 Ark. 377, 438 S.W.2d 313 (1969), we defined a "third party" as used in section 410 as:

> some person or entity other than the first and second parties involved, and the first and second parties can only mean the injured employee and the employer or *one liable under the compensation act.*

(Emphasis added.) Relying upon this language, we reasoned in *Burkett v. PPG Industries, Inc.*, 294 Ark. 50, 740 S.W.2d 621 (1987), that the workers' compensation carrier was not a "third party" under section 410 because it was the only other entity, besides the employer, that could be held "liable under the workers' compensation act." Hence, we held in *Burkett*, that a workers' compensation carrier has the same immunity from suit as provided to the employer under section 105. *Id.* Likewise, in *Brown v. Finney*, 326 Ark. 691, 932 S.W.2d 769 (1996), we held that co-employees are immune from suit under section 105 if at the time of the injury they were performing the employer's duty to provide a safe work place.

In this case, however, Insurisk was neither Arkansas Oak Flooring's workers' compensation carrier as in *Burkett*, nor was it Arkansas Oak Flooring's employee, as in *Brown*. Instead, Insurisk was an independent contractor hired by Arkansas Oak Flooring to perform safety inspections. Because we have strictly construed section 105 to extend immunity beyond the employer in only the two instances enumerated in *Burkett* and *Brown*, we

hold that the trial court erred when it ruled that Insurisk was immune from Wilson's tort action under the exclusive remedy provision of the Workers' Compensation Act.

II. Duty of Care

Next, Wilson claims that the trial court erred when it ruled that Insurisk and Moorhead did not owe him a duty of care. Specifically, Wilson argues that by contracting with Arkansas Oak Flooring to perform safety inspections of its facilities, Insurisk and Moorhead undertook a duty of care towards all of Arkansas Oak Flooring's employees to perform those inspections with reasonable care. We agree with this argument, and accordingly we reverse the trial court's order of summary judgment.

In *Construction Advisors, Inc. v. Sherrell*, 275 Ark. 183, 628 S.W.2d 309 (1982), we previously held that by undertaking a duty to the owner of a construction site, Construction Advisors also owed a duty of care to a third party who was injured due to Construction Advisor's negligent performance of its undertaking. In *Sherrell*, however, Construction Advisors agreed to maintain a safe premises instead of merely agreeing to inspect the work site and warn about potential safety problems as in this case. *Id.* Hence, we are asked for the first time to decide whether an independent consulting firm that agrees to perform safety inspections of an employer's premises, but has no authority to implement the safety changes it suggests, owes a duty of care to a third-party employee who is injured on the job.

Wilson argues that such a duty exists under section 324A[2] of the Restatement of Torts which states that:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to

[2] The doctrine embodied in Restatement 324A is frequently called the "good samaritan" doctrine even though the duty may be undertaken gratuitously or for consideration. *See, e.g.*, *Pantentas v. United States*, 687 F.2d 707 (3rd Cir. 1982); *Santillo v. Chambersburg Eng'g Co.*, 603 F. Supp. 211 (E.D. Pa. 1985), *aff'd*, 802 F.2d 448 (3rd Cir. 1986).

> liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if
>
> (a) his failure to exercise reasonable care increases the risk of such harm, or
>
> (b) he has undertaken to perform a duty owed by the other to the third person, or
>
> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

Restatement (Second) of Torts § 324A (1965). According to the comments to the Restatement, the "undertaker" is liable to the third party under section (b) merely if it undertakes a duty owed to the third party by another. *Restatement (Second) of Torts* § 324A, cmt. d (1965).

As previously mentioned, whether an independent safety-inspection company owes a duty of care to a third-party employee is an issue of first impression in Arkansas. Other jurisdictions have consistently held that pursuant to section (b) of Restatement 324A an independent consulting firm that agrees to perform safety inspections of an employer's work place owes a duty of care to a third-party employee to perform those inspections with reasonable care. *Canipe v. National Loss Control Serv. Inc.*, 736 F.2d 1055 (5th Cir. 1984); *Santillo v. Chambersburg Eng'g Co.*, 603 F. Supp. 211 (E.D. Pa. 1985), *aff'd*, 802 F.2d 447 (3rd. Cir. 1986); *see also Price v. Management Safety Inc.*, 485 So.2d 1093 (Ala. 1986) (imposing a duty without mentioning Restatement § 324A); *Gallicho v. Corporate Group Serv. Inc.*, 227 So.2d 519 (Fla. App. 1969) (finding a duty of care under contract law). These jurisdictions reason that the safety consultant owes a duty of care under Restatement § 324A(b) because it is reasonably foreseeable that if the inspections are done improperly a third-party employee will be injured. *See Santillo, supra*; *Gallicho, supra.*

Moreover, the facts of the cases in which other courts have imposed a duty of care are virtually identical to the facts at hand. For example, in *Santillo*, an employer hired NATLCO, an independent consulting firm, to perform safety inspections of its plant and make recommendations concerning safety improvements. *Santillo, supra.* Although it appears that NATLCO did not

have the authority to implement the safety improvements it recommended, the Pennsylvania court held that pursuant to section (b) of Restatement 324A, NATLCO owed a duty of care to an employee who was injured as a result of NATLCO's allegedly negligent inspection of a piece of machinery. *Santillo*, *supra*.

Likewise, in *Canipe*, an employer hired National Loss, an independent consulting firm, to provide safety inspections and accident-prevention services at its manufacturing plant. *Canipe*, *supra*. As in *Santillo*, National Loss did not have the authority to implement the safety improvements it deemed necessary. *Canipe*, *supra*. Despite this fact, the Fifth Circuit Court of Appeals held that National Loss owed the employee a duty of care under Restatement 324A(b) to conduct its safety inspections with reasonable care. *Canipe*, *supra*.

In both *Santillo* and *Canipe*, the courts imposed a duty of care on the independent safety consultant despite the fact that the consultant did not have the authority to implement the safety corrections. Moreover, Insurisk and Moorhead have failed to cite, nor could we find, any case in which the ability of the safety consultant to implement improvements was a relevant factor in determining whether the consultant owed a duty of care to the injured employee. *See generally*, Frank J. Wozniak, *Breach of Assumed Duty to Inspect Property as Ground for Liability to Third Party*, 13 A.L.R.5th 289 (1993). This is because the authority to implement safety changes is an issue of proximate causation and not duty.

We are aware that some courts have refused to impose a duty of care when the inspection is performed by the employer's insurance carrier because the carrier performed the inspection to reduce its own potential liability and not for the purpose of protecting employees from harm. *See, e.g.*, *Davis v. Liberty Mut. Insur. Co.*, 525 F.2d 1204 (5th Cir. 1976) (applying Alabama law); *Tillman v. Travelers Indem. Co.*, 506 F.2d 917 (5th Cir. 1975) (applying Mississippi law). Likewise, some courts have refused to impose a duty of care when the inspections are performed by a government agency. *See, e.g.*, *Raymer v. United States*, 660 F.2d 1136 (6th Cir.

1981) (applying Kentucky law); *Blessing v. United States*, 447 F. Supp. 1160 (E.D. Pa. 1978) (applying Pennsylvania law).

In this case, Insurisk was neither Arkansas Oak Flooring's insurer nor was it a government agency. Thus, we hold that Insurisk and Moorhead owed a duty of care to Arkansas Oak Flooring's employees, including Wilson, to perform safety inspections with reasonable care. In this respect, however, we acknowledge that the degree of the undertaking defines the scope of the duty of care owed to the third party. *See, e.g., Santillo, supra; Canipe, supra; Blessing, supra.*

In this case, Insurisk and Moorhead agreed to inspect the work site and warn Arkansas Oak Flooring about any detected safety hazards. Hence, Insurisk and Moorhead will be liable to Wilson only if it is determined that they breached those duties, and that such breach proximately caused Wilson's injuries. Whether Arkansas Oak Flooring would have exercised its sole authority to implement the changes suggested by Insurisk and Moorhead is an issue of proximate causation, not duty, and thus, should be resolved by the jury instead of the court. *See, Shannon v. Wilson*, 329 Ark. 143, 947 S.W.2d 349 (1997); *McGraw v. Weeks*, 326 Ark. 285, 930 S.W.2d 285 (1996). Moreover, neither party appealed the trial court's finding that "there would be sufficient evidence to make [a] jury question regarding breach of duty and proximate cause if the Defendants owe a duty" to Wilson.

For these reasons, we conclude that Insurisk and Moorhead are not immune from Wilson's tort action under the exclusive remedy provision of the workers' compensation statute, and that pursuant to section (b) of the *Restatement (Second) of Torts* § 324A, Insurisk and Moorhead owed Wilson a duty of care in connection with their undertaking to inspect the premises and warn Arkansas Oak Flooring about any detected safety hazards. Accordingly, we reverse the trial court's order of summary judgment and remand for further proceedings consistent with this opinion.

Reversed and remanded.

Clarence MANNING *v.* STATE of Arkansas

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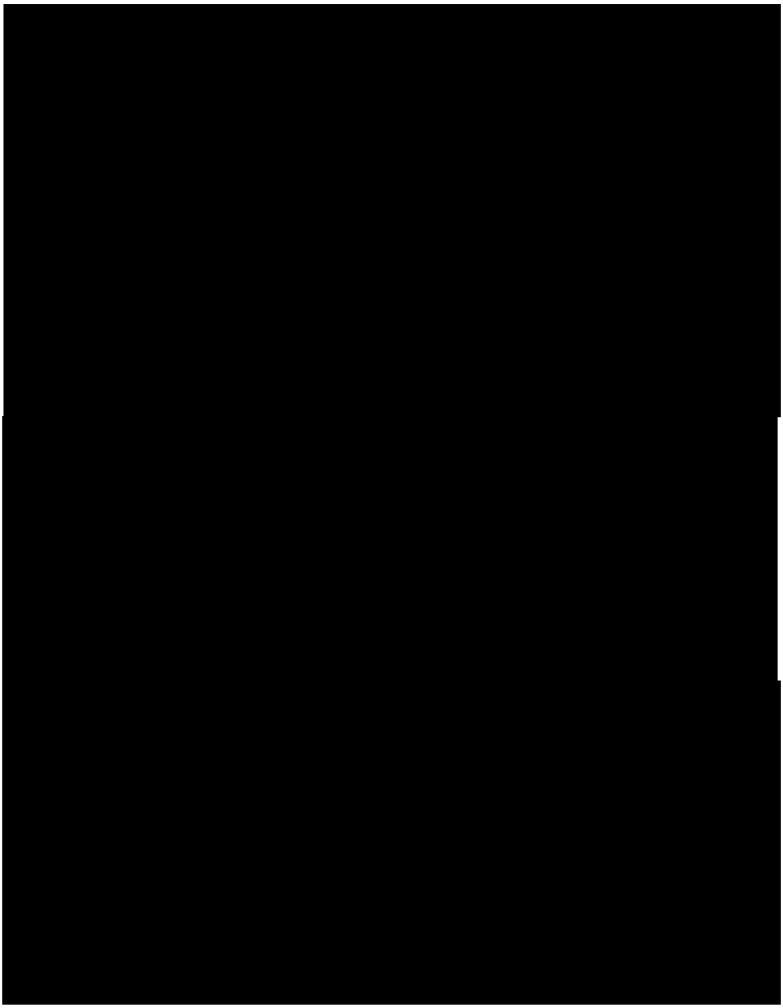
Supreme Court of Arkansas
Opinion delivered December 4, 1997



Christopher M. Jester, for appellant.

Winston Bryant, Att'y Gen., by: *SC. Joseph Cordi, Jr.*, Asst. Att'y Gen., for appellee.

RAY THORNTON, Justice. Clarence Manning, appellant, was convicted by bench trial of possession of a controlled substance with intent to deliver, possession of drug paraphernalia with intent to use, and simultaneous possession of drugs and a firearm. He appeals only the simultaneous possession conviction, arguing that, under the statutory defense, the guns found at his home were not "readily accessible for use." After careful consideration of the meaning of this phrase, we disagree, and affirm.

Manning was arrested and charged with the offenses after four police officers executed a search warrant at 216 East Word, in Jonesboro. When they entered the home, two men were seated in the living room, and four men, including Manning, were in the

kitchen. The police searched the house and found two guns wrapped in a black ski mask on the top shelf of the closet in the only bedroom. One gun was a Lorcin 9-millimeter pistol, which was loaded, and the other was an unloaded Smith & Wesson .38-caliber revolver. While in the bedroom, the police also found seventeen grams of rock cocaine in the pocket of a jacket hung in the closet, and about three grams of cocaine powder in the pocket of a pair of jeans in a dresser drawer. The police found drug paraphernalia in the kitchen. All parties concede that the house is very small. After determining that Manning lived in the house by himself, the trial court convicted him.

Under the Arkansas Criminal Gang, Organization, or Enterprise Act, "[n]o person shall unlawfully commit a felony violation of § 5-64-401 [Uniform Controlled Substances Act] . . . while in possession of . . . [a] firearm." Ark. Code Ann. § 5-74-106(a) (Repl. 1993). A person found guilty of this offense may be sentenced to prison for a term of ten to forty years, or life. *Id.* §§ 5-4-401(a)(1), 5-74-106(b). At trial, Manning raised the statutory defense that the "defendant was in his home and the firearm was not readily accessible for use." *Id.* § 5-74-106(d). The code does not define the phrase, "readily accessible for use."

The State argued that the accessibility of the guns should not turn on their proximity to the appellant at the moment of the officers' entry into the residence. The trial court agreed, stating that it should not make a difference in a defendant's guilt or innocence that he was in the room with the firearm or in another room. The court stated that the term "readily accessible for use" means more than "in close proximity to defendant." Instead, the court maintained that close proximity is just one factor among the several to be considered. The court noted that "it is inconceivable that the defendant would not be guilty if he was in the kitchen but guilty if he was in the bedroom."

On appeal, Manning contends that "the location of the guns is key." He seems to conclude that the firearm must be within the defendant's reach when he argues that the guns were not readily accessible because they were in a different room, wrapped in a ski mask, and one was unloaded.

Because our case law has not addressed the meaning of "readily accessible for use," we approach the issue by applying rules of statutory construction. First, we attempt to construe the statute "from the natural and obvious import of the language used by the legislature without resorting to subtle and forced construction for the purpose of limiting or extending the meaning." *City of North Little Rock v. Montgomery*, 261 Ark. 16, 18, 546 S.W.2d 154, 155 (1977). As a rule, criminal statutes are strictly construed with any doubts resolved in favor of the accused. *Puckett v. State*, 328 Ark. 355, 358, 944 S.W.2d 111, 113 (1997) (citations omitted). We have stated, however, that such statutes shall not be so strictly construed as to defeat the obvious intent of the legislature. *Id.* Thus, when the language of the statute is capable of two interpretations, its meaning is ambiguous and we are compelled to look to the intent and purpose of the General Assembly in enacting the statute. *First State Bank v. Arkansas State Banking Bd.*, 305 Ark. 220, 223, 806 S.W.2d 624, 626 (1991). Finally, to determine legislative intent, we look to appropriate sources that clarify the matter, including the language of the statute, the subject matter, the object to be accomplished, and the purpose to be served. *Bd. of Trustees v. Stodola*, 328 Ark. 194, 199, 942 S.W.2d 255, 257 (1997).

Manning's argument suggests that the plain meaning of the phrase, "readily accessible for use," is that the firearm must be "in close approximation to the defendant or within defendant's easy reach." The State construes the phrase according to dictionary definitions as "available to the defendant without much difficulty."[1] Both constructions have merit. Neither one can be said to force a construction that limits or extends the meaning of the phrase. In view of this ambiguity, we look to the legislative intent and purpose in enacting the statute to determine whether the construction urged by Manning would be consistent with that legislative intent.

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[1] The dictionary definition of "readily" is "without much difficulty." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 980 (1987). "Accessible" means "capable of being reached." *Id.* at 48.

The General Assembly declares its intent and purposes of the Act in Ark. Code Ann. section 5-74-102, which is entitled, "General legislative findings, declarations, and intent." A fair reading of that section's provisions suggests that the General Assembly intended to address violence in the drug trade by making laws tougher on drug dealers who use firearms. The following statements are most pertinent to the simultaneous possession provision: (1) It is the right of every person "to be secure and protected from fear, intimidation, and physical harm caused by the activities of groups engaging in random crimes of violence, and committing crimes for profit and violent crimes committed to protect or control market areas or 'turf'"; (2) these groups are becoming "increasingly sophisticated at avoiding arrest and prosecution"; and (3) "one of the primary reasons for the increased homicide rate is the use of firearms by criminal gangs, organizations, or enterprises to control the crack cocaine market within their geographical 'turf.'" The legislative intent behind the Act is obvious in section 5-74-102(e) where the General Assembly said, "[i]t is furthermore the intent of the General Assembly to focus the state's law enforcement agencies and prosecutors on investigating and prosecuting all ongoing organized criminal activity and to provide for penalties that will punish and deter organized ongoing criminal activity." Ark. Code Ann. § 5-74-102(e) (Repl. 1993).

When addressing another issue, we construed the legislative intent of the Act in *State v. Zawodniak*, 329 Ark. 179, 946 S.W.2d 936 (1997). In that case, we said that the simultaneous possession statute "not only serves to deter organized gang and criminal activities, but also seeks the broader purpose to curtail any person's use of a firearm when that person is involved in the illegal trafficking in or possession of controlled substances." *Id.* at 182, 946 S.W.2d at 937.

The legislative intent informs us that there must be some link between the firearm and drugs, and that mere possession of a firearm is not enough. Despite this clear expression, the question remains whether the firearm must be proximate and accessible to the defendant, proximate to the drugs or drug proceeds, or some combination of the two. Here, however, we can determine that the Lorcin handgun was readily accessible for use

because the facts show that this proximity and accessibility test is met for both situations.

In this case, there was evidence showing more than mere possession of a firearm in Manning's home. Manning had a loaded handgun, wrapped in a ski mask, near an abundant supply of illegal drugs, all within his easy reach. Given the legislative intent, we conclude that the factual circumstances are such in this case that the trial judge did not err when he determined that the Lorcin handgun was readily accessible for use.

Affirmed.

Patrick M. WRIGHT and Elizabeth Wright *v.* Bimlendra SHARMA, M.D., and B.V. Pai, M.D.

97-24 956 S.W.2d 191

Supreme Court of Arkansas
Opinion delivered December 4, 1997

Andrew L. Clark, for appellant.

Friday, Eldredge & Clark, by: *J. Phillip Malcom* and *Fran C. Hickman*, for appellees.

RAY THORNTON, Justice. This is an appeal from a trial court's order dismissing a medical malpractice case as untimely filed. Appellant Patrick Wright and his wife, Elizabeth, brought an action against two cardiologists, Dr. Bimlendra Sharma and Dr. B.V. Pai, alleging that they were negligent in causing Mr. Wright to undergo an unnecessary pericardiectomy. The Wrights argued to the trial court that the doctors undertook a continuous course of treatment of Mr. Wright for pericarditis, and that this tolled the statute of limitations. We hold that the trial court was correct in determining that the continuous-treatment doctrine did not toll

the applicable two-year statute of limitations, Ark. Code Ann. § 16-114-203 (Supp. 1995).

When the running of the statute of limitations is raised as a defense, the defendant has the burden of affirmatively pleading the defense. *First Pyramid Life Ins. Co. v. Stoltz*, 311 Ark. 313, 843 S.W.2d 842 (1992). However, once it is clear from the face of the complaint that the action is barred by the applicable limitations period, the burden shifts to the plaintiff to prove by a preponderance of the evidence that the statute of limitations was in fact tolled. *Id.* Here, it is clear that the act complained of did not take place within the limitations period because the allegedly unnecessary surgery took place on July 13, 1993, and the action was commenced on February 9, 1996, which was more than two years later. Ark. Code Ann. § 16-114-203.

We note that, although the Wrights initially filed a complaint on June 8, 1995, the cause of action was never commenced because the doctors were not served until more than 120 days after the first complaint was filed. Under Ark. R. Civ. P. 4(i), if a plaintiff files a lawsuit and does not serve the defendant within 120 days, the action is never commenced. *Thomson v. Zufari*, 325 Ark. 208, 924 S.W.2d 796 (1996). Therefore, the trial court was correct in calculating the limitations period from February 9, 1996, the date this action was filed.

Because it was clear from the face of the complaint that the alleged negligent act took place outside the limitations period, it became the Wrights' burden in the lower court to show that the limitations period was tolled. *Stoltz, supra.* We hold that the trial court was correct in its determination that the Wrights failed to prove that the period was tolled by a continuous course of treatment.

At the hearing on the motion, the trial court considered affidavits, discovery documents, pleadings, and exhibits that revealed the following facts. On January 5, 1993, Mr. Wright was admitted to St. Joseph's Regional Medical Center with chest pain. Dr. Sharma diagnosed and treated him for pericarditis, of which he had a history. On June 22, 1993, Mr. Wright was again admitted to the hospital with chest pain. On that date he was treated by Dr.

Pai, who was covering for Dr. Sharma. Dr. Pai's discharge summary states that the chest pain on that date was "secondary to gastrointestinal etiology."

On July 13, 1993, Mr. Wright was again admitted to the hospital with chest pain. This time, he was seen by Dr. Matthew Hulsey, a family-practice physician. An emergency CAT scan was performed, which, according to Dr. Hulsey's notes, revealed acute aortic dissection. An emergency thoracotomy was ordered, upon which it was discovered that Mr. Wright had a constrictive pericarditis with a heavy sludge within the entire pericardium. The record indicates that a Dr. Howe performed a partial pericardiectomy, removing the outside lining of the pericardial sac. There is no indication in the record that either Dr. Sharma or Dr. Pai ordered, performed, or participated in this surgery.

On August 30, 1993, Mr. Wright saw Dr. Sharma in his office for a post-hospital visit. The nurses' notes state that he denied having any chest pain or shortness of breath. Nurses' notes taken on March 1, 1994, show that he requested a letter from Dr. Sharma stating that he could perform a job as a truck driver. The notes indicate that on March 4, 1994, he was told that he needed to be seen before the doctor could give him the letter. He was seen in Dr. Sharma's office on April 12, 1994, at which time he stated that he had no chest discomfort.

We agree with the trial court that the continuous-treatment doctrine does not apply to these facts. We have said that "the continuous treatment doctrine becomes relevant when the medical negligence consists of a series of negligent acts, or a continuing course of improper treatments." *Lane v. Lane*, 295 Ark. 671, 675, 752 S.W.2d 25, 27 (1988). The cause of action accrues at the end of a continuous course of medical treatment. *Id.* The doctrine is based upon the principle that it is unfair to bar a plaintiff who has been subjected to a series of treatments that were negligently administered, simply because the plaintiff is unable to identify the one treatment that produced his injury. *Id.* We have also said that "'[i]t would be absurd to require a wronged patient to interrupt corrective efforts by serving a summons on the physi-

cian.'" *Id.* (quoting 1 D. LOUISELL AND H. WILLIAMS, MEDICAL MALPRACTICE § 13.08 (1982)).

Here, there is no allegation of a series of negligent acts; in fact, the Wrights' complaint clearly states that the doctors successfully treated Mr. Wright for his pericarditis with anti inflammatories. Only one negligent act is alleged, and that is the allegedly unnecessary surgery, which had continuing effects.

It appears that the complaint is based upon an assertion of a continuing tort. While it is undisputed that neither Dr. Sharma nor Dr. Pai ordered or performed the surgery, the Wrights urge that they were negligent in not preventing the surgery from taking place. Even if their inaction could be regarded as a basis for a claim of negligence, it was consummated upon the performance of the surgery, and did not give rise to circumstances that would make appropriate the application of the continuous-treatment doctrine. *See Tullock v. Eck*, 311 Ark. 564, 845 S.W.2d 517 (1993); *Treat v. Kreutzer*, 290 Ark. 532, 720 S.W.2d 716 (1986); *Owen v. Wilson*, 260 Ark. 21, 537 S.W.2d 543 (1976); *Williams v. Edmondson*, 257 Ark. 837, 250 S.W.2d 260 (1975); *see also* Note, *Torts — Limitations on Actions — Arkansas Adopts Continuous Treatment Rule to Toll Statute of Limitations in Medical Malpractice Actions*, 11 U.A.L.R. L. J. 405 (1989).

In summary, we recognize that in some circumstances a medical injury may result from one or more wrongful acts that are connected with a continuation of treatment or culmination of the injury, and that under such circumstances the statute of limitations is tolled under the continuous-treatment doctrine. However, those circumstances are not reflected in the record of this case. We agree with the finding of the trial court that the two-year statute of limitations was not tolled and that the action was time-barred.

Affirmed.

James Jess COLVIN *v.* STATE of Arkansas

CR 97-1353 958 S.W.2d 297

Supreme Court of Arkansas
Opinion delivered December 4, 1997

Kent T. Tharel, for appellant.

No response.

PER CURIAM. Appellant James Jess Colvin has filed a motion for rule on the clerk. The motion reflects that the notice of appeal was filed before the judgment and commitment order was entered. The motion was, therefore, untimely and ineffective. *See* Ark. R. App. P.—Civ. 4.

Appellant's attorney, Kent T. Tharel, has assumed responsibility for not verifying that the judgment and commitment order had been filed prior to the filing of the notice of appeal. Because he has admitted responsibility for the error, we treat the motion for rule on the clerk as a motion for belated appeal, and we grant it. We direct that a copy of this order be filed with the Committee on Professional Conduct. *See In Re: Belated Appeals in Criminal Cases*, 265 Ark. 964 (1979) (*per curiam*).

Mikey Dale FORREST *v.* STATE of Arkansas

CR 97-1311 955 S.W.2d 187

Supreme Court of Arkansas
Opinion delivered December 4, 1997

Greg Robinson, for appellant.

No response.

PER CURIAM. Petitioner, Mikey Dale Forrest, by his attorney, Greg Robinson, has filed a motion for rule on the clerk. His attorney admits that the record in this case was tendered late due to a mistake on his part.

We find that such error, admittedly made by the attorney for a criminal defendant, is good cause to grant the motion. *See Terry v. State*, 272 Ark. 243, 613 S.W.2d 90 (1981); *In Re: Belated Appeals in Criminal Cases*, 265 Ark. 964 (1979) (per curiam).

A copy of this opinion will be forwarded to the Committee on Professional Conduct. *In Re: Belated Appeals in Criminal Cases*, 265 Ark. 964.

Robert Harold KINKEAD and Joyce Kinkead *v.* Carol and Kinkead SPILLERS and Jeannine Lea Kinkead Mathis, Hon. Ellen Brantley, Fifth Division Chancery Court of Pulaski County, Arkansas

97-1302 955 S.W.2d 909

Supreme Court of Arkansas
Opinion delivered December 4, 1997

Joyce Kinkead, for petitioners.

No response.

PER CURIAM. Petitioners Robert Harrold Kinkead and Joyce Kinkead petition this court for a writ of mandamus to Chancellor Ellen B. Brantley, Fifth Division Chancery Court of Pulaski County, directing that she enter a final order in this matter. We grant the writ.

On March 17, 1997, this court handed down an opinion in this matter in which we dismissed the appeal of the Kinkeads without prejudice for failure to appeal from a final order. *See Kinkead v. Spillers*, 327 Ark. 552, 940 S.W.2d 437 (1997). In our opinion, we made specific mention of a judgment lien in favor of intervenor Boatmen's National Bank of Arkansas, which, according to the record before us, had not been resolved with regard to

the proceeds derived from the sale of the land at issue. We specifically stated that the Boatmen's claim was not merely collateral to the Kinkeads' claim.

According to the record before this court filed in conjunction with the Kinkeads' petition for a writ of mandamus, after the chancellor's order entered on September 10, 1996, which approved the commissioner's deed in this matter, the lien of Boatmen's was satisfied. On October 9, 1996, the chancellor of the Second Division Chancery Court of Pulaski County entered an order releasing funds received from the sale of the land and held by the Chancery Clerk to Boatmen's, and the bank subsequently released its judgment lien against the land.

Following this court's opinion on March 17, 1997, the Kinkeads moved Chancellor Brantley for entry of a final judgment from which they could appeal. By letter opinion dated June 3, 1997, and by order entered August 19, 1997, Chancellor Brantley made it clear that she disagreed with the opinion of this court. The chancellor stated in her order:

> The Supreme Court found that the Defendants' appeal was premature as not having been made from a final order, as asserted by Intervenor. However, the parties' briefs apparently did not sufficiently impress upon the Supreme Court that a final order (the order of September 10, 1996), *had been entered* but *after the order appealed from* and that the matter of Intervenor's lien had been fully addressed therein. Therefore, this Court having already entered a final order which was not appealed from, there is nothing more required of this Court. (Emphasis in the original order.)

In her specific order, she stated: "The Court finds no need to make any further orders in this case."

Without a final order, the Kinkeads are unable to perfect their appeal. The Fifth Division Chancery Court is directed to enter a final order forthwith incorporating her order of September 10, 1996, and describing the resolution of intervenor Boatmen Bank's judgment-lien claim.

Writ granted.

Gary BODIFORD, M.D. *v.* Ronald Keith BESS

97-462 956 S.W.2d 861

Supreme Court of Arkansas
Opinion delivered December 11, 1997

Davis, Cox & Wright, by: *Walter B. Cox* and *Tim E. Howell*, for appellant.

No response.

W.H. "DUB" ARNOLD, Chief Justice. The appellant, Gary Bodiford, M.D., appeals an order dismissing, without prejudice, the medical malpractice complaint of appellee Ronald Keith Bess.

Dr. Bodiford's sole argument on appeal is that the dismissal should have been with prejudice. We agree and affirm the trial court's judgment as modified.

On June 13, 1996, Mr. Bess filed a pro se complaint against Dr. Bodiford in the Fort Smith District of the Sebastian County Circuit Court to recover damages for medical injury arising from radial keratotomies that Dr. Bodiford performed on him on or about July 23, 1993, and October 28, 1994. Particularly, Mr. Bess alleged that, during these eye surgeries, Dr. Bodiford carelessly and negligently placed the cuts too close together on his eye, resulting in diminished vision. After filing the complaint, Mr. Bess did not perfect service upon Dr. Bodiford within 120 days as required by Ark. R. Civ. P. 4(i), nor did he file a motion to extend his time to obtain service within the 120-day period as required by the rule.

Upon learning of the lawsuit informally, Dr. Bodiford filed a motion to dismiss the case with prejudice on January 2, 1997. According to Dr. Bodiford, he was entitled to a dismissal with prejudice because the malpractice alleged in the complaint occurred on or before October 28, 1994. Because Mr. Bess had not obtained service on him and had not sought an extension within 120 days after filing the complaint, Dr. Bodiford maintained that the complaint had not been legally commenced. It was Dr. Bodiford's contention that, since the complaint had not been legally commenced, Mr. Bess was not entitled to the one-year saving statute, codified at Ark. Code Ann. § 16-56-126 (1987). He asserted that the two-year statute of limitations for medical injury actions under Ark. Code Ann.§ 16-114-203 (1987), expired no later than October 28, 1996, thus barring the action. After considering Dr. Bodiford's motion, the trial court agreed to dismiss Mr. Bess's complaint, but entered an order of dismissal without prejudice.

Arkansas Civil Procedure Rule 3 provides that an action is commenced by filing a complaint with the clerk of the proper court. *Sublett v. Hipps*, 330 Ark. 58, 952 S.W.2d 140 (1997), *citing Forrest City Mach. Works, Inc. v. Lyons*, 315 Ark. 173, 866 S.W.2d 372 (1993), and *Green v. Wiggins*, 304 Ark. 484, 803

S.W.2d 536 (1991). However, effectiveness of the commencement date is dependent upon meeting the requirements of Rule 4(i), which provides in pertinent part:

> (i) Time Limit for Service: If service of the summons is not made upon a defendant within 120 days after 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 . . .

(Emphasis added.) Rule 4(i) must be read in light of other procedural rules, such as the statute of limitations. *Green v. Wiggins, supra.* For example, the "dismissal without prejudice language [in Rule 4(i)] does not apply if the plaintiff's action is otherwise barred by the running of a statute of limitations." *Id.* at 489. "The touchstone for a limitations defense to a tort action is when the cause of action was commenced." *Sublett v. Hipps, supra.*

In the *Sublett* case, Ms. Sublett filed a complaint on January 3, 1995, against two defendants to recover damages for personal injury arising from a January 8, 1992, automobile accident. She did not obtain service against one of the defendants, Mr. Berry, within 120 days after filing the complaint and failed to request an extension within that same period. Mr. Berry moved for summary judgment, claiming that the complaint was barred by the three-year statute of limitations for negligence actions under Ark. Code Ann.§ 16-56-105 (1987), since Ms. Sublett had not commenced her cause of action within the three years due to her failure to obtain service or seek an extension within 120 days of filing the complaint. The trial court granted summary judgment, and we affirmed.

In the present case, because the medical injury occurred on or before October 28, 1994, and service on Dr. Bodiford was not obtained and no extension sought within 120 days after Mr. Bess filed his complaint on June 13, 1996, the statute of limitations ran on his cause of action. Because the dismissal-without-prejudice language in Rule 4(i) does not apply if a plaintiff's action is otherwise barred by the running of a statute of

limitations, the trial court should have dismissed Mr. Bess's complaint with prejudice. Thus, for the foregoing reasons, we modify the trial court's judgment to reflect that the dismissal of the complaint is with prejudice.

Affirmed as modified.

CITY of RUSSELLVILLE *v.* Sharon (Reynolds) HODGES

97-152 957 S.W.2d 690

Supreme Court of Arkansas
Opinion delivered December 11, 1997

Dunham & Faught, P.A., by: *Jame Dunham*, for appellant.

Young & Finley, by: *Dale W. Finley*, for appellee.

W.H."DUB" ARNOLD, Chief Justice. This is a zoning case. The appellant, the City of Russellville, appeals the decision of the Pope County Chancery Court that it was estopped from enforcing its zoning ordinance due to the actions of its building official. Because we agree with the City that the building official was not authorized to waive the zoning requirements, we reverse and the chancellor's decision remand.

The City of Russellville annexed the Bishop Addition residential subdivision in 1985. On January 23, 1986, it amended Ordinance No. 859, thereby rezoning the area R-2, a classification that prohibits mobile homes or trailers. At that time, there were no mobile homes on lots 13, 14, 15, and 16 of Block G or East Sixth Street, the subject of this dispute. Sometime after annexation and rezoning, appellees Sharon Reynolds Hodges, Tom Reynolds, Billy Bowman, Roy Turner, and others placed mobile homes on the lots at issue. On May 9, 1995, the City filed suit for injunctive relief to enforce its zoning ordinance. Though it named eleven defendants in its complaint, only five answered or appeared, which included the appellees, who affirmatively pleaded that the City was estopped from enforcing its zoning ordinance due to the conduct of its building official, Gearl Cooper, who had issued electrical permits and power tags for the mobile homes.

At trial, Mr. Cooper testified that he had issued electrical and other types of inspection permits to the structures. However, as building official, he stated that he was not authorized to alter the

City's zoning classifications. According to Mr. Cooper, he had been aware that there had been mobile homes in the Bishop Addition "since the first one moved in." It was his testimony that, Joe Vinson, the chairman of the planning commission, had told him that he was going to allow mobile homes to be placed in the area.

City Clerk Helen Price testified that she served on the planning commission. According to Ms. Price, an individual member of the commission did not possess the authority to make a decision for the group. It was her testimony that if Mr. Vinson told Mr. Cooper in 1985 or 1986 that mobile homes would be allowed in Bishop Addition, he would have done so without proper authorization, as there had been no vote by the planning commission and city council making such an allowance.

Mayor Phil Carruth testified that neither the building official, his employees, nor the city engineer had authority to change zoning laws or to allow the placement of structures that are in violation of the city's zoning laws. It was his testimony that, if there were any actions taken by city employees to allow the placement of mobile homes in the Bishop Addition, they were not official authorized acts of the City.

After hearing all the evidence, the chancellor issued written findings of fact. These findings included that the city's building official, Mr. Cooper, along with his assistants, had at times issued permits for electrical power hookups and had inspected and tagged the hookups for the mobile homes while knowing that the placement of these homes in the area might be improper. According to the chancellor, Mr. Cooper's acts were authorized acts of the city. The chancellor further found that the chairman of the planning commission, Joe Vinson, was also aware that some mobile homes had been placed in Bishop Addition after annexation. It was also the chancellor's finding that, while none of the appellees had ever applied for or received a building permit to place mobile homes in the area, they were unaware that Bishop Subdivision was zoned R-2, and had relied on the inspections and the building official's approval. After making these findings, the chancellor concluded that, while the City had made a prima facie entitlement to the injunctive relief requested in its complaint, the

defendants who appeared had proved by a preponderance of the evidence that the City should be estopped from enforcing its zoning ordinance, and that the defendants who had not appeared or answered were entitled to the benefit of this affirmative defense.

Four elements are necessary to establish estoppel. They are: (1) the party to be estopped must know the facts; (2) the party to be estopped must intend that the conduct be acted on or must act so that the party asserting the estoppel had a right to believe it was so intended; (3) the party asserting the estoppel must be ignorant of the facts; and (4) the party asserting the estoppel must rely on the other's conduct and be injured by that reliance. *State v. Wallace*, 328 Ark. 183, 941 S.W.2d 430 (1997); *Foote's Dixie Dandy, Inc. V. McHenry*, 270 Ark. 816, 607 S.W.2d 323 (1980). Additionally, we have specifically held that a sovereign is not bound by the unauthorized acts of its employees. *Arkansas State Highway Comm'n v. Townsend*, 313 Ark. 702, 858 S.W.2d 66 (1993); *Miller v. City of Lake City*, 302 Ark. 267, 789 S.W.2d 440 (1990); *Hankins v. City of Pine Bluff*, 217 Ark. 226, 229 S.W.2d 231 (1950). On appeal, we do not reverse a chancellor's findings of fact unless they are clearly against the preponderance of the evidence. *Thompson v. Potlatch Corp.*, 326 Ark. 244, 930 S.W.2d 355 (1996).

We need not decide whether the four elements are met because we conclude that the chancellor erred in finding that Mr. Cooper was authorized to waive the City's zoning requirements. While the chancellor found that Mr. Cooper's issuance of electrical permits and power tags constituted authorized acts of the City, this finding disregards the testimony of both Mayor Carruth and Mr. Cooper himself that he had no authority to authorize the placement of mobile homes in the Bishop Addition in violation of the zoning ordinance. We can find no testimony in the record that refutes the City's proof on this issue. As in *Miller v. Lake City, supra*, the appellees did not meet all the requirements necessary to prove estoppel, as "the building inspector . . . was not authorized to waive the zoning requirements." 302 Ark. at 270. Therefore, we must conclude that the chancellor's finding that the building official was authorized to waive the City's zoning requirements was clearly against the preponderance of the evidence. Accord-

ingly, the chancellor's ruling that the City was estopped from enforcing its ordinance was in error.

Reversed and remanded.

Brian John WHITE *v.* STATE of Arkansas

CR 96-1233 957 S.W.2d 683

Supreme Court of Arkansas
Opinion delivered December 11, 1997

Sam Sexton III, for appellant.

Winston Bryant, Att'y Gen., by: *Gil Dudley*, Asst. Att'y Gen., for appellee.

DAVID NEWBERN, Justice. Brian John White appeals from a January 25, 1996 judgment revoking his probation and sentencing him to serve six years concurrently on each of four felony charges to which he pleaded guilty in February of 1993. On February 19, 1993, the Benton County Circuit Court placed Brian John White on supervised probation for five years based on two separate cases. In CR 91-544-1, Mr. White was charged with terroristic threatening, theft of property, and fraudulent use of a credit card. In CR 92-339-1, Mr. White was charged with forgery in the second degree. In *White v. State*, 329 Ark. 487, 951 S.W.2d 556 (1997) (*White I*), Mr. White appealed the revocation of his probation in CR 92-339-1, and this Court affirmed the revocation. Mr. White raises the same points on the appeal in this case, CR 91-544-1, and we affirm.

In his first point, Mr. White, citing Ark. Code Ann. § 5-4-310 (Repl. 1993), again argues that because his probation-revocation hearing was not conducted within the requisite sixty-day period after his arrest, the probation revocation petition should have been dismissed. On July 10, 1994, Mr. White was arrested and charged with the June 24, 1994 rape of a twelve-year-old girl. That felony charge resulted in a revocation petition, but the record does not disclose if or when Mr. White was arrested on the revocation petition. Mr. White was ultimately tried on the rape charge and the probation revocation on January 23, 1996.

In *White I*, this Court, affirming the Trial Court, held that Mr. White waived his argument for dismissal, when at an October 17, 1994 hearing, he agreed to having the revocation hearing with the substantive proceedings. This Court, citing *Barnes v. State*, 294 Ark. 369, 742 S.W.2d 369 (1988), stated that "[w]hen a defendant prefers that the revocation matter be deferred until disposition of an underlying charge, he cannot then turn around and complain of delay." *White I*, 329 Ark. at 489; 951 S.W.2d at 557.

Mr. White argues that his constitutional right to a speedy trial was violated due to a delay in hearing the revocation

petition. In *White I*, we held that we had no basis upon which to address that argument because Mr. White had not received a ruling in the Trial Court on the applicability of Ark. R. Crim. P. 28.1 to a revocation proceeding. We reiterate that ruling here. Additionally, we have recently recognized that the constitutional right to a speedy trial does not apply to probation revocations. *Dority v. State*, 329 Ark. 631, 951 S.W.2d 559 (1997).

Mr. White also argues that he was not sentenced properly in accordance with Ark. Code Ann. § 16-93-303 (Supp. 1995), which requires that the court enter a judgment and commitment order. As noted in *White I*, the Trial Court entered such an order on January 25, 1996, on the charges for which Mr. White had been placed on probation.

Affirmed.

CORBIN, J., not participating.

Phillip PETRUS, et al. *v.* The NATURE CONSERVANCY and the Arkansas Natural Heritage Commission

97-156 957 S.W.2d 688

Supreme Court of Arkansas
Opinion delivered December 11, 1997

Green, Henry & Green, by: *David G. Henry*, for appellants.

Marian M. McMullan, P.A., for appellees.

TOM GLAZE, Justice. This case is a sequel to *Nature Conservancy v. Kolb*, 313 Ark. 110, 853 S.W.2d 864 (1993). In *Kolb*, this court determined that the Nature Conservancy and Arkansas Natural Heritage Commission's predecessors-in-title had obtained a 100-foot-wide easement, not a fee simple interest, in a strip of land across the north half of a section of land in Lonoke County, so long as that land was used for railroad purposes. Kolb and others who owned property adjoining the disputed easement filed suit to quiet title, alleging that, when the right-of-way was no longer used for railroad purposes, all interest in the right-of-way reverted to them. The *Kolb* court upheld the trial court's ruling, adopting Kolb's and the adjoining landowners' contention.

The *Kolb* decision was relied on by Phillip and J. D. Petrus and six other Prairie County landowners (collectively Petruses) when filing this quiet title suit against appellees, Nature Conservancy and Arkansas Natural Heritage Commission (ANHC). The Petruses claimed that, in 1985, when the appellees' predecessors-in-title abandoned their railroad right-of-way easement located in Prairie County, the disputed easement automatically reverted to them as adjoining property owners. However, Nature Conservancy and ANHC counterclaimed, stating that, even if the Petruses' reliance on *Kolb* was correct, they had acquired title by adverse possession to the strip of land after it was abandoned in 1985.

After trial on the parties' respective issues, the trial court dismissed the Petruses' reversionary interest claim, and ruled the Nature Conservancy and ANHC had sustained their burden of proof, showing they had acquired title by adverse possession to the abandoned easement except for those portions of the old railroad right-of-way being used by the Petruses for farming, drainage, roadways, and wells under, across, and on the right-of-way. During trial, Nature Conservancy and ANHC stipulated that they did not intend to lay claim to those portions of the right-of-way the Petruses had continued to use after the easement had been abandoned for railroad purposes. In addition, they agreed to underwrite the expenses of conducting a survey to identify and legally

describe those portions of the right-of-way the adjoining appellant landowners continued to use.

The Petruses filed their appeal in the court of appeals, arguing only that Nature Conservancy and ANHC's proof was insufficient to show adverse possession, but the court of appeals certified the appeal to us, raising the question as to whether the trial court's decree was a final appealable order. The court of appeals suggests that, since the trial court purportedly quieted title in Nature Conservancy and ANHC, the court's decree should have specifically set out the legal description of the property, or portion thereof, to which each party and landowner had title. The court of appeals is right.

Under Rule 2(a) 1 and 2 of the Appellate Procedure — Civil, an appeal may be taken from a final decree entered by the chancery court and an order which in effect determines the action and prevents a judgment from which an appeal might be taken from, or discontinues the action. We have interpreted this portion of Rule 2 to mean that, for an order to be appealable, it must dismiss the parties from the court, discharge them from the action, or conclude their rights to the subject matter in controversy. *Doe v. Union Pac. R.R. Co.*, 323 Ark. 237, 914 S.W.2d 312 (1996). The order must be of such a nature as to not only decide the rights of the parties, but also put the court's directive into execution, ending the litigation or a separable part of it. *Id.*

In a long line of cases, this court has held that a chancery court's decree must describe the boundary line between disputing land owners with sufficient specificity that it may be identified solely by reference to the decree. *Riddick v. Streett*, 313 Ark. 706, 858 S.W.2d 62 (1993); *see also Harris v. Robertson*, 306 Ark. 258, 813 S.W.2d 252 (1991); *Rice v. Whiting*, 248 Ark. 592, 452 S.W.2d 842 (1970); *McEntire v. Robinson*, 243 Ark. 701, 421 S.W.2d 877 (1967). In the present case, the chancellor entered a decree captioned "Final Order" which purported to dismiss the Petruses' claims and found ANHC had prevailed on its adverse possession claim. Instead of identifying the boundary lines of the properties in dispute, the trial court's decree merely made the following relevant findings:

> ANHC filed its claim of adverse possession only to those lands which were not actually being cultivated as farmlands by the [Petruses].
>
> ANHC announced at the trial that it did not intend to lay a claim to the continued use of portions of the old railroad right-of-way presently being used by the [Petruses] including cultivation, drainage outlets, roadways, and wells under, across, and on the railroad right-of-way.
>
> ANHC further announced at trial that in the event ANHC prevailed in its action for adverse possession, it would bear the expense of conducting a survey to adequately identify and legally describe the [Petruses'] respective uses of the right-of-way and [Petruses'] uses will be specifically reserved.

Nowhere in the chancellor's decree is the property awarded to ANHC identified along with the portions excepted and reserved to the Petruses. Ordinarily, one who enters adversely under color of title and actually possesses any part of the tract is deemed to have possession of the entire area described in the document constituting color of title. *St. Louis Union Trust Co. v. Hillis*, 207 Ark. 811, 182 S.W.2d 882 (1944); *Bailey, Trustee v. Martin*, 218 Ark. 513, 237 S.W.2d 16 (1951). Obviously, neither the chancellor nor the respective parties intended for this settled rule of property to apply to the circumstances here, since ANHC claimed only the disputed right-of-way minus those portions the Petruses continued to farm and use. While the chancellor and the parties apparently intended to resolve the boundary lines via a future survey, the permanent record in a boundary-line decision should describe the line with sufficient specificity that it may be identified solely by reference to the order. *See Harris*, 306 Ark. at 261; *Riddick*, 313 Ark. at 712. Otherwise, leaving those lines to be established by a future survey may likely result in additional disputes, litigation, and appeals. Again, the case law that requires a chancery decree to fix and describe the boundary lines in a dispute between landowners discourages piecemeal litigation. *McEntire*, 243 Ark. at 704.

The suggestion has been raised that this court's more recent case of *Riddick v. Streett, supra*, might represent a departure from this court's exacting rule that requires the trial court's decree to set

out boundary line descriptions when deciding such landowner disputes. The suggestion is without merit. In *Riddick*, the court did factually distinguish that case from earlier cases, noting that *Riddick* involved a dispute between a multitude of landowners, rather than just adjoining landowners. Such a distinction, however, has no legal significance, since irrespective of the number of landowners involved, any such landowner dispute must be resolved by fixing and defining boundary lines. Unlike the case at hand, the chancellor in *Riddick* made over two hundred findings pertaining to ownership of properties. Although the *Riddick* court determined all surveying angles, distances, and points of reference were not fully described, it remanded the case for the chancellor to instruct the survey or to use the chancellor's and this court's findings pertaining to easements and ownership of the disputed area and from them, establish an official replat to be incorporated into an amended decree which would remove the various clouds on the landowners' titles to their respective real estate.

In sum, we hold this court's rule is well settled, and requires the chancellor to modify his decree to fix and define the boundary lines, including those establishing the Petruses' encroachments. Because we hold the appeal is premature and the decree lacks finality, we dismiss without prejudice. *See Doe*, 323 Ark. at 242.

NEWBERN, J., not participating.

Jake WHEELER and Bobby Wheeler *v.* Gary MYERS and Donna Kerns

97-396 956 S.W.2d 863

Supreme Court of Arkansas
Opinion delivered December 11, 1997

Joseph H. O'Bryan, for appellants.

Malcolm Smith, for appellees.

DONALD L. CORBIN, Justice. Appellants Jake and Bobby Wheeler appeal the orders of the Prairie County Chancery and Probate Courts, finding that Appellees Gary Myers and Donna Kerns are the heirs of Ervin Myers to the exclusion of Appellants. This appeal was certified to us from the court of appeals on the basis that it presents an issue of first impression; hence, our jurisdiction is pursuant to Ark. Sup. Ct. R. 1-2(d). Appellants' sole point for reversal is that the trial court erred in holding that the right of adopted children to inherit from their natural ancestors is dependent upon the laws on adoption and inheritance in effect at the time of the natural ancestors' deaths. We find no error and affirm.

The essential facts are not in dispute. Appellants and Appellees are the four surviving natural children of Ira Myers. Ira Myers was the sole child of Ervin and Mae Myers. Appellants were adopted by their stepfather Robert James Wheeler in 1961. Ira Myers died in 1973. Ervin Myers died on September 28, 1980, and was survived by his wife Mae. Mae Myers held possession of the property at issue from the time of Ervin Myers's death until her own death in 1995.

Appellants filed a petition in the Prairie County Chancery Court on December 27, 1995, requesting that the court declare and adjudicate the rights to the possession and rental income from the property at issue. Appellees denied all material allegations contained in the petition and filed a counterclaim stating that Appellants had no interest in the property because they had been adopted and had thus ceased to be heirs of Ira Myers. While that action was pending in the chancery court, Appellees filed a petition in the Prairie County Probate Court requesting the court to conduct a hearing to determine the decedent's heirs.

The trial court found that Jake and Bobby Wheeler were legally adopted by Robert James Wheeler in 1961 and that the temporary and final orders of their adoption were not subject to collateral attack. The trial court determined that the right to inherit property does not vest until the death of the owner and that the law in effect at the time of the owner's death is controlling as to matters of inheritance. The court concluded further that

Ark. Code Ann. § 9-9-215 (Supp. 1995)[1], which was passed in 1977 and was in effect at the time of Ervin Myers's death, provides that all legal relationships between the adopted individual and his or her natural relatives, including the right of inheritance, are terminated upon the final decree of adoption. Accordingly, the trial court ruled that the application of section 9-9-215 precluded Jake and Bobby Wheeler from inheriting from their natural grandfather, Ervin Myers.

Appellants do not dispute that the law in effect at the time of Ervin Myers's death would preclude them from inheriting any part of his estate. Thus, the sole issue for our review is whether the trial court erred in ruling that the law in effect at the time of Ervin Myers's death is controlling as to Appellants' rights to inherit from his estate. For the reasons outlined below, we conclude that the trial court's ruling was correct.

Appellants rely heavily on this court's decisions in *Dean v. Smith*, 195 Ark. 614, 113 S.W.2d 485 (1938), and *Dean v. Brown*, 216 Ark. 761, 227 S.W.2d 623 (1950), for the proposition that the law in effect at the time of adoption is controlling. Appellants' reliance is misplaced, however, as both those cases addressed factual situations involving challenges to the validity of the adoption orders themselves. This court held in both cases that the law in effect at the time of the adoption must be applied when attempting to test the validity of the adoption order. Were Appellants questioning the validity of their adoptions in the present case, we would be required to apply the law that was in effect at the time of their adoptions. We decline, however, to extend this legal principle to their assertion that they should be recognized as heirs of their natural grandfather's estate. Furthermore, Appellants concede that the analogy between the *Smith* case and the present one is weak due to the fact that in *Smith*, all of the relevant events, including the children's adoptions and the death of both ancestors, occurred prior to the enactment of the law sought to be applied. Hence, the holdings in those cases are not dispositive of the issue

[1] This section was previously codified as Ark. Stat. Ann. § 56-215 (Supp. 1977). There have since been changes in that provision, however, they are not relevant to the issue presented in this case.

at hand. We thus turn to our case law on the rights of inheritance in general.

This court has long recognized the principle that a living person has no heirs. In *Wallace v. Wallace*, 179 Ark. 30, 13 S.W.2d 810 (1929), this court held:

> In the strictly proper sense of the word, no one is an heir until after the death of the ancestor, and the word signifies one who has succeeded to a dead ancestor; it is used to express the relation of persons to some deceased ancestor, and cannot be applicable to one whose ancestor is living.

Id. at 34-35, 13 S.W.2d at 812 (quoting 29 C.J. 290). Similarly, in *Purinton v. Purinton*, 190 Ark. 523, 80 S.W.2d 651 (1935), it was observed that the rights of the decedent's family to inherit from the decedent were fixed and vested as of the date and time of the decedent's death. More recently, this court has reiterated that the right to inherit property is a right that accrues upon the owner's death and that "[o]n a person's death, the rights of his heirs become vested and may not be impaired by subsequent legislation." *Lucas v. Handcock*, 266 Ark. 142, 153, 583 S.W.2d 491, 496 (1979).

Correspondingly, in *Estate of Caisson*, 289 Ark. 216, 710 S.W.2d 211 (1986), upon which the trial court relied for its ruling, this court was presented with the issue of whether the adoptive or blood heirs of an intestate decedent may inherit the estate of an adopted child. As is true in the present case, in *Caisson*, the trial court determined that the law pertaining to descent and distribution at the time of the decedent's death was controlling. This court agreed with the trial court, stating:

> We do not hesitate to hold that the law in effect at the time of the death of the adopted child is controlling on matters of inheritance. To hold otherwise would create a myriad of problems and confuse the law.
>
> The *right to inherit property does not vest until the death of the owner* and the devolution of property is controlled either by common law or statute.

Id. at 217, 710 S.W.2d at 212 (emphasis added). Appellants attempt to distinguish this holding on the basis of the relationship of the parties to one another. In effect, they argue that because the facts presented in *Caisson* involved the estate of an adopted child, as opposed to the present facts where the estate is that of a natural ancestor, the holding of that case cannot be applied to the issue at hand. Although, arguably, the holding in *Caisson* was necessarily tailored to the facts of that case, we believe that same rationale should be extended to the present case.

Thus, notwithstanding whether the adopted person is the heir or the ancestor or, correspondingly, whether the natural relative is the claimant to the estate or the decedent, the law in effect at the time of the death of the ancestor is controlling on matters of inheritance. As was stated in *Caisson*, "[t]o hold otherwise would create a myriad of problems and confuse the law." *Id.* at 217, 710 S.W.2d at 212. We have found much support for this conclusion amongst the holdings of other jurisdictions. *See, e.g., Black v. Washam*, 421 S.W.2d 647 (Tenn. Ct. App. 1967); *Hamilton v. Butler*, 397 S.W.2d 932 (Tex. Civ. App. 1965); *In re Williams*, 144 A.2d 116 (Me. 1958); *In re Trainor's Estate*, 256 N.Y.S.2d 497 (N.Y. Surr. Ct. 1965).

Accordingly, because Appellants' rights to inherit from their natural relatives could not have possibly vested until the time of Ervin Myers's death in 1980, the law in effect at the time of his death is controlling. The trial court thus correctly concluded that section 9-9-215, which had been in effect since 1977, prohibited Appellants from inheriting from Myers's estate.

Affirmed.

Charles DEPEW *v.* James L. JACKSON

97-553 957 S.W.2d 177

Supreme Court of Arkansas
Opinion delivered December 11, 1997

Bernard Whetstone, P.A., by: *Bernard Whetstone* and *Kevin Odum*, for appellant.

Anderson & Kilpatrick, L.L.P., by: *Joseph E. Kilpatrick, Jr.*, and *Penny B. Wilbourn*, for appellee.

ANNABELLE CLINTON IMBER, Justice. The appellant obtained a $1,600 jury verdict on a negligence claim brought against the appellee. The appellant moved for a new trial and argued, among other things, that the verdict was clearly against the preponderance of the evidence and that the jury erred in assessing the amount of the recovery. The motion was deemed denied, and the present appeal ensues. We find no error and affirm.

On August 1, 1995, Charles Depew was a passenger in a vehicle that was struck from behind in an automobile accident. Depew filed a complaint against James Jackson, alleging that the accident and his resulting injuries were due to Jackson's negligence. Jackson admitted liability, and the case was submitted to the jury on the issue of damages only. At trial, Depew testified

that the collision snapped or popped his neck back. A few days later, he developed increasing pain and soreness in his neck area. X-rays taken after a visit to the emergency room revealed a possible fracture in Depew's spine, and Depew was referred to a neurosurgeon, Dr. Anthony Russell.

Dr. Russell examined Depew and recommended surgery. According to Dr. Russell, Depew had a bone that was not properly connected to another bone in his neck — this resulted in the possibility that the floating bone might be driven into his brain stem, rendering Depew a quadriplegic. This condition, known as an os odontoideum, was either a congenital abnormality where the bone fails to fuse properly, or a fracture that had occurred several years earlier and had failed to fuse and heal properly. Dr. Russell stated that it most likely "formed way back in the embryonic stage." Cables were used in the surgery to fuse the floating bone with another piece of bone. As a natural consequence of this procedure, Depew lost range of motion in his neck, including a degree of stiffness. Constant pain was also consistent with the surgery, in addition to headaches. Depew later went to another physician to receive treatment for his pain, which included injections and other medications.

Depew's medical bills amounted to over $15,000. Depew's expert witness projected total damages in the amount of $345,794, which figure included past and future medical expenses, loss of household services and pain and suffering.

The jury returned a verdict for Depew in the amount of $1,600. Depew filed a motion for new trial, which was deemed denied. While Depew articulates a number of points on appeal, his argument consists of two primary components — that the verdict was clearly against the preponderance of the evidence, and that the jury erred in the assessment of the recovery.

1. Ark. R. Civ. P. 59(a)(6).

When a motion for new trial is made on the ground that the verdict was clearly against the preponderance of the evidence and is denied by the trial court, *see* Ark. R. Civ. P. 59(a)(6), this court will affirm if there is substantial evidence to support the

verdict. *Esry v. Carden*, 328 Ark. 153, 942 S.W.2d 846 (1997); *Patterson v. Odell*, 322 Ark. 394, 909 S.W.2d 648 (1995). Substantial evidence is evidence of sufficient force and character to compel a conclusion one way or the other with reasonable certainty. *Esry, supra.* The evidence must force the mind to pass beyond suspicion or conjecture. *Esry, supra.* In examining whether substantial evidence exists, the verdict is given "the benefit of all reasonable inferences permissible in accordance with the proof." *Patterson, supra.*

As controlling authority, Depew relies almost exclusively on *Young v. Honeycutt*, 324 Ark. 120, 919 S.W.2d 216 (1996), a case where the trial court granted the plaintiff's motion for new trial following a defendant's verdict in a negligence case. Given that *Young* involved the appellate review of the grant of a motion for new trial, it provides us with little guidance in the present case.[1] Moreover, in *Young* there was no dispute that the plaintiff's injuries were sustained as a result of the accident. By contrast, the issue of proximate causation is the crux of the present case.

In attempting to show that the verdict was not supported by substantial evidence, Depew quotes extensively from Dr. Russell's testimony concerning the stability of Depew's spine both before and after the accident:

> Q: [Y]ou can go on and have a fracture and still remain stable?
> A: Yes.
>
> * * *
>
> Q: Then all at once you have some kind of insult or something happens to your body and it affects your stability at that point, then you start having trouble?
> A: Yes.

[1] Depew also quotes from *Young* to make a number of other points regarding appellate review of the grant of a new trial that have little bearing in the present case. Here we are not concerned with the grant of a new trial. The same can be said for Depew's assertion that when a new trial has been granted, it is "more difficult" to show an abuse of discretion on appellate review because the opposing party will have another opportunity to prevail. *See, e.g., Diamond State Towing Co., Inc. v. Cash*, 324 Ark. 226, 919 S.W.2d 510 (1996); *Bristow v. Flurry*, 320 Ark. 51, 894 S.W.2d 894 (1995).

When asked his opinion of Depew's stability up until the time of the accident, Dr. Russell answered "stable with the potential for instability." When asked about Depew's stability given that he had no pain or dysfunction in the neck region up until the time of the accident, Dr. Russell testified "[i]t would tell you that most likely he was stable during that time although you could still be unstable." Dr. Russell added that Depew's pre-accident level of functioning did "not necessarily" indicate that he was stable, although in "almost all cases" the patient would have known about it sooner if he had instability. Ultimately, Dr. Russell opined to a reasonable degree of medical certainty that Depew was "[n]ot grossly unstable" before the accident. The fact that Depew had no pre-accident pain "could be an indicator that he had become unstable at the time of the collision." When asked whether an "[os odontoideum] can remain stable all your life until you're sixty-two years old," Dr. Russell replied "True." Plaintiff's counsel then asked, "And you'll never know you had it?":

> A: That's true because you've still got all your ligaments in there holding it to this bone like it's supposed to be there.
> Q: That keeps it stable?
> A: That keeps it stable, yes.

In operating on Depew, Dr. Russell wanted to "restore stability to [Depew's] spine." In a letter written to Depew's attorney, Dr. Russell wrote that Depew's "paraspinous muscle spasm" was a sequelae of his recent auto accident. In other deposition testimony Dr. Russell stated that it was his opinion within a reasonable degree of medical certainty that "the automobile accident aggravated the preexisting condition leading to [Depew's] ultimate surgical procedure." Dr. Russell answered in the affirmative when asked whether it was a reasonable assumption that Depew's neck pain was caused by the collision, considering that he had no neck pain before but had persistent neck pain afterward.

The above-recited evidence does support Depew's theory that the collision rendered his spine unstable, necessitating stabilizing surgery. However, other portions of Dr. Russell's testimony are equivocal on the point, and tend to support Jackson's position that the collision had nothing to do with aggravating or worsening

Depew's condition — the accident and resulting x-rays simply led to the discovery of the defect.

As quoted above, Dr. Russell testified that the os odontoideum condition was most likely congenital. Dr. Russell explained that "[t]he fracture was discovered by the emergency room physician at Southwest and then brought to my attention. Certainly, I commented on it, felt like it needed surgery." When asked on cross examination whether he recommended surgery "[b]ecause of that condition where that is not fused," and "because you thought that condition alone posed some threat to Mr. Depew," Dr. Russell answered in the affirmative. Dr. Russell opined that the os odontoideum "certainly" occurred before the accident, and that the accident did not make the fracture any worse. At one point the following colloquy occurred:

> Q: And this [is] a very similar thing. It showed a condition that was there?
>
> A: Yes.
>
> Q: Not caused by the accident?
>
> A: No.
>
> Q: Not made worse just shown to you, is that right?
>
> A: Correct.

Thus, this above-recited evidence shows that Dr. Russell operated to repair a congenital defect that was not caused or even worsened by the accident. The accident had the incidental result of bringing Depew into the hospital for x-rays, which allowed the os odontoideum condition to be discovered. In reading from deposition testimony at trial, Dr. Russell was asked "Do you still stick with your statement that. . . [Depew] had a C-1, 2 instability aggravated by a motor vehicle accident?" Dr. Russell replied:

> In the terms you're asking for in a legal sense, I guess what I'll have to say is no, you're wanting me to say that the accident. . . When I said aggravated what I meant to say was, brought to our attention, that's what I should have said. The accident brought this problem to our attention.

Dr. Russell could not say that it was "a hundred percent certain" that the accident aggravated a preexisting problem. In being asked whether he had changed his mind as to whether the accident aggravated a preexisting injury, Dr. Russell answered:

> [Reading from deposition testimony.] "I haven't changed my mind. I maintain the point that he had a preexisting condition, that due to the automobile accident, it was brought to our attention. And it ultimately led to his surgery, yes. I mean. . . I'll never, ever dictate the word 'aggravated' in anything I do again because it seems to be a point of contention here. I don't know. It's suddenly changed meaning for me." And I went on to state that due to the surgery, he will have permanent impairment, decreased range of motion, secondary to the operative procedure.

Depew makes much of the following statement contained in a letter written by Dr. Russell:

> In my opinion it is more likely than not that had Charles Depew not been involved in the vehicle collision of August 1, 1995, and had not received any other injury to his neck then he probably would have lived the balance of his life in the same condition that he was in before the collision.

However, this statement does not necessarily establish that the collision proximately caused or aggravated the os odontoideum condition. Dr. Russell testified that a person with an os odontoideum condition could live "until you're sixty-two" and not even know there was a problem. As a result of the collision, the os odontoideum condition was discovered and Dr. Russell recommended surgery to prevent the possibility, however remote, of the floating bone compressing the spinal chord and causing paralysis. As explained by Dr. Russell, "The surgery is not for those ninety-nine who don't get injured it's for that one that trips and become[s] Christopher Reeve."

In summary, Dr. Russell's testimony cuts both ways. While portions of it show that Depew's spine was stable before the accident and unstable afterward, other portions establish that Depew had a congenital defect that was not caused or worsened by the collision. The incidental x-rays necessitated by the collision simply allowed the defect to be discovered and treated. Thus, the loss of mobility and pain due to the surgery, and the accompanying decrease in Depew's ability to perform routine activities, were not proximately caused by Jackson's negligence. Given the character of this testimony, the jury did not have to resort to conjecture or speculation to arrive at its verdict. This is especially true

considering that we are to give the verdict "the benefit of all reasonable inferences permissible in accordance with the proof." *See Patterson, supra.* Because substantial evidence supports the verdict, we cannot say that the trial court erred in denying Depew's motion for new trial on the ground that the verdict was clearly against the preponderance of the evidence.

2. Ark. R. Civ. P. 59(a)(5).

Generally, where the primary issue on appeal is the alleged inadequacy of the jury's award, *see* Ark. R. Civ. P. 59(a)(5), this court will affirm the denial of a motion for new trial absent a clear and manifest abuse of discretion. *See Whitney v. Holland Retirement Ctr., Inc.*, 323 Ark. 16, 912 S.W.2d 427 (1996); *Luedemann v. Wade*, 323 Ark. 161, 913 S.W.2d 773 (1996); *National Bank of Commerce v. McNeill Trucking Co., Inc.*, 309 Ark. 80, 828 S.W.2d 584 (1992); *Smith v. Petit*, 300 Ark. 245, 778 S.W.2d 616 (1989). "An important issue is whether a fair-minded jury could have reasonably fixed the award at the challenged amount." *Luedemann, supra* (citing *Smith, supra*).

In the present case, a fair-minded jury could have reasonably fixed the award at $1,600. Obviously, the jury accepted Jackson's theory of the case, and declined to award Depew damages for any of his surgery-related medical bills. As more fully discussed in the prior point, there was substantial evidence from which the jury could have decided that the surgery, and therefore the resulting pain and loss of mobility, were due to a preexisting condition and not proximately caused by the automobile accident. Thus, a fair-minded jury could have reasonably decided to exclude the surgery-related medical bills from its award. The record reflects that most of the $15,000 in medical bills incurred by Depew related to the surgery. The mere fact that a plaintiff has incurred medical expenses and the defendant has admitted liability does not automatically translate into a damage award equivalent to those expenses. *See Kratzke v. Nestle-Beich, Inc.*, 307 Ark. 158, 817 S.W.2d 889 (1991). Based on the foregoing, we cannot say that the trial court clearly and manifestly abused its discretion in denying Depew's motion for new trial on

the ground that the jury erred in the assessment of the amount of recovery.

Affirmed.

Patricia (Langhard) SANDERSON *v.* Olen D. HARRIS

97-423 957 S.W.2d 685

Supreme Court of Arkansas
Opinion delivered December 11, 1997

Office of Child Support Enforcement, by: *William F Cavenaugh*, for appellant.

Harrell & Lindsey, P.A., by: *Searcy W. Harrell, Jr.*, for appellee.

ANNABELLE CLINTON IMBER, Justice. At issue in this case is whether the general ten-year statute of limitations for actions on judgments applies to actions to collect support arrearages payable through the registry of the court, which become final judgments as they accrue pursuant to Ark. Code Ann. § 9-14-234(b) (Supp. 1995). The trial court concluded that the ten-year statute of limitations did not apply, and barred the appellant's action to obtain income withholding from the obligor's employer following the twenty-third birthdays of the two children involved. We affirm the trial court's ruling.

An August 27, 1987 judgment entered in Nevada County Chancery Court case number 4897-2 recited that on March 5, 1985, Olen Dale Harris was ordered to pay $15 weekly child support in two separate cases, chancery case number 4897-2 and county case number CC-82-5. The trial court assumed jurisdiction over CC-82-5, "merging" it with 4897-2 because the parties in both cases were the same. Since the entry of the 1985 order, the trial court found that $3,520 in total arrearage had accrued —

$1,760 with respect to the minor child Amanda (date of birth February 23, 1972), and $1,760 as to the minor child Matthew (date of birth December 1, 1969). The trial court reduced this amount to judgment and ordered Harris to pay $10 weekly in each case, for a total of $20 weekly, towards satisfying this judgment. The trial court additionally found that the circumstances of the parties had changed and that following August 28, 1987, Harris would be obligated to pay $30 weekly in support in each case, for a total of $60 weekly. All support payments were ordered paid through the registry of the court. Patricia Harris, the mother of the children, agreed that Elizabeth Durham, apparently Matthew's grandmother, would be entitled to receive the support payments as to Matthew.

On April 28, 1988, Patricia Sanderson (formerly Harris) petitioned the trial court for Harris to appear and show cause, alleging that he had failed to pay child support accruing since August 28, 1987, and that he had failed to pay on the judgment rendered against him on August 28, 1987. On October 5, 1988, the trial court entered an order finding Harris in contempt and $5,560 in arrears. The record then shows various notices of income withholding filed against two of Harris's purported employers. A December 31, 1992 notice served on Dwayne Lee Logging shows $30 weekly withholding on a $2060 amount past due in case number 4897-2. This is followed by two notices served on Smackover Motors, Inc., on May 31, 1996. One shows $30 weekly withholding on a $1940 amount past due in CH4897-2, while the other reflects $30 weekly withholding on a $5570 amount past due in CH-4897.

On June 24, 1996, Harris petitioned the trial court in case number 4897 to enter an order relieving him and his employer, Smackover Motors, Inc., from paying additional support, claiming that the children involved in the proceeding had already turned twenty-three and that the limitations period had run. OCSE filed an answer and counterclaim in case number 4897-2. In its answer, OCSE clarified that the August 27, 1987 order merged 4897-2, involving Patricia Sanderson, and CC-82-5, involving Elizabeth Durham, into case number 4897-2. Under this order, both children were provided for, with $30 weekly going to Elizabeth Dur-

ham for Matthew and $30 weekly going to Patricia Sanderson for Amanda. While conceding that both children had reached the age of majority, OCSE argued that Ark. Code Ann. §§ 9-14-235 (Supp. 1995) and 9-14-236 (Supp. 1995) entitled it to collect the child-support payments, "which are in arrears from the initial order." OCSE also counterclaimed on the $60 weekly support provided for in the August 27, 1987 order, alleging that Harris was $2,580 in arrears as of July 31, 1996.

A "Stipulation of Transcript" reflects that the trial court held a hearing on September 26, 1996, where Harris argued that since the children were older than twenty-three, the limitations period found in Ark. Code Ann. § 9-14-236 barred any attempt at collection. OCSE responded that the accrued arrearages "should be considered as final judgments" pursuant to Ark. Code Ann. § 9-14-234(b)-(c) (Supp. 1995). Following the submission of briefs, the trial court entered an order on October 30, 1996, granting Harris's petition to terminate given "that actions to enforce child support are barred by a statute of limitations which runs five years after the eighteenth birthday of the child." Sanderson appeals from this order.

For her sole point on appeal, Sanderson argues that the general ten-year limitations period for actions on judgments, Ark. Code Ann. § 16-56-114 (1987), applies to accrued support arrearages under Ark. Code Ann. § 9-14-234, which provides that accrued support installments payable through the registry of the court become final judgments.[1] This issue was decidedly resolved in a recent case involving the same obligor, *Cole v. Harris*, 330 Ark. 420, 953 S.W.2d 586 (1997). In *Cole* we determined that the enactment of Act 1057 of 1987, codified at Ark. Code Ann. § 9-14-234 and providing for the finality of accrued installments, was done to ensure state qualification for future federal funding,

[1] We are cognizant of the fact that, at least at the trial court level, this case involved two distinct claims. One to collect arrearages that had accrued since the August 27, 1987 judgment, and another to collect on the *judgment* that Sanderson had obtained on August 27, 1987. However, Sanderson's argument on appeal is limited in scope to the accrued arrearages that became final judgments by operation of law under Ark. Code Ann. § 9-14-234, and contains no mention of the arrearage that had been reduced to judgment on August 27, 1987.

and was not accompanied by any legislative expression to revive the general ten-year limitations period. *Cole, supra.*[2] Indeed, by repealing the former ten-year limitations period for support arrearages formerly provided for by Act 525 of 1989, *see* 1991 Ark. Acts 870 §§ 1-2 (codified at Ark. Code Ann. §§ 9-14-105 and 9-14-236), the General Assembly had "made clear its intention that a ten-year statute of limitations should not apply to actions for child-support arrearages." *Cole, supra.* Thus, the specific limitations provision found in Ark. Code Ann. § 9-14-236 governed the accrued arrearages, and the appellant's action to collect arrearages more than five years after the child's eighteenth birthday was barred. *Cole, supra.*

We disagree with Sanderson's contention that the General Assembly intended that the limitations period found in Ark. Code Ann. §9-14-236 apply only to arrearages not paid through the registry of the court. Such a distinction would leave the limitations period found in Ark. Code Ann. § 9-14-236 with practically no application. Notably, all orders requiring payments for child support are required to direct that payments be made through the registry of the court, subject to the trial court's discretion in determining the best interests of the parties. Ark. Code Ann. § 9-12-312(d) (Supp. 1995). Given that almost all support obligations are ordered payable through the registry of the court, numerous practical problems would flow from the application of an individual limitations period to each accrued installment, and it would be difficult to ascertain the precise amount of the "judgment" at a given time. Significantly, the emergency clause to Act 870 provides that "it is in the best interest of the people of the State of Arkansas that child support be collected and enforced in the most *expedient* manner for all children of this state[.]" (emphasis added).

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[2] In *Sullivan v. Edens*, 304 Ark. 133, 801 S.W.2d 32 (1990), this court acknowledged the federal concern with state courts that could retroactively modify or nullify past-due obligations, given that some states had "accorded child support orders a lesser stature than other money judgments and have allowed child support awards to be modified retroactively." Act 1057 of 1987 provides in part, "AN ACT to. . .Provide that Unpaid Child Support Becomes a Judgment; to Prohibit Retroactive Modification Thereof Until Notice is Served on the Other Party. . . ."

The present case is essentially indistinguishable from *Cole*. While support installments payable through the court registry become final judgments as they accrue, *see* Ark. Code Ann. § 9-14-234, the general ten-year statute of limitations found at Ark. Code Ann. § 16-56-114 does not apply to actions to collect such arrearages. *Cole, supra.* Instead, the limitations period found at Ark. Code Ann. § 9-14-236(c) governs. *Cole, supra.* Given that Ark. Code Ann. § 9-14-236(c) controls, we do not reach Sanderson's contention that purported partial payments tolled the ten-year statute of limitations. *See Cole, supra.* Because the appellant did not institute withholding on the accrued arrearage until after both children had turned twenty-three, the trial court did not err in granting Harris's petition to terminate the collection of child support.

Affirmed.

Djuane THOMPSON *v.* STATE of Arkansas

97-339 957 S.W.2d 1

Supreme Court of Arkansas
Opinion delivered December 11, 1997
[Petition for rehearing denied January 15, 1998.]

William R. Simpson, Jr., Public Defender, by: *Jeffrey A. Weber*, for appellant.

Winston Bryant, Att'y Gen., by: *Brad Newman*, Asst. Att'y Gen., for appellee.

ANNABELLE CLINTON IMBER, Justice. This is an interlocutory appeal filed by Djuane Thompson from the circuit court's denial of his motion to transfer his criminal case to juvenile court. We reverse and remand for transfer to the juvenile court.

Djuane Thompson, and two others, were charged as adults in the Pulaski County Circuit Court with aggravated assault, kidnapping, and theft of property. According to the information, a handgun was used in these crimes, and less than $500 was taken from the victim. At the time of the alleged offenses, Thompson was sixteen years of age. Thompson subsequently filed a motion to transfer the case to juvenile court.

During the transfer hearing, Thompson's mother, Shirley Ford, testified that her son had no prior charges in either juvenile or circuit court, that he attended school regularly, and that he did not "run the streets." Thompson's mother explained that during the summer months her son took tutoring classes and mowed yards to earn money. She described Thompson as a "good kid" who was helpful around the house and got along well with his family. Finally, Ford testified that she never suspected that Thompson was involved in gang activity or used drugs or alcohol.

The State did not put on any evidence during the hearing, but instead relied upon the allegations asserted in the information. The prosecutor, however, admitted to the trial court that Thompson did not have a weapon, but his codefendants did. The trial court denied the motion to transfer, and Thompson timely filed this interlocutory appeal. We have jurisdiction pursuant to Ark. Code Ann. § 9-27-318(h) (Supp. 1995).

■ ■ On appeal, Thompson alleges that the trial court erred when it denied his motion to transfer. To determine whether a criminal case should be transferred to juvenile court, the trial court must conduct a hearing and consider the following factors:

> (1) The seriousness of the offense, and whether violence was employed by the juvenile in the commission of the offense;
>
> (2) Whether the offense is part of a repetitive pattern of adjudicated offenses which would lead to the determination that the juvenile is beyond rehabilitation under existing rehabilitation programs, as evidenced by past efforts to treat and rehabilitate the juvenile and the response to such efforts; and
>
> (3) The prior history, character traits, mental maturity, and any other factor which reflects upon the juvenile's prospects for rehabilitation.

Ark. Code Ann. § 9-27-318(e) (Supp. 1995). Although the court must consider all of the above factors, it is not required to give them equal weight. *Fleetwood v. State*, 329 Ark. 327, 947 S.W.2d 387 (1997); *Olgesby v. State*, 329 Ark. 127, 946 S.W.2d 693 (1997). The trial court's decision to try the juvenile as an adult must be supported by clear and convincing evidence, Ark. Code Ann. § 9-27-318(f), and we will not reverse the court's determination unless it is clearly erroneous. *Fleetwood*, *supra*; *Olgesby*, *supra*.

I. Juvenile's Participation in the Crime

It is well settled that a juvenile may be tried as an adult solely upon the serious and violent nature of the offense. *Sims v. State*, 329 Ark. 350, 947 S.W.2d 376 (1997); *McClure v. State*, 328 Ark. 35, 942 S.W.2d 243 (1997). Although the charges against Thompson were serious, he claims on appeal that the trial court's ruling must be reversed because the prosecutor conceded that violence was employed by the codefendants, but not Thompson. We, however, have previously held that:

> [i]t is of no consequence that appellant may or may not have personally used a weapon, as his association with the use of a weapon in the course of the crimes is sufficient to satisfy the violence criterion.

Guy v. State, 323 Ark. 649, 916 S.W.2d 760 (1996); *see also*, *Collins v. State*, 322 Ark. 161, 908 S.W.2d 80 (1995); *Walter v. State*, 317 Ark. 274, 878 S.W.2d 374 (1994). Thus, we find no merit to Thompson's first argument.

II. Sufficiency of the Information Alone

Next, Thompson contends that the trial court's ruling must be reversed because there was no evidence presented during the transfer hearing to substantiate the serious and violent nature of the charges contained in the information. We agree with Thompson's argument, and accordingly we reverse and remand for transfer to the juvenile court.

For several years, we have held that the trial court could rely solely upon the allegations contained in the information to support its finding that a juvenile should be tried as an adult due to the serious and violent nature of the crime. *See, e.g.*, *Lammers v. State*, 324 Ark. 222, 920 S.W.2d 7 (1996); *Davis v. State*, 319 Ark. 613, 893 S.W.2d 768 (1995); *Vickers v. State*, 307 Ark. 298, 819 S.W.2d 13 (1991). In *Sanders v. State*, 326 Ark. 415, 932 S.W.2d 315 (1996), we began to question the soundness of this rule. Although the sufficiency of the information alone was not an issue in *Sanders*, we made the following admonition:

> This case exemplifies the fact that, under our current interpretations of the code, prosecuting attorneys can file a serious charge against a juvenile in circuit court and do nothing more. It may be that there is no substantial evidence to support the charge, and a transfer may be denied. In this case the trial judge was apparently frustrated by a total lack of proof by the State. He even inquired whether the knife alleged to have been used was a butter knife or a butcher knife, and the State did not know. This type of proceeding was not envisioned by the drafters of the juvenile code, and we did not intend for our interpretations to do away with the need for a *meaningful hearing*. As a result, we issue a caveat that in juvenile transfer cases tried after this date [October 28, 1996], we will consider anew our interpretation of the juvenile code when the issues are fully developed and briefed.

Id. (emphasis added).

Less than six months later, the appellant in *Humphrey v. State*, 327 Ark. 753, 940 S.W.2d 860 (1997), accepted our invitation in *Sanders* to reevaluate our interpretation of the juvenile code by arguing that his conviction should be reversed because the trial court based its denial of his motion to transfer solely upon the

allegations contained in the information. The record of Humphrey's case, however, revealed that the allegations contained in the information were substantiated by two witnesses who testified during the transfer hearing about the serious and violent nature of the crimes. *Id.* Hence, we did not reach the issue.

A few months later, we announced once again that if the proper case was presented, we would reconsider the issue of whether a court could base its decision on a motion to transfer solely upon the allegations contained in the information. *Ponder v. State*, 330 Ark. 43, 953 S.W.2d 555 (1997) (Glaze, J., concurring). We find that this case presents the proper opportunity to consider this issue because there was no evidence to substantiate the allegations contained in the information, and the hearing was held after October 28, 1996, as required by *Sanders*.

The plain and unambiguous language of the transfer statute declares that:

> Upon the motion of the court or of any party, the judge of the court in which a delinquency petition or criminal charges have been filed *shall conduct a hearing* to determine whether to retain jurisdiction or to transfer the case to another court having jurisdiction.

Ark. Code Ann. § 9-27-318(d) (emphasis added). If the State can merely rest upon the allegations in the information that the crime was violent and serious, there is no need to have such a hearing. In fact, the hearing in this case was far from "meaningful" as stated in *Sanders*.

Hence, we hold that from the date of this opinion forward, there must be some evidence to substantiate the serious and violent nature of the charges contained in the information. Accordingly, all prior decisions inconsistent with this opinion are hereby overruled. Furthermore, we reverse the trial court's denial of Thompson's motion to transfer and remand for transfer to the juvenile court. The dissenting and concurring opinions debate which party bears the burden of proof. We, however, refuse to address the issue at this time because it was not raised by either party.

Reversed and remanded for orders consistent with this opinion.

NEWBERN, J., concurring.

CORBIN and BROWN, JJ., concurring in part and dissenting in part.

DAVID NEWBERN, Justice, concurring. The majority holds that the State must produce "some evidence to substantiate the serious and violent nature of the charges contained in the information." That evidence relates to the first of the three factors on which proof is required in a "meaningful" juvenile transfer hearing according to Ark. Code Ann. § 9-27-318(e) (Supp. 1995). "Upon a finding by clear and convincing evidence that a juvenile should be tried as an adult, the court shall enter an order to that effect." Ark. Code Ann. § 9-27-318(f) (Supp. 1995). By requiring that "clear and convincing evidence that a juvenile should be tried as an adult," the General Assembly has obviously placed the burden of proof on the State. *See Walker v. State,* 304 Ark. 393, 803 S.W.2d 502 (1991) (Newbern, J., dissenting.) In the *Walker* case, the opposite conclusion was reached.

The majority now says the State must produce "some evidence" but refuses to recognize the error made in the *Walker* decision or to tackle again the burden of proof issue. That leaves the trial courts wondering who must produce the "clear and convincing evidence" of the factors supporting trial of a juvenile as an adult. We should hold that, although the juvenile may be the moving party, the statute clearly places the burden of proof on the State. Contrary to the concurring and dissenting opinion of Justice Brown in this case, the State would not be asked to "prove a negative." Rather, the statute requires "clear and convincing evidence that a juvenile should be tried as an adult," and that cannot be properly characterized as a negative proposition.

The majority opinion purports to be concerned about a "meaningful hearing." Any hearing, meaningful or otherwise, in an adversary system of justice must proceed on the basis that one party or the other has the burden of proof with respect to the issue at hand. Although the parties may not have used the term "bur-

den of proof" in their arguments, that is what this case is about. We should not duck the issue, and we should not create a hybrid, unclear situation that we or the General Assembly will have to undo later.

ROBERT L. BROWN, Justice, concurring in part; dissenting in part. Since our decision in *Walker v. State*, 304 Ark. 393, 803 S.W.2d 502 (1991), *reh'g denied*, 304 Ark. 402-A, 805 S.W.2d 80 (1991), we have cited the principle that a criminal information may suffice as proof of the seriousness and violence of a charge in some nineteen cases.[1] Now, after almost seven years of experience under the *Walker* holding, this court has determined that the prosecutor must do more than simply rely on the criminal information to establish seriousness and violence. I am amenable to requiring the prosecutor to offer some proof of the crime itself to meet the seriousness-and-violence criterion. Indeed, in *Walker v. State, supra*, we said that it was desirable, even preferable, for the prosecutor to present evidence at the hearing in addition to the charge itself.

What satisfies the requirement of "some proof" is not answered in the majority opinion. Evidence of a shooting or death should be enough to corroborate the criminal information on the seriousness and violent nature of the crime. More often than not, the investigating law-enforcement officer could establish that element. Robberies, assaults, and batteries might require the testimony of the victim, absent an agreement to permit hearsay testimony by the investigating officer. In this regard, I remain convinced that the Rules of Evidence should apply to juvenile-

[1] *Jones v. State*, 326 Ark. 681, 933 S.W.2d 387 (1996); *Carrol v. State*, 326 Ark. 602, 932 S.W.2d 339 (1996); *Sanders v. State*, 326 Ark. 415, 932 S.W.2d 315 (1996); *Brooks v. State*, 326 Ark. 201, 929 S.W.2d 160 (1996); *Butler v. State*, 324 Ark. 476, 922 S.W.2d 685 (1996); *Booker v. State*, 324 Ark. 468, 922 S.W.2d 337 (1996); *Green v. State*, 323 Ark. 635, 916 S.W.2d 756 (1996); *Cole v. State*, 323 Ark. 136, 913 S.W.2d 779 (1996); *McGaughy v. State*, 321 Ark. 537, 906 S.W.2d 671 (1995); *Hamilton v. State*, 320 Ark. 346, 896 S.W.2d 877 (1995); *Ring v. State*, 320 Ark. 128, 894 S.W.2d 944 (1995); *Davis v. State*, 319 Ark. 613, 893 S.W.2d 768 (1995); *Bell v. State*, 317 Ark. 289, 877 S.W.2d 579 (1994); *Walter v. State*, 317 Ark. 274, 878 S.W.2d 374 (1994); *Beck v. State*, 317 Ark. 154, 876 S.W.2d 561 (1994); *Tucker v. State*, 313 Ark. 624, 855 S.W.2d 948 (1993); *Johnson v. State*, 307 Ark. 525, 823 S.W.2d 440 (1992); *Vickers v. State*, 307 Ark. 298, 819 S.W.2d 13 (1991); *Bradley v. State*, 306 Ark. 621, 816 S.W.2d 605 (1991).

transfer hearings. *McClure v. State*, 328 Ark. 35, 942 S.W.2d 243 (1997)(Brown and Imber, JJ., concurring).

I disagree with the concurring opinion of Justice Newbern, however, that the State should have the full burden of proof in juvenile-transfer cases. Admittedly, these hearings present something of a hybrid situation, with both parties having some obligation to offer proof. It would be unreasonable, though, to hold that a juvenile who has been charged in circuit court could simply move to transfer an adult criminal charge to juvenile court and then sit back and force the State to prove a negative, that is, why the matter should not be transferred. It is the juvenile who seeks to change the status quo, and under such circumstances, he or she should have the burden of going forward with the proof.

The better course, in my opinion, was set in *Walker v. State, supra*, when we said that the juvenile has the burden of going forward with proof to show that the criteria are met. More precisely, the juvenile should have the burden of justifying a transfer based on his or her prospects for rehabilitation within the juvenile system, a showing that the current offense does not evidence a repetitive pattern, and perhaps even proof that the offense was not sufficiently serious and violent to warrant a circuit court trial. The prosecutor, however, must also offer some evidence of the seriousness and violence associated with the crime, if the matter is to remain in circuit court, since the circuit court must make that decision based on clear and convincing evidence. And that evidence, with today's holding, must be more than the criminal information. Without such evidence by the prosecutor, a transfer to juvenile court becomes automatic. Thus, both parties are required to offer some proof.

Finally, I disagree with the majority when it holds that the charges against Djuane Thompson in circuit court should be transferred to juvenile court. The prosecutor undoubtedly relied on our line of cases in offering only the criminal information as proof of seriousness and violence in the instant case. With today's decision, we are changing our caselaw, after citing the principle that a criminal information is sufficient to meet the seriousness-and-violence factor in nineteen cases. I would remand this matter

for a juvenile-transfer hearing to be held forthwith, in light of today's decision, bearing in mind that Thompson turns eighteen on February 28, 1998. Should a hearing not be conducted before that date in sufficient time for the juvenile court to assume jurisdiction over Thompson in the event of a favorable decision to transfer, then I agree that the matter should be automatically transferred.

CORBIN, J., joins.

CITY OF LITTLE ROCK *v.* PULASKI COUNTY CIRCUIT COURT

97-480 957 S.W.2d 684

Supreme Court of Arkansas
Opinion delivered December 11, 1997

Thomas M. Carpenter, Little Rock City Att'y, and *Marshall L. Nash*, Asst. City Att'y, for petitioner.

Winston Bryant, Att'y Gen., by: *Kelly K. Hill*, Deputy Att'y Gen., for respondent.

RAY THORNTON, Justice. This petition for a writ of prohibition was brought by the City of Little Rock to prohibit the Pulaski County Circuit Court from considering an appeal from the Little Rock Municipal Court and from enforcing an order with respect to that appeal, because the notice of appeal was untimely. From the abstract and record provided to us by the City, we are unable to tell when the appeal was perfected. We deny the petition because the abstract is flagrantly deficient and the record is incomplete.

The judgment of the municipal court, the docket entries relating thereto, and the notice of appeal from that order are not reflected in the abstract presented to us for review. We will not belabor the insufficiency of the materials, but note that while some proceedings in the municipal court are described in the abstract, those proceedings are not reflected in the record before this court. In short, we have no clear record of exactly what took place and when.

The standard for a writ of prohibition is well settled. Such a writ is appropriate only when the lower court is wholly without jurisdiction. *Nucor Holding Corp. v. Rinkines*, 326 Ark. 217, 931 S.W.2d 426 (1996). In deciding whether the writ will lie, we confine our review to the pleadings. *Id.* Here, the record does not contain the necessary pleadings to determine whether the circuit court had jurisdiction.

A petitioner bears the burden of producing a fair and accurate record and abstract that establish an entitlement to a writ. *See* Ark. Sup. Ct. R. 4-2 & 6-1; *Davis v. State*, 319 Ark. 171, 889 S.W.2d 769 (1994); *State v. Pulaski County Circuit-Chancery Court*, 316 Ark. 473, 872 S.W.2d 854 (1994); *Oaklawn Jockey Club v. Jameson*, 280 Ark. 150, 655 S.W.2d 417 (1983). An ambiguous

record, such as the one presented in the instant case, cannot satisfy the petitioner's burden. *Davis v. State, supra.*

The record and abstract provided by the petitioner do not comply with Ark. Sup. Ct. R. 4-2. We deem them flagrantly deficient, and deny the petition.

Larry KEMP *v.* STATE of Arkansas

CR 97-932 956 S.W.2d 860

Supreme Court of Arkansas
Opinion delivered December 11, 1997

Appellant, pro se.

No response.

PER CURIAM. Larry Kemp was convicted of being a felon in possession of a firearm. Mr. Kemp sought postconviction relief pursuant to Ark. R. Crim. P. 37.1 which allows "[a] petitioner in custody under a sentence of a circuit court" to seek release from custody, a new trial, or modification of sentence upon a showing of one or more grounds listed in the Rule.

Mr. Kemp petitioned the Pope Circuit Court relief pursuant to the rule. The petition was denied. He has appealed from that decision. The State moves to dismiss the appeal on the ground that, although Mr. Kemp's sentence included a fine, it did not include confinement so he is not a person "in custody." The argument is that the Circuit Court was thus without jurisdiction

to proceed pursuant to the Rule, and therefore, we lack jurisdiction as well.

Mr. Kemp's response concedes he has no right to relief under Rule 37.1 unless it can be found that he is in custody. He contends, however, that "in custody" as used in Rule 37.1 should include a person who has been sentenced to a fine. That is so, says Mr. Kemp, because such a person is subject to incarceration in the event the fine is not paid. It is argued further that our Rule is, as we said in *Mason v. State,* 285 Ark. 484, 687 S.W.2d 849 (1985), modeled upon federal *habeas corpus* laws in which, Mr. Kemp argues, the concept of "custody" is expanded to include the situation in which a person has been fined.

While we decline to hold that we lack jurisdiction in this matter in view of the State's failure to cite any law or case that says so, we dismiss the appeal because Mr. Kemp's argument with respect to whether he is in custody is without merit. In support of his argument Mr. Kemp cites *U.S. v. Keane,* 852 F.2d 199 (7th Cir. 1988) (*coram nobis* petition seeking return of fine held improper after custody had ceased), *U.S. ex rel. Lawrence v. Woods,* 432 F.2d 1072 (7th Cir. 1970) (*habeas corpus* petition filed while petitioner was in custody held not moot after his discharge from custody), and *Hanson v. Circuit Court of First Judicial Circuit of Illinois,* 591 F.2d 404 (7th Cir. 1979) (*habeas corpus* held not available to a person subjected to a "fine-only" sentence). None of the cases is in point here.

The appeal is dismissed because Mr. Kemp has failed to demonstrate that he is a person "in custody" as required by Rule 37.1.

Altricia MUHAMMED *v.* STATE of Arkansas

CR 97-1048 957 S.W.2d 692

Supreme Court of Arkansas
Opinion delivered December 11, 1997

Appellant, pro se.

No response.

PER CURIAM. On June 28, 1996, judgment was entered in the Circuit Court of Clark County reflecting that Altricia Muhammed had been found guilty by a jury of possession of a controlled substance and sentenced to 120 months' imprisonment. Her retained attorney, Gregory Bryant, filed a timely notice of

appeal from the judgment on July 8, 1996. Counsel subsequently sought in the trial court to have Ms. Muhammed declared indigent, or, in the alternative, to be relieved as counsel. The trial court declined to declare Muhammed indigent. The court also declined to relieve counsel, correctly noting that any motion to be relieved which Bryant desired to file must be addressed to this court because a notice of appeal had been filed in the case.

Mr. Bryant did not proceed here to be relieved, and the appeal has gone unperfected. Ms. Muhammed now seeks by *pro se* motion to proceed with a belated appeal of the judgment. As the notice of appeal was timely filed, we treat the motion as a motion for rule on clerk rather than a motion for belated appeal and grant it.

The direct appeal of a judgment of conviction is a matter of right, and a state cannot penalize a criminal defendant by declining to permit an appeal when the defendant's counsel has failed to follow mandatory appellate rules. *Reagan v. State*, 316 Ark. 511, 872 S.W.2d 396 (1994), *citing Evitts v. Lucey*, 469 U.S. 387 (1985). Rule 16 of the Rules of Appellate Procedure—Criminal provides:

> Trial counsel, whether retained or court appointed, shall continue to represent a convicted defendant throughout any appeal to the Arkansas Supreme Court, unless permitted by the trial court or the Arkansas Supreme Court to withdraw in the interest of justice or for other sufficient cause.

Once the notice of appeal was filed, attorney Bryant was obligated to perfect the appeal. If he desired to ask to be relieved of responsibility for the appeal or to have his client declared indigent, his course of action was an appropriate motion filed here with a partial record. In no event may counsel simply abandon an appeal, and Bryant remains responsible for representing the appellant. *See Atkins v. State*, 308 Ark. 675, 827 S.W.2d 636 (1992).

Attorney Bryant is directed to appear before this court on Thursday, January 8, 1998, at 9 a.m. and show cause why he should not be held in contempt for failure to perfect this appeal.

A copy of this opinion will be forwarded to the Committee on Professional Conduct.

Motion for rule on clerk granted.

ARNOLD, C.J., not participating.

Wilbert MULDREW *v.* STATE of Arkansas

CR 97-561 957 S.W.2d 693

Supreme Court of Arkansas
Opinion delivered December 11, 1997

David Mark Gunter, for appellant.

No response.

PER CURIAM. The procedural background in this matter is set forth in our *per curiam* opinion delivered on November 13, 1997. *Muldrew v. State*, 330 Ark. 609, 954 S.W.2d 272 (1997). Attorney David Mark Gunter, counsel for appellant Wilbert Muldrew, was ordered to appear before this court on December 4, 1997, to show cause why he should not be held in contempt for his failure to file Muldrew's brief in a timely manner. Mr. Gunter appeared on that date, entered a plea of guilty to the contempt citation, and accepted full reponsibility for failing to file Muldrew's brief.

Based on the foregoing, we hold that Mr. Gunter is in contempt for failing to file Muldrew's brief in a timely manner.

We fine him $250.00 and will allow him to file a belated brief in this matter. A copy of this opinion will be forwarded to the Committee on Professional Conduct.

Steve CRISWELL *v.* Melyssa HOLLIDAY

97-1327 957 S.W.2d 181

Supreme Court of Arkansas
Opinion delivered December 11, 1997

Diana M. Maulding, for appellant.

No response.

PER CURIAM. Steve Criswell, by his attorney, has filed a motion for a rule on the clerk.

The Pulaski County Chancery Court entered an order on July 3, 1997, regarding appellant's visitation with the minor child. Pursuant to Ark. R. Civ. P. 60, appellant filed a motion to set aside that order on July 8, 1997. Before the trial court ruled upon appellant's motion to set aside, he filed a first notice of appeal on August 6, 1997, and an amended first notice of appeal on August 7, 1997. The first notice of appeal and amended first notice of appeal reflected that appellant was appealing from the July 3, 1997 order.

On August 26, 1997, the Pulaski County Chancery Court denied appellant's motion to set aside the July 3, 1997 order. Appellant filed a second notice of appeal on August 29, 1997, which reflected that he was appealing from the August 26, 1997 order and the July 3, 1997 order.

Pursuant to Ark. R. App. P.—Civ. 4(a), a notice of appeal shall be filed within thirty (30) days from the entry of the judgment, decree or order appealed from. The deadline for filing a notice of appeal is not extended by the filing of a motion under Ark. R. Civ. P. 60. *See*, Ark. R. App. P.—Civ. 4(b). Therefore, the first notice of appeal and first amended notice of appeal, filed by appellant on August 6 and August 7, 1997, were not timely with regard to an appeal from the July 3, 1997 order.

However, the second notice of appeal filed by appellant on August 29, 1997, was timely with regard to an appeal from the August 26, 1997 order. *Smart v. Biggs*, 26 Ark. App. 141, 760 S.W.2d 882 (1988). Notwithstanding the fact that (a) appellant has not filed a timely appeal from the July 3, 1997 order and (b) the July 3, 1997 order is not an "intermediate order" under Ark. R. App. P.—Civ. 2(b), his timely appeal from the August 26, 1997 order will necessarily involve a review of the trial court's references to the July 3, 1997 order, in the August 26, 1997 order.

The motion for rule on the clerk is, therefore, granted with regard to appellant's appeal from the August 26, 1997 order.

Robin K. SCHLESIER *v.* STATE of Arkansas

CR 97-399 955 S.W.2d 910

Supreme Court of Arkansas
Opinion delivered December 11, 1997

PER CURIAM. On October 9, 1997, the Honorable Steele Hays was appointed the master to conduct the hearing in this contempt proceeding. It is necessary that a substitute master be appointed, and we hereby appoint the Honorable Robert Dudley to succeed Justice Hays as the master in this matter. After the hearing, we direct the master to make findings of fact and file them with the court. Upon receiving the master's findings, we will decide whether Nila J. Keels should be held in contempt.

Lawrence BROWN *v.* DEPARTMENT OF HUMAN SERVICES

97-479 956 S.W.2d 866

Supreme Court of Arkansas
Opinion delivered December 18, 1997

Law Offices of Treeca J. Dyer, P.A., by: *Treeca J. Dyer*, for appellant.

Joel P. Landreneau, for appellee.

W.H. "DUB" ARNOLD, Chief Justice. The appellants, Lawrence Brown and Charles Murdock, appeal an order of the Pulaski County Circuit Court upholding the decision of the Office of Hearing and Appeals of the Arkansas Department of Human Services that there was some credible evidence to support allegations that they had abused a juvenile at a youth facility in North Little Rock. Finding no merit to the appellants' three arguments for reversal, we affirm the trial court's judgment.

The appellants first argue that the trial court erred in rejecting their argument that their due process rights were violated because OHA did not complete its hearing process within ninety

days from the date that it received their request for a hearing. Under the Arkansas Administrative Procedures Act, particularly Ark. Code Ann. § 12-12-512 (Repl. 1995), the administrative hearing process must be completed within ninety days from the date of receipt of the request for a hearing. Appellants filed their request for a hearing on January 31, 1996, but OHA did not conclude the hearing until May 21, 1996.

We need not decide whether this delay prejudiced the appellants' due process rights because they did not present this argument to OHA. It is well-settled that we do not set aside an administrative determination on a ground not presented to the agency. *Alcoholic Beverage Control Div. v. Barnett*, 285 Ark. 189, 685 S.W.2d 511 (1985). The trial court correctly rejected the appellants' argument for this reason.

Next, the appellants assert that the trial court erred in rejecting their argument that the continuance of the hearing from May 2, 1996, to May 21, 1996, on DHS's motion so that it could secure the presence of its key witness in the case, violated their due process rights. We cannot reach this argument because the record reveals that no objection was made below to the granting of a continuance. Because the appellants failed to present this argument at the administrative hearing, we do not consider it on appeal. *Riverways Home Care v. Ark. Health Serv. Comm'n*, 309 Ark. 452, 831 S.W.2d 611 (1992).

Finally, the appellants contend that because the trial court found that there was some credible evidence of abuse, it erroneously felt compelled to reject their due process arguments, as it reasoned that it "must affirm the DHS decision." Arkansas Code Annotated § 25-12-212(h) (Repl. 1996) provides in part that the trial court "may" reverse or modify an agency's decision if it determines that the substantial rights of the petitioner have been prejudiced due to an agency's decision that is in violation of constitutional or statutory provisions. Thus, under our statute, even if we were to agree that the appellants' due process rights were violated, it would have been within the trial court's discretion to reverse and remand their case. When reviewing the trial court's order, it appears to us that he made separate findings with respect

to the substantive evidence of abuse and the appellants' due process claims. In any event, we cannot say that the trial court erred.

For the foregoing reasons, we affirm the trial court's decision.

CRITTENDEN HOSPITAL ASSOCIATION *v.* The BOARD OF EQUALIZATION of Crittenden County

97-43 958 S.W.2d 512

Supreme Court of Arkansas
Opinion delivered December 18, 1997

Hanover, Walsh, Jalenak & Blair, by: *James A. Johnson*, for appellant.

Hale, Fogleman & Rogers, by: *Joe M. Rogers*, for appellees.

W.H. "DUB" ARNOLD, Chief Justice. The property that is the subject of this appeal is a physicians' office building and parking lot located adjacent to the Crittenden Memorial Hospital and leased from the county by appellant Crittenden Hospital Association. The primary issue presented is whether this property is exempt from ad valorem taxation as public property used exclusively for public purposes. Ark. Const. article. 16, § 5(b). The Association was assessed taxes for this property for the tax year 1993 and applied for an exemption. The County Equalization Board denied the exemption. The Association appealed to the

county court, which reversed the board's ruling and ordered the property to be removed from the tax rolls. The tax assessor appealed to the circuit court, which ruled that the Association had not met its burden of proving that the property was used exclusively for public purposes. The Association appeals, raising several arguments for our review. We have permitted the Arkansas Hospital Association to file a brief as amicus curiae in support of the Association's position. Finding no merit to the Association's claims, we affirm the circuit court's judgment.

I. Burden of proof

We examine first the Association's argument that the circuit court erred in requiring it to establish an entitlement to the tax exemption beyond a reasonable doubt. In making its argument, the Association asks us to reconsider our well-established case law on ad valorem tax exemptions:

> It is settled that a taxpayer must establish an entitlement to an exemption beyond a reasonable doubt. *City of Little Rock v. McIntosh*, 319 Ark. 423, 892 S.W.2d 462 (1995). A strong presumption operates in favor of the taxing power. *Id.* Tax exemptions must always be strictly construed against the exemption. *City of Fayetteville v. Phillips*, 306 Ark. 87, 811 S.W.2d 308 (1991). In *Hilger v. Harding College*, 231 Ark. 686, 331 S.W.2d 851 (1960), we wrote:
>
>> Taxation is an act of sovereignty to be performed, so far as conveniently can be, with justice and equality to all, and exemptions, no matter how meritorious, are acts of grace, and must be strictly construed, and every reasonable intendment must be made that it was not the design to surrender the power of taxation or to exempt any property from its due proportion of the burden of taxation.
>
> *Id.* at 693, 331 S.W.2d at 855 (*quoting Brodie v. Fitzgerald*, 57 Ark. 445, 22 S.W. 29 (1893)).

City of Fayetteville v. Phillips, 320 Ark. 540, 899 S.W.2d 57 (1995). We have plainly stated that "[w]e cannot accept any lesser standard for a tax exemption case arising under the Constitution." *City of Fayetteville v. Phillips*, 306 Ark. 87, 811 S.W.2d 308 (1991).

We decline to depart from our long line of cases embracing this standard of proof.

II. Exclusivity requirement

Article 16, section 5(b), of the Arkansas Constitution provides that:

> The following property shall be exempt from taxation: public property used exclusively for public purposes, . . . and buildings and grounds and materials used exclusively for public charity.

It is undisputed that the building and parking lot are public property; thus, the question is whether the property is used exclusively for public purposes. The circuit court concluded that the Association failed to prove beyond a reasonable doubt that the building and lot are used exclusively for public purposes. The Association challenges this conclusion, claiming that the facts presented to the circuit court demonstrated that the properties indeed serve a public and charitable purpose.

The Association initially points to the fact that the properties were constructed for a public purpose. In 1976, Crittenden County issued bonds for the purpose of financing extensions and improvements to its hospital. The following year, the bonds were refunded to finance the costs of these improvements, which included the construction of the physicians' office building and parking lot in question. The 1977 bonds were issued under the authority of Act 175 of 1961, codified at Ark. Code Ann. § § 14-265-101 *et seq.* (1987). In the county's official statement required to issue the bonds, it concluded that the improvements to the hospital and surrounding facilities were necessary in order to recruit new physicians to the area and thus to provide medical care to the public. The county entered into a long-term lease agreement whereby it leased the hospital and surrounding facilities to the Association, a not-for-profit corporation. The Association leases office space in the physicians' office building to doctors engaged in private practice who also staff the hospital. It receives rental income from this property and uses it to fund the operation of the

hospital. According to the Association, it has not raised the rental price since the building was erected.

The Association contends that, since the purpose of constructing the building and parking lot was to attract physicians to the county and thus provide better medical care to its citizens, this public purpose justified the issuance of a tax exemption. According to the Association, the legislature, in passing Act 175, pronounced the public policy to assist hospitals and related facilities with financing. However, the issue here turns not on the purpose behind the issuance of the bonds under Act 175 to construct these properties, but on whether the building and lot are exclusively used for public purposes and are thus entitled to a tax exemption under Article 16, § 5(b). We illustrated this point in *Holiday Island Suburban Improvement District No. 1 v. Williams*, 295 Ark. 442, 446, 749 S.W.2d 314 (1988), a case involving recreational facilities that were open only to members of an improvement district:

> The District contends there is a distinction between a public use and a public purpose, proposing that the Article 16 exemption rests not upon *usage* by the public but upon a public purpose as that term is used in connection with tax exempt revenue bonds. The District submits that "retirement" is an industry and Holiday Island promotes employment and other economic benefits to northern Arkansas. No doubt that is true, and if the issue here were tax exemption for the income from improvement district bonds, the public purpose might well be satisfied. But this is not the issue and it is clear the phrase "public purpose" is not an exact term, susceptible of a static definition [*City of Glendale v. White*, 194 P.2d 435 (Ariz. 1948)], but has various shades depending on whether the context is eminent domain, revenue bonds, lending the credit of a political subdivision, or tax exemption under § 5(b) of Article 16. Thus, our decision here deals only with a public purpose within the context of Article 16 § 5(b).

The Association further contends that the building should be considered as part of the hospital because one could not function without the other. The collection of rent, the Association asserts, is merely incidental to the charitable purpose of the hospital. In support of its argument that its purpose is not to make a profit, the

Association alludes to the fact that it has not raised the rental fees for the building. However, the applicable test for Article 16, § 5(b), purposes is not whether the rents collected from the building are used for a public purpose, but whether the building is used exclusively for a public purpose:

> There is a material difference between the use of property exclusively for public purposes and renting it out and applying the proceeds arising therefrom to the public use. The property under our Constitution must be actually occupied or made use of for a public purpose and our court has recognized the difference between the *actual use* of the property and the *use of the income.*

Hilger v. Harding College, 231 Ark. 686, 694, 331 S.W.2d 851 (1960) (emphasis in the original); *see also City of Fayetteville v. Phillips*, 320 Ark. 540, 899 S.W.2d 57 (1995); *Off-Street Parking Development District No. 1 v. City of Fayetteville*, 284 Ark. 453, 683 S.W.2d 229 (1985).

The Association asks that we apply the rationale of our decision in *Burgess v. Four States Memorial Hospital*, 250 Ark. 485, 491, 465 S.W.2d 693 (1971), where we recognized that a benevolent and charitable organization's property used as a hospital may be constitutionally exempt from taxation if it is open to the general public, if its services are not refused for inability to pay, and if all profits go toward maintaining the hospital and extending and enlarging its charitable purposes. However, in that case, we held that the chancellor did not err in finding that a portion of hospital property for which rents were collected was not being used directly and exclusively for a charitable purpose and thus was subject to taxation. *Id.* at 493. The tax exemption of the hospital, we said, was not affected by the revenue-generating hospital building, just as the building was not made exempt by the tax-exempt hospital. *Id.* In so holding, we emphasized that the determining factor for tax-exemption purposes is the actual use to which the property is put. *Id.*

In the present case, the circuit court considered evidence that the Association rents the building exclusively to for-profit private health-care providers. While the Association presented testimony that the parking lot is used by hospital physicians, patients, staff,

and visitors, there was also evidence that it is used by the physicians who rented the building and their patients. The circuit court obviously considered this evidence in reaching its conclusion that the Association failed to meet its burden of proving that the building and lot are used exclusively for public purposes, as "[t]o doubt is to deny the exemption." *City of Little Rock v. McIntosh*, 319 Ark. 423, 426, 892 S.W.2d 462 (1995); *quoting Pledger v. Baldor Int'l*, 309 Ark. 30, 33, 827 S.W.2d 646, 648 (1992). Moreover, an additional reason for the trial court's decision to deny the exemption is the fact that the building is in competition with other tax-paying medical facilities in the county. *See City of Little Rock v. McIntosh, supra* (city and its airport commission not entitled to ad valorem exemption where city leased airport property in question to private car rental agencies who were in competition with other tax-paying car rental companies); *City of Fayetteville v. Phillips, supra* (art center not entitled to ad valorem exemption where facility offered priority seating whereby the general public was excluded to an unknown extent from events and the center was in competition with similar tax-paying art facilities).

The Association further contends that the building is being used exclusively for the public purpose of insuring that the hospital will continue to survive. Requiring the payment of taxes on the building, the Association suggests, would threaten the existence of the hospital. After reviewing the record, we cannot say that the Association proved beyond a reasonable doubt that the hospital would not survive without a tax-free physicians' office building.

We will set aside the circuit court's findings of fact only if they are clearly erroneous. *City of Little Rock v. McIntosh, supra.* When reviewing all the facts in this case, we cannot say the circuit court's finding that the Association failed to prove beyond a reasonable doubt that the building and lot are used exclusively for public purposes was clearly erroneous.

III. Estoppel

The Association further contends that the tax assessor should be estopped from assessing ad valorem taxes against the Associa-

tion. In making its argument, the Association refers us to the lease agreement between it and the county that provides that the county will take no action to assess the leased premises. According to the Association, the assessor, whom it claims is a county official, should not be permitted to break this covenant.

The assessor is charged with the duties of making the county tax books and preparing and submitting a final abstract of those books to the State Equalization Board. *See* Ark. Code Ann. § 28-28-303 (Supp. 1995). The lease agreement referenced by the Association was not signed by the assessor, but the county judge. Thus, the assessor is not bound by the contents of the lease agreement. However, even if we were to agree with the Association that the assessor was bound by the agreement's terms, the parties to this agreement are "conclusively presumed" to have contracted with reference to the existing law, which, in this case, is our Constitution, article 16, § 5(b). *See Ellison v. Tubb*, 295 Ark. 312, 749 S.W.2d 650 (1988); *quoting Robards v. Brown*, 40 Ark. 423 (1883).

For the foregoing reasons, we affirm the decision of the circuit court.

GLAZE and IMBER, JJ., concur.

CORBIN and THORNTON, JJ., dissent.

TOM GLAZE, Justice, concurring. Although Crittenden Hospital Association contends that estoppel applies in this case, I thoroughly disagree. The Association's argument is based upon the county having leased the hospital office building to the Association and thereby agreeing "no part of the leased premises would be subject to ad valorem taxation." The tax assessor was not a party to the lease.

This court has held that a government entity can be estopped to deny the *authorized* acts of its officers, but it cannot be estopped by the *unauthorized* acts of its officers. *See Miller v. City of Lake City*, 302 Ark. 267, 789 S.W.2d 440 (1990); *Klinger v. City of Fayetteville*, 297 Ark. 385, 762 S.W.2d 338 (1988); *Greene County v. Paragould*, 166 Ark. 192, 265 S.W.2d 839 (1924).

Here, the county court and the county judge leased the premises to the Association without the tax assessor joining in the agreement. Nevertheless, the assessor is the county officer who is mandated by law to assess and place a value on all real properties. *See* Ark. Code Ann. §§ 26-26-301 -1306 (Repl. 1992) and (Supp. 1995). Simply put, neither the county court nor the county judge was authorized to agree to dispense with the imposition of an ad valorem tax on the leased premises. Consequently, under a long line of Arkansas case law, estoppel is not applicable to the circumstances described in this case. I join in the majority opinion on the other points with these added thoughts regarding estoppel.

IMBER, J., joins this concurrence.

DONALD L. CORBIN, Justice, dissenting. I dissent. The majority's decision is based on a long-standing precedent that entitlement to a tax exemption has to be proven beyond a reasonable doubt. It gives no consideration to the legislative intent declared by the Hospital Revenue Bond Act, Ark. Code Ann. § 14-265-102, the enabling act in this case. The burden here is too onerous. Proof beyond a reasonable doubt is a criminal standard and should not be applicable in a civil proceeding because it violates due process guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article 2 of our Arkansas Constitution.

It is no small wonder that there have been several efforts to seek a new constitution over the past twenty or so years. I suspect that it is the very strictness and narrow-mindedness of this court's interpretations of our 1874 Constitution that has led to the dissatisfaction with that Constitution. I am forced to the inescapable conclusion that, historically, it is rare to find a tax that this court does not like.

The record in this case outlines the critical atmosphere of modern rural Arkansas as it relates to the delivery of health care to our rural citizens. Hospitals have closed their doors throughout rural Arkansas. Crittenden County recognized the critical shortage of doctors in rural Arkansas and made a noble effort to protect the health and welfare of its citizens by establishing a plan to attract physicians to its rural location. Today we condemn these

efforts, placing the future health and welfare of Crittenden County residents at risk.

THORNTON, J., joins in this dissent.

RAY THORNTON, Justice, dissenting. In return for providing charitable care to the public, nonprofit hospitals historically have been afforded tax exemptions on their buildings and lands. Crittenden Hospital is no exception, having provided millions of dollars of charity care over the years to Crittenden County residents. It is not only the physical plant and the lands that allow the Hospital to provide charity care, but also it is the physicians who examine and treat those citizens in the hospital, and who provide after care to those same citizens in their office building following discharge from the Hospital. Without physician staff at the Hospital, the Hospital could not provide charity care. Without physician aftercare, medical services to the poor would be poor indeed. It is for this reason, and the reasons set forth below, that I respectfully dissent from the decision by the majority.

In affirming the trial court's ruling, the majority relies on the extraordinary standard of proof required to sustain a tax exemption. The majority then exercises its review of the trial court's decision and determines that the trial court's finding that the Association failed to prove beyond a reasonable doubt that the building and parking lot were used exclusively for public purposes was not clearly erroneous. While I agree that the decision of the trial court should be accorded deference, this case presents an issue involving the interpretation of our constitution, and it is our responsibility to decide the legal issues and to develop a coherent principle of law for application in future cases.

Under Article 16, section 5, of the Arkansas Constitution, all real and tangible personal property are taxable, except those enumerated in subsection (b), which excludes from taxation "public property used exclusively for public purposes; . . . and buildings and grounds . . . used exclusively for public charity." The statutes add that all buildings, and lands on which these buildings sit, are exempt from taxation so long as they are "not leased or otherwise used with a view to profit." Ark. Code Ann. § 26-3-301(7) (Supp. 1995).

The constitution does not define every instance of "exclusive public use and purpose." In light of that, we have adhered to the notion that "public policy is declared by the General Assembly; not by courts," when considering issues of tax exemption. *Kerr v. East Cent. Arkansas Regional Hous. Auth.*, 208 Ark. 625, 630, 187 S.W.2d 189, 192 (1945).

In this case, the improvements to the hospital complex were financed pursuant to Act 175 of 1961, which authorizes counties to build health-care facilities for the public benefit and provides the procedure for issuance of bonds to accomplish that public purpose. In Act 175, the legislature spoke: improvement of health care is of vital importance to the public; and as such, the construction of needed health-care facilities is a necessary and essential public purpose and function of county governments. *See* preamble to Health Care Facilities Act, codified at §§ 14-265-101 to -112.

Our decisions over many years have construed "exclusive public use and purpose" in the terms of "necessary and essential public purpose and function." When reading these cases together, a coherent principle of law emerges: A facility of a tax-exempt organization does not lose its exclusive public purpose when a private person exacts a benefit as long as the facility remains essential and necessary to the organization's primary public or charitable purpose.

In one of the earliest cases, we determined that school property held for investment was not exempt from taxation, and said: "It is necessary that a school district shall have a school building and grounds . . . . But it is not essential that a school district should hold land for the purpose of sale or rent, and as an investment for profit." *School Dist. of Fort Smith v. Howe*, 62 Ark. 481, 487, 37 S.W. 717, 718 (1896). We expanded on this analysis in *Hilger v. Harding College*, 231 Ark. 686, 331 S.W.2d 851 (1960). In that case, we determined that the operation of a printing plant, a laundry, and a dairy, at least partially for profit, caused the college to lose its tax-exempt status for those operations because they were not necessary to the educational purposes of the institution. We noted, however, that a different result might be reached if the

college offered courses of instruction requiring those operations. We said: "If and when [animal husbandry and dairying courses are offered,] a different situation will be presented relative to the exemption from taxation of such equipment and lands as are necessary to implement such course or courses . . . ." *Hilger*, 231 Ark. at 695, 331 S.W.2d at 856.

While we have recently held that the operations by private businesses of aircraft modification and service shops, car rental agencies, and other for-profit enterprises justified the removal of tax-exempt status, the thoughtful dissent by Justice Glaze joined in by two other justices reminds us of the well-established principles that clearly apply to the facts before us. *City of Little Rock v. McIntosh*, 319 Ark. 423, 892 S.W.2d 462 (1995). The dissent pointed out that the majority opinion "ignores the well-settled rule that, where the primary and principal use to which the property is put is public, the mere fact that income is incidentally derived from its use does not affect its character as property devoted to public use." *Id.* at 432, 892 S.W.2d at 468. Equally important, the dissent recognized the "essential" character of the aircraft modification and service shops to the operation of the airports. *Id.* at 433, 892 S.W.2d at 468.

In the case before us, the primary purpose of the improvements was, and is, to attract new physicians to the area to deliver needed medical care to the County's citizens. Without physicians, the hospital cannot provide that charity care. These physicians need office space, and they need a place to park their cars. Here, the Hospital's office building and parking lot remain essential and necessary to the Hospital's primary public and charitable purpose because they afford space for an important Hospital resource, the physician staff, to practice its trade.

Further, it should not matter that these physicians also treat patients who are able to pay their bills, just as it does not matter that tax-exempt hospitals may treat patients who pay their bills. *See Burgess v. Four States Memorial Hosp.*, 250 Ark. 485, 465 S.W.2d 693 (1971). Like the charity hospital, a physician who provides charity care must also treat non-charity patients to survive. Moreover, it would defy logic to preserve a tax exemption

when physicians deliver this medical care from office space located in the Hospital, but to deny this exemption when these physicians provide this care in an adjacent building, connected by a walkway.

The majority points out that the trial court based its decision, in part, on the fact that the office building is in competition with other tax-paying medical facilities in the county. I find no merit in this argument. While appellees state that at least fifty percent of the physicians in the area are housed in buildings in competition with the Hospital's office building, appellees do not tell us how many of those physicians provide charity care at the Hospital, or whether those physicians were recruited to the area by the Hospital to deliver needed care to the County's citizens.

I believe the trial court erred in interpreting the law, and clearly reached the wrong conclusion on the evidence presented in this case. I would also reverse the court under principles that we established in another context, the use of municipal bonds and tax exemptions to attract industry to our state. In *Wayland v. Snapp*, 232 Ark. 57, 334 S.W.2d 633 (1960), we held that the profits made by a private manufacturing plant constructed on public lands using tax-exempt bonds did not invalidate the public policy of providing employment opportunities, and therefore met the constitutional exemption from ad valorem taxes.

The appellants in that case challenged the manufacturing plant's tax exemption as "contrary to Article 16, sections 5 and 6 of the Arkansas Constitution." *Id.* at 61, 334 S.W.2d at 636. In disposing of this argument, we held:

> As we understand the above provisions of the Constitution, for property to be exempted from taxation two elements must be present: (a) the subject property must be "public property", that is, it must be owned [in this instance] by the City of Batesville; (b) it must be used exclusively for public purposes. In our opinion both of these elements are present . . . . Any benefit [the manufacturer] may receive from this entire undertaking will be entirely incidental it seems to us.

Id. at 72, 334 S.W.2d at 641. *Wayland* tells us that the exclusive public use that justifies the tax exemption is determined by the public benefit of the entire project, not just the subtenant's use.

Here, as in *Wayland*, the exclusive public use is to provide needed medical care to the citizens of Crittenden County. These citizens would suffer an important detrimental loss without this tax-exempt undertaking.

For sixteen years, Crittenden County honored its agreement not to seek or impose ad valorem taxes on the improved property, the use and purpose of which has not changed. We need not rely, however, on principles addressing the question of estoppel in concluding that the actions of the Tax Assessor should be reversed on the basis of the reasons stated in this dissent.

CORBIN, J. joins.

Thomas B. SCHUECK *v.* W.F. BURRIS

97-465 957 S.W.2d 702

Supreme Court of Arkansas
Opinion delivered December 18, 1997

Mark T. McCarty, for appellant.

Lewis E. Ritchey, for appellee.

W.H. "DUB" ARNOLD, Chief Justice. The appellee, W. F. Burris, filed a negligence suit against the appellant, Thomas B. Schueck, in Pulaski County Circuit Court. Following a bench trial, the trial judge ruled that Mr. Schueck was negligent and that he had breached the parties' contract. The trial judge awarded Mr. Burris a judgment of $1392.51. It is from that judgment that Mr. Schueck appeals, raising four allegations of error. We find no merit to his arguments and affirm.

The parties are former owners of adjacent properties located in the Hillside Village area of Little Rock. They entered into a written agreement in 1978 to settle Mr. Burris's claim that he had established title by adversely possessing a portion of Mr. Schueck's land. Pursuant to the agreement, Mr. Burris received $2,500.00

cash and was entitled to use, for so long as he owned and occupied his property, a six-foot strip of Mr. Schueck's land running along Mr. Burris's south property line. Desiring to settle the ownership dispute, Rector-Phillips-Morse, Inc. ("RPM"), the agent who sold Mr. Schueck his lot and a party to the 1978 agreement, constructed a six-foot-high wooden fence, six feet south of Mr. Burris's south property line, that extended the 140-foot depth of Mr. Burris's lot. RPM also covenanted to leave the property in such a condition that Mr. Burris could plant and mow the strip. On January 3, 1979, Mr. Burris and his wife executed a quit-claim deed in favor of Mr. Schueck, relinquishing all of their ownership rights in the disputed property.

In 1994, Mr. Schueck began construction of six separate patio homes known as Fillmore Place. During this construction, Mr. Schueck's contractor removed the six-foot wooden fence described in the 1978 agreement and replaced it with a twelve-foot-high wall. The height of the new fence was six feet off the ground at one end of the property line and then rose to twelve feet at the other end, with a concrete wall underneath the wooden portion of the fence.

In Mr. Burris's complaint against Mr. Schueck, he alleged that Mr. Schueck's agent negligently carried out the performance of constructing the patio homes, resulting in damage to his land and property. Specifically, Mr. Burris claimed that Mr. Schueck's negligent and intentional actions caused the loss of a fence, the destruction of twelve azalea bushes, the erosion of soil, and the destruction of siding on the southeast corner of his home. Mr. Burris requested compensatory damages in the amount of $1,838.51, attorney's fees, and costs.

After hearing the testimony of the parties and other witnesses, the trial judge ruled in Mr. Burris's favor. Mr. Schueck appeals.

1. *Negligence*

Mr. Schueck first claims that the trial judge's finding that he was negligent was not supported by substantial evidence. This is not, however, the correct standard of review in

civil cases where the trial judge, rather than a jury, sits as the trier of fact. In bench trials, the standard of review on appeal is not whether there is any substantial evidence to support the finding of the court, but whether the judge's findings were clearly erroneous or clearly against the preponderance of the evidence. *Superior Improvement Co. v. Mastic Corp.*, 270 Ark. 471, 604 S.W.2d 950 (1980); *see also* Ark. R. Civ. P. 52. Particularly, to meet his burden of proving negligence, Mr. Burris was required to prove that he sustained damages, that Mr. Schueck was negligent, and that Mr. Schueck's negligence was the proximate cause of his damages. *See Anselmo v. Tuck*, 325 Ark. 211, 924 S.W.2d 798 (1996).

At trial, Mr. Burris claimed that cement and water used during the construction of the foundation of the patio homes washed onto his property and damaged his twelve azalea bushes. In support of this claim, Mr. Burris offered oral testimony, photographic evidence, and a written estimate of the cost of replacing the lost bushes. Mr. Schueck's general contractor also testified that "some of the cement did go into Mr. Burris's azalea bed," and that "[t]he concrete people may have ruined the azaleas." On appeal, Mr. Schueck merely maintains that Mr. Burris failed to establish the "three-prong requirement for negligence as it relates to the allegedly destroyed azaleas." We disagree. In light of the above evidence, the trial judge could have rightfully concluded that Mr. Burris sustained damages to his azaleas, that Mr. Schueck was negligent in permitting cement to run into the azalea beds, and that, as a result of Mr. Schueck's negligence, Mr. Burris's azalea bushes were lost. We cannot say that the trial judge's finding in this regard was clearly erroneous.

Mr. Burris further testified that his property was eroded and offered photographic evidence of erosion damage. He testified that the drainage problems began after Mr. Schueck's construction in 1994. Prior to that, he claimed that there were no drainage problems in over thirty years. On appeal, Mr. Schueck asserts that Mr. Burris had existing drainage problems prior to the construction, and that the preventative land contouring and drainage control measures improved, rather than exacerbated, these problems. He also argues that Mr. Burris's oral estimates of damages pro-

vided no basis for the trial judge's award because Mr. Burris lacked credibility.

The trial judge was free to find Mr. Burris a truthful witness. As the fact-finder, it was within the judge's "province to believe or disbelieve the testimony of any witness." *Smith v. Galaz*, 330 Ark. 222, 953 S.W.2d 576 (1997). In this case, the trial judge was in the best position to observe Mr. Burris, to hear his testimony, and to weigh the alleged inconsistences argued by Mr. Schueck. In this regard, we conclude that the trial judge's finding as to Mr. Burris's erosion claim was not clearly erroneous.

Mr. Burris also claimed that trim on the southeast corner of his house was damaged by Mr. Schueck's subcontractor's truck. According to Mr. Burris, the truck was driven on the elevated ground and caught the telephone wire attached to his house, pulling the trim off the structure. He contended that the trier of fact might infer from circumstantial evidence that his damages were proximately caused by Mr. Schueck's negligence. In a negligence action, the proximate-cause evidence is sufficient "if the facts proved are of such a nature and are so connected and related to each other that the conclusion therefrom may be fairly inferred." *White River Rural Water Dist. v. Moon*, 310 Ark. 624, 839 S.W.2d 211, 212 (1992). Proximate cause is a cause that, in a natural and continuous sequence, produces damage and without which the damage would not have occurred. *Id.*

Giving the trial judge's finding the benefit of all reasonable inferences permissible under the proof, we cannot agree that his finding as to the damaged siding was clearly erroneous.

2. Breach of contract

Mr. Burris maintained at trial that Mr. Schueck's intentional acts caused the removal and loss of the six-foot-high wooden fence that was erected pursuant to their 1978 written agreement. He presented photographic evidence, a written estimate of replacement cost, and oral testimony to prove his damages. On appeal, Mr. Schueck asserts that Mr. Burris's failure to specifically plead breach of contract in his complaint barred the trial judge from awarding contract damages.

Arkansas Civil Procedure Rule 15(b) permits the amendment of pleadings to conform to the evidence presented at trial. If an issue is tried by the implied consent of the parties, it shall be treated as if it were raised in the pleadings. *Godwin v. Churchman*, 305 Ark. 520, 810 S.W.2d 34 (1991). A party may move to amend the pleadings, but failure to do so does not affect the result of the trial of the issue. *Id.*

Mr. Schueck contends that, because the contract claim was not specifically pleaded, he was deprived of notice and the opportunity to prepare a defense to this claim at trial. The record, however, does not support his contention. In his motion to dismiss made at the close of Mr. Burris's case, Mr. Schueck's attorney argued the alleged lack of proof on the contract issue, stating that the "agreement is explicit on the terms in regard to [the] fence." Under these circumstances, we cannot agree that Mr. Schueck was unaware of the contract claim. Thus, the trial judge did not err in treating the contract issue as if it were raised in the pleadings.

Turning to the merits of Mr. Burris's contract claim, the trial judge heard testimony that the new fence was twelve-feet high and encompassed a concrete wall that prevented maintenance and mowing. When considering the four corners of the parties' 1978 written agreement, the photographic evidence, and oral testimony describing the old and new fences, we cannot say that the trial judge's finding that Mr. Schueck breached the contract was clearly erroneous.

3. Attorney's fees

Next, Mr. Schueck asserts that the trial judge's award of attorney's fees was inappropriate because the case involved a tort action. We do not reach this argument because Mr. Schueck did not object to this award below. Thus, he has not preserved this issue for appeal. *Jamison v. Estate of Goodlett*, 56 Ark. App. 71, 938 S.W.2d 865 (1997).

4. Evidentiary rulings

Finally, Mr. Schueck maintains that the trial judge erred in allowing Mr. Burris to testify about the terms of the parties' 1978 agreement. Mr. Schueck claims that this testimony was permitted in violation of the parol evidence rule, which prohibits the introduction of extrinsic evidence to vary the terms of a written agreement, absent an ambiguity in the contract's terms. *First National Bank of Crossett v. Griffin*, 310 Ark. 164, 832 S.W.2d 816 (1992). This rule does not, however, prohibit a trial judge from becoming familiar with the circumstances surrounding the making of a contract. *Id.* On appeal, we will not reverse the trial judge's ruling allowing or disallowing evidence absent an abuse of discretion. *Id.*

Mr. Burris's disputed testimony at trial was as follows:

> I signed this agreement on December 26, 1978. I basically agreed to sign this document and waive any claims to the property. And as part of that agreement, [RPM] constructed a fence on my property line. As part of this agreement, I was entitled to use six feet of that land south of my property for my life, and they built the fence directly on that line. I could not tell you when the fence was built, but it [was] shortly after 1979. . .

He further described his maintenance efforts and the difference between the old and new fences. When viewing this testimony, we cannot say that it varied the terms of the parties's contract; rather, Mr. Burris was merely describing the circumstances surrounding the making of the 1978 agreement. Therefore, we conclude that the trial judge did not abuse his discretion in permitting this testimony.

Mr. Schueck further contends that the trial judge should have permitted an RPM employee who negotiated the 1978 agreement to testify about his interpretation of the contract. The trial judge disallowed this testimony as well as the agent's opinion testimony regarding Mr. Burris's rights under the contract. On appeal, Mr. Schueck asserts that Mr. Burris opened the door to this otherwise inadmissible testimony.

Having concluded that Mr. Burris's testimony was properly admitted, we disagree that Mr. Burris opened the door to testimony violative of the parol evidence rule. While Mr. Burris's testimony addressed circumstances surrounding the making of the agreement, the agent's testimony was offered to elicit a legal opinion and an interpretation of the contract that could vary its terms in the absence of any ambiguity in those terms. See *First National Bank of Crossett v. Griffin, supra.* Under these circumstances, we hold that the trial judge did not abuse his discretion in disallowing this testimony.

Affirmed.

TRI-COUNTY FUNERAL SERVICE, INC., d/b/a Howard Funeral Home *v.* EDDIE HOWARD FUNERAL HOME, INC.

97-220 957 S.W.2d 694

Supreme Court of Arkansas
Opinion delivered December 18, 1997

Horne, Hollingsworth & Parker, by: *Allan W. Horne* and *Mark H. Allison*, for appellant.

Blair & Stroud, by: *J. Scott Davidson* and *Robert D. Stroud*, for appellee.

DAVID NEWBERN, Justice. This is a trade-name infringement case. The appellant, Tri-County Funeral Service, Inc. ("Tri-County"), which does business as Howard Funeral Home in Melbourne, sought an injunction pursuant to Ark. Code Ann. § 4-71-113 (Repl. 1996) to prohibit the appellee, Eddie Howard Funeral Home, Inc., also located in Melbourne, from using the name "Howard" in connection with its funeral business. The Chancellor declined to issue the injunction. Our determination in this *de novo* review is that Tri-County was entitled to the relief sought; thus we reverse the Chancellor's decision.

In 1949, Roman and Wilma Howard began working for the Roller Funeral Home in Melbourne. At some point in the 1950s they left that employment. The funeral home changed hands several times, and Mr. and Mrs. Howard returned as employees in 1961. A Mr. Robinson purchased the business while it was being operated as "McCollum Funeral Home," and in 1968 Mr. Robinson asked the Howards for permission to operate as "Howard Funeral Home," although the Howards owned no interest in the business. Permission was granted.

In 1974, Billy Howard, Mr. and Mrs. Howard's son, joined them as an employee of Howard Funeral Home. In 1978, the business was sold to Justin Jones who, in 1984, sold it to Rhodes-Madden, Inc., the parent company of Tri-County. In the sales agreement, there was a provision selling the name, "Howard Funeral Home." The ensuing bill of sale, however, did not mention the sale of the name. Tri-County continued to operate the business as Howard Funeral Home.

Roman Howard retired sometime during the 1980s. Billy Howard left his employment with the business in 1984. Wilma Howard remained until 1989 when her employment was terminated because of rumors that Billy Howard was attempting to open a competing funeral business.

In 1991, Billy Howard was rehired by Tri-County to manage the business, and he rehired Wilma Howard as an employee. In 1992, Billy Howard hired his younger brother, Eddie Howard, to work in the business. Billy Howard died, and Eddie Howard became the manager in 1994. In 1996, Eddie Howard's employment was terminated due to his apparent efforts to begin a competing business. Wilma Howard then resigned from her employment with Tri-County.

Eddie Howard established "Eddie Howard Funeral Home, Inc.," a corporation of which he and his wife are the only shareholders. Tri-County sued to prevent that corporation from using the Howard name, alleging that the name had acquired a secondary meaning and that it constituted an interest protectable in accordance with § 4-71-113.

Eddie Howard and Wilma Howard intervened in the proceeding with a complaint seeking to enjoin Tri-County from using the name "Howard," alleging that they had not been compensated for the use of the name and seeking to revoke the permission given to Tri-County's predecessor.

At the trial, Robert Eichelberger, secretary-treasurer of the parent company of Tri-County, testified that when his company purchased a funeral home it attempted to keep the same name and employees in the operation so that people may not even realize that a change in ownership has taken place. He testified further that there had been a slight decrease in the business of Howard Funeral Home since the Eddie Howard Funeral Home commenced operations and that some confusion had resulted from the fact that two funeral businesses are now using the Howard name.

The first of two orders issued by the Chancellor denied temporary relief to Tri-County. The Chancellor emphasized that the Howards had not been compensated for the use of their name and that Tri-County had failed to show that any property interest had been "damaged" by use of the name by Eddie Howard Funeral Home, Inc. The subsequent order denied permanent relief but ordered Eddie Howard to return a customer list to Tri-County. In his order denying relief to Tri-County, the Chancellor dismissed the Howards' claim in intervention, and no appeal has been

taken from that aspect of the order. Nor has the order to return the list been appealed by Eddie Howard.

The relevant language of § 4-71-113 is as follows: "Likelihood of injury to business reputation or of dilution of the distinctive quality of . . . a trade name valid at common law, shall be grounds for injunctive relief notwithstanding the absence of competition between the parties or the absence of confusion as to the source of goods and services." Eddie Howard Funeral Home, Inc., concedes that the Chancellor applied the wrong standard in holding that there had been no showing of "damage" to an interest held by Tri-County, as the statute imposes no such requirement. The question for us is thus whether Tri-County had a "trade name valid at common law," and if so, whether there was "likelihood of injury" to Tri-County's "business reputation" or "dilution" of its trade name. In addition, we consider whether Eddie Howard has an inherent right to use his own name in his business even if it runs afoul of an established secondary meaning and the protection offered by the statute.

■ Generally speaking, the granting or denying of an injunction is a matter within the discretion of a chancellor, and we do not reverse unless there has been a clearly erroneous factual determination, *Warren v. Robinson*, 288 Ark. 249, 704 S.W.2d 614 (1986); *Bassett v. City of Fayetteville*, 282 Ark. 395, 669 S.W.2d 1 (1984), or unless the decision is contrary to some rule of equity or the result of improvident exercise of judicial power. *Mills v. Patton*, 233 Ark. 755, 346 S.W.2d 689 (1961). We agree, however, with Tri-County's assertion that when a statute provides terms that constitute grounds for issuing an injunction, a chancellor's discretion is somewhat circumscribed. *See State Industrial Accident Comm'n v. Miller*, 162 P.2d 146, 150 (Or. 1945)(stating injunction should issue when statute imposes "positive duty" "upon the court to grant injunctive relief . . . when the conditions set forth therein are made to appear"); *Vicksburg, S. & P. Ry. Co. v. Webster Sand, Gravel & Constr. Co.*, 62 So. 140, 143 (La. 1913); *Sawyer v. Termohlen*, 122 N.W. 924, 925 (Iowa 1909).

1. *Trade name property*

Eddie Howard Funeral Home, Inc., suggests that Tri-County was not entitled to an injunction because it has no valid interest or property right in using the "Howard" name in connection with its business. The suggestion seems to be that Tri-County had not acquired an interest in the Howard name because (1) neither it, nor any of its predecessors, paid consideration to the Howards for the use of their name; (2) the Howards had orally given permission to Mr. Robertson to use their name, and that permission was later revoked with respect to Tri-County; and (3) the right to use the Howard name was not mentioned in the bill of sale and thus was not acquired by Tri-County from Mr. Jones. No authority is cited by the Howards or the Chancellor for the proposition that successful acquisition of a trade name depends on those factors.

There is ample authority for the proposition that a person acquires a property right in a trade name merely by using the name in connection with a particular business for a period of time.

"Generally, the word 'trade name' applies to a business and its good will, while the word 'trade-mark' applies to the commodity to which it is affixed." *King Pharr Canning Operations, Inc. v. Pharr Canning Co.*, 85 F. Supp. 150, 157 (W.D. Ark. 1949). "Trade names are afforded protection under the law of unfair competition. They are protected by a registration statute and by the common law. *See* Ark. Stat. Ann. 70-539(E), 70-550 [now Ark. Code Ann. § 4-71-113], and 70-552 (Repl. 1979)." *Pullan v. Fulbright*, 287 Ark. 21, 23, 695 S.W.2d 830, 831 (1985). "[W]hen a name, mark or symbol has acquired a 'secondary meaning,' the original user has a 'property right which equity will protect against unfair appropriation by a competitor.'" *Champions Golf Club, Inc. v. Sunrise Land Corp.*, 846 F. Supp. 742, 757 (W.D. Ark. 1994), *quoting Pullan v. Fulbright, supra.*

The concept of "secondary meaning" has been explained as follows:

> There are certain names, marks, and symbols which in their primary sense are merely generic or descriptive and do not ordinarily indicate the origin of goods or services. Such names, marks,

> or symbols, when used in their primary sense, cannot form the subject matter of a trade or service mark. However, a name, mark, or symbol by long and exclusive use and advertising by one person in the sale of his goods and services may become so associated in the public mind with such goods or services that it serves to identify them and distinguish them from the goods or services of others. When such an association exists, the name, mark, or symbol is said to have acquired "secondary meaning" in which the original user has a property right which equity will protect against unfair appropriation by a competitor.

Pullan v. Fulbright, 287 Ark. at 23-24, 695 S.W.2d at 831, *quoting Liberty Mut. Ins. Co. v. Liberty Ins. Co. of Tex.*, 185 F.Supp. 895, 903 (E.D. Ark. 1960).

We do not have many cases that thoroughly treat the question of how one acquires a property right in a trade name. Of course, we have recognized that a person may acquire such a right by *purchasing* the name. *See Williams v. Spelic*, 311 Ark. 279, 284, 844 S.W.2d 305, 309 (1992)("When a business purchases goodwill and a trade name, it acquires a valuable property right, and that is the right to inform the public that it possesses the experience and skill symbolized by the original concern."; sale of trade name specifically mentioned in bill of sale).

One may, however, acquire a protectable interest in a trade name, without purchasing the rights to it, simply by using the name in connection with a business over the course of time and giving a "secondary meaning" to the name. *Clyde Campbell University Shop v. Campbell-Bell, Inc.*, 243 Ark. 937, 422 S.W.2d 875 (1968); *Liberty Cash Groceries, Inc., v. Adkins*, 190 Ark. 911, 82 S.W.2d 28 (1935). *See also Champions Golf Club, Inc. v. Sunrise Land Corp.*, 846 F. Supp. at 757 (stating the right to a trademark or trade name "originates in common law by prior appropriation and use"), *citing* 4A RUDOLF CALLMAN, THE LAW OF UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES § 25.03 (L. Altman ed., 4th ed. 1993); RESTATEMENT OF THE LAW (THIRD) *Unfair Competition* § 18, at p. 184 (1995).

Tri-County has used the Howard name continuously in connection with its business since 1984, and prior owners of the business used the name continuously since 1968. No one else in the

area used that name or a similar name in connection with any business. The Howards, themselves, had never used their own name in connection with a business they owned. Howard Funeral Home was one of only two funeral businesses in the area, and its share of the funeral business was near 70 percent before Eddie Howard opened his business in 1996. Tri-County advertised and promoted its name in various ways.

Thus, it is clear that Tri-County went through the necessary steps of acquiring "Howard Funeral Home" as a valid trade name with obvious "secondary meaning." It occurred irrespective of any "permission" initially *given* by the Howards to Mr. Robertson in 1968 and irrespective of the fact that the Howards later purported to *revoke* the permission with respect to Tri-County, after it had used the name beginning in 1984.

The Howard name was not previously appropriated when Mr. Robertson began to use it in connection with his funeral business in 1968. It was just a surname, and there is no protection given to a surname until it acquires a secondary meaning. 2 McCarthy on Trademarks and Unfair Competition § 13.02[1], at p. 13-5 (3d ed. 1995). In 1968, the Howards had not used their name in connection with their business; it had not acquired a secondary meaning. Thus, it was not necessary for the Howards to "permit" Mr. Robertson or anyone else to call the business the "Howard Funeral Home" because the Howards had not established a protectable interest in their name.

It also was irrelevant that the bill of sale was silent on the matter of whether the right to the Howard Funeral Home trade name passed in the transaction between Mr. Jones and Tri-County. Regardless of what transpired in connection with the bill of sale, Tri-County has continued to use, advertise, and promote the Howard Funeral Home name since 1984. Even if Tri-County did not "acquire" the right to that name at the precise point of the 1984 transaction with Mr. Jones, Tri-County most certainly gave the name a "secondary meaning" in the years thereafter.

2. *Infringement*

The next question is whether Eddie Howard Funeral Home, Inc., by calling its business the "Eddie Howard Funeral Home," has infringed on Tri-County's trade name, "Howard Funeral Home." According to the statute, Tri-County has presented grounds for an injunction against Eddie Howard Funeral Home, Inc., if the latter's actions have created a "[l]ikelihood of injury to business reputation or of dilution of the distinctive quality of . . . a trade name valid at common law." Ark. Code Ann. § 4-71-113 (Repl. 1996). That "likelihood," if established, "*shall* be grounds for injunctive relief notwithstanding the absence of competition between the parties or the absence of confusion as to the source of goods or services." *Id.* (emphasis added).

"The issue is . . . one . . . of the *likelihood* of dilution of the value of the trade name as an asset by its use by someone other than the owner." *Williams v. Spelic*, 311 Ark. at 282, 844 S.W.2d at 308. *See also Wood v. Wood's Homes, Inc.*, 519 P.2d 1212, 1215 (Colo.App. 1974)("Nor is it necessary for the plaintiff to prove *present damage,* since the purpose of the action is to prevent the damage which *would* arise if defendant becomes established under the deceptive name.")(emphasis added).

> "An infringement on a trade name is such a colorable imitation of the name that the general public, in the exercise of reasonable care, *might* think that it is the name of the one first appropriating it. Where such a similarity occurs, it *tends* to divert trade from a business rival who has previously adopted its name and operates as a fraud which may be restrained by injunction, although the prior users may not have an exclusive right to the use of the name."

Liberty Cash Groceries, Inc. v. Adkins, 190 Ark. at 912, 82 S.W.2d at 28 (emphasis added), *quoting* 26 R.C.L., at p. 876.

Tri-County demonstrated all that the statute required it to demonstrate to be entitled to injunctive relief. It established at least a likelihood of harm or dilution, given the fact that the names are sufficiently similar, Howard Funeral Home had long established a secondary meaning, and — although seemingly made unnecessary by the statute — there was testimony about name

confusion and a decrease in Howard Funeral Home's business following the opening of Eddie Howard's business.

3. The right to use one's own name

Older cases suggested that a junior user, or "second comer," should never be enjoined from using his or her own name in connection with a business, even if a senior user of the same name could be harmed. *See, e.g., Societe Vinicole de Champagne v. Mumm*, 143 F.2d 240, 240 (2d Cir. 1944). As early as 1949, however, Judge John Miller in *King Pharr Canning Operations, Inc. v. Pharr Canning Co.*, 85 F. Supp. 150, 153-54 (W.D. Ark. 1949), rejected the "sacred right" theory in a case involving the federal trade-mark law.

Recent cases reject the idea that a junior user has an absolute or "sacred" right to use his or her own name in business if a first comer has been using that name and has established a secondary meaning. *See generally* Annotation, *Use of "Family Name" by Corporation as Unfair Competition*, 72 A.L.R.3d 8 (1976). *See also* McCarthy, *supra*, at § 13.03[3], at p. 13-13. Because it may become a trade name subject to the rule of priority in order to prevent deception of the public, one has no absolute right to use one's own name, even honestly, as the name of a business. *John R. Thompson Co. v. Holloway*, 366 F.2d 108, 113 (5th Cir. 1966). *See* McCarthy, *supra*, at § 13.03[6], at pp. 13-25 to 13-28 (discussing cases imposing "absolute prohibition against use of personal name as business mark").

No doubt one may continue to use one's own name personally even after another has added a secondary meaning to it. The question, however, is whether one may use one's own name in a business if there is a likelihood of dilution of the trade name used by the party having established a secondary meaning or injury to the business reputation of the first user.

In *Williams v. Spelic, supra*, the office-supply portion of a business known as "Vowels Printing and Supply" was sold to Mr. and Mrs. Spelic by Mr. and Mrs. Williams. The Vowels name had been used by Mrs. Williams's father in connection with the business for many years and Vowels apparently was Mrs. Williams's

name prior to her marriage. The part of the business sold was the office-supply portion. The Williamses retained the printing portion that operated across the street from the office-supply store. The Chancellor found that the sales agreement had impliedly sold the Vowels name to the Spelics. The Williamses began using the Vowels name with their printing business. One of the Williamses' arguments on appeal of an injunction against their use of the Vowels name was that "a family name may be used in the absence of fraud or deceit unless the exclusive right to the family name is contracted away." 311 Ark. at 282, 844 S.W.2d at 308. We held that the argument ignored the statutory grounds for injunction, noting that a showing of a likelihood of injury to the trade name was sufficient for the issuance of the injunction.

An inescapable conclusion to be drawn from our decision in the *Williams* case is that we reject the "sacred right" argument because, "[w]hen a surname is used as a trade name, it risks becoming a symbol of the business and losing its individual identity." *Id.* at 284, 844 S.W.2d at 309.

4. Conclusion

The decision of the Chancellor is reversed. Eddie Howard Funeral Home, Inc., is enjoined from using the name "Howard" as part of the name of its business or to identify its business.

IMBER, J., not participating.

Paul CALCAGNO *v.* SHELTER MUTUAL INSURANCE COMPANY and Bill Bledsoe

97-45 957 S.W.2d 700

Supreme Court of Arkansas
Opinion delivered December 18, 1997

Q. Byrum Hurst, Jr., for appellant.

Matthews, Sanders & Sayes, by: *Margaret M. Newton* and *Roy Gene Sanders*, for appellees.

DONALD L. CORBIN, Justice. Appellant Paul Calcagno appeals the decision of the Garland County Circuit Court dismissing his complaint for negligence and breach of contract against Appellees Shelter Mutual Insurance Company and Bill Bledsoe. The Arkansas Court of Appeals affirmed the trial court's decision. *Calcagno v. Shelter Mut. Ins. Co.*, 55 Ark. App. 321, 934 S.W.2d 548 (1996). We granted Appellant's petition for review of that decision pursuant to Ark. Sup. Ct. R. 1-2(e). When we grant review following a decision by the court of appeals, we review the

case as though the appeal was originally filed with this court. *Olsten Kimberly Quality Care v. Pettey*, 328 Ark. 381, 944 S.W.2d 524 (1997). We affirm.

The facts of this case are not in dispute. Appellant was injured in an automobile accident on January 11, 1990. Appellant settled with the tortfeasor for the limits of the tortfeasor's insurance policy on January 24, 1992. Appellant then demanded payment from Shelter for underinsured motorist coverage pursuant to his insurance policy, as his medical damages exceeded the amount of money available from the tortfeasor's insurance. Shelter refused to pay, asserting that Appellant's policy did not include underinsured motorist coverage. Appellant filed his initial complaint against Shelter on February 23, 1993, for breach of contract and for the negligence of Bledsoe, Shelter's agent. The complaint was amended to include Bledsoe as a named defendant in December 1994.

Appellees filed motions to dismiss the complaint on the ground that the three-year statute of limitations barred both causes of action. They argued that the limitations period began to run on January 11, 1990, the date of the accident, and that Appellant's initial complaint filed on February 23, 1993, was untimely. The trial court agreed with Appellees and granted the motions.

It is clear from a review of the abstract that the trial court treated the motions to dismiss as motions for summary judgment, by considering the partial depositions of Appellant and Bledsoe. Where the trial court considered matters outside the pleadings, we will treat the motion as one for summary judgment. ARCP Rule 12(b)(6); *Smothers v. Clouette*, 326 Ark. 1017, 934 S.W.2d 923 (1996). Summary judgment should only be granted when it is clear that there are no genuine issues of material fact to be litigated and the moving party is entitled to judgment as a matter of law. *Pugh v. Griggs*, 327 Ark. 577, 940 S.W.2d 445 (1997). The burden of sustaining a motion for summary judgment is the responsibility of the moving party. *Morrison v. Jennings*, 328 Ark. 278, 943 S.W.2d 559 (1997). 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. *Pugh*, 327 Ark. 577, 940 S.W.2d 445. This court views the evidence in a light most favorable to the party against whom the motion was filed, resolving all doubts and inferences against the moving party. *Id.* Where it is clear that the statute of limitations bars the action, summary judgment is appropriate. *Alexander v. Twin City Bank*, 322 Ark. 478, 910 S.W.2d 196 (1995).

I. Action Against Bledsoe

It is Appellant's theory that Bledsoe was negligent in failing to advise him about underinsured motorist coverage at the time he obtained his policy from Shelter, and that Ark. Code Ann. § 23-89-209 (Supp. 1987) required insurance companies and their agents to make such coverage available to the named insured. The parties to this suit agree that the applicable statute of limitations for negligent acts of an insurance agent is three years. *See* Ark. Code Ann. § 16-56-105 (1987); *Flemens v. Harris*, 323 Ark. 421, 915 S.W.2d 685 (1996). The question then is when did the action against Bledsoe accrue.

Appellant contends that the cause of action accrued on the date that he settled his claim with the tortfeasor. He claims that prior to such settlement, he was not in fact underinsured. Appellant relies on the cases of *State Farm Mut. Auto. Ins. Co. v. Beavers*, 321 Ark. 292, 901 S.W.2d 13 (1995), and *State Farm Mut. Auto. Ins. Co. v. Thomas*, 316 Ark. 345, 871 S.W.2d 571 (1994), in support of his argument. Appellant's reliance on those cases is misplaced, as neither case presented a question involving the statute of limitations.

In *Flemens*, 323 Ark. 421, 915 S.W.2d 685, which was relied upon by the court of appeals, this court held that in an action for negligence against an insurance agent, the three-year-limitations period begins to run, absent concealment of the wrong, on the date that the negligent act was committed, rather than the date that it was discovered. This court recognized the harshness of this rule to insurance clients, but nevertheless concluded that it would be up to the General Assembly to effect a change in the well-

settled principle that an action for negligence accrues at the time the negligent act is committed.

Here, the alleged negligent act, Bledsoe's failure to make underinsured motorist coverage available to Appellant, occurred on the date that Appellant obtained his insurance policy, which was sometime prior to January 11, 1990. Appellant's initial complaint was not filed until February 23, 1993. Applying the holding in *Flemens*, it is clear that Appellant's claim for the alleged negligent actions of Bledsoe is precluded by the statute of limitations.

II. Action Against Shelter

Appellant makes an identical argument with regard to his claim for breach of implied contract against Shelter. Appellant asserts that his action against Shelter is one based upon a contract implied in law, as opposed to one implied in fact, because Shelter did not fulfill its statutory duty by making underinsured motorist coverage available to him. Without reaching the issue of whether the action against Shelter is barred by the statute of limitations, we affirm the trial court's ruling on the basis that Appellant did not present proof of a material element of his claim.

At the time that Appellant obtained his insurance policy with Shelter, section 23-89-209(a) provided in pertinent part:

> Every insurer writing automobile liability insurance covering liability arising out of the ownership, maintenance, or use of any motor vehicles in this state shall make underinsured motorist coverage available to the named insured[.]

To sustain his action against Shelter, Appellant must prove that Shelter failed to fulfill its duty under section 23-89-209 to make underinsured motorist coverage available to him at the time he took out his policy with Shelter. It is the act of failing to inform an insured about the availability of underinsured motorist coverage that triggers the trial court's implying such coverage by operation of law. *Shelter Mut. Ins. Co. v. Irvin*, 309 Ark. 331, 831 S.W.2d 135 (1992); *see also Colonia Underwriters Ins. Co. v. Richardson*, 325 Ark. 300, 924 S.W.2d 808 (1996).

Appellant has failed to demonstrate that Shelter did not fulfill its duty to make such coverage available to him pursuant to section 23-89-209. In fact, Appellant conceded in his deposition that Shelter did comply with the statutory requirements. When asked by Shelter's counsel if he had previously known about the existence of underinsured motorist insurance, Appellant indicated that he was aware of that type of coverage, but that Bledsoe had told him about it anyway. Thus, Appellant has admitted that Shelter fulfilled its statutory duty by informing him of the existence and availability of underinsured motorist coverage. This court has recognized that summary judgment is proper when an appellant fails to present proof of a material element of his claim. *Bushong v. Garman Co.*, 311 Ark. 228, 843 S.W.2d 807 (1992). We have recently held that where a plaintiff "makes a pivotal admission that goes to the heart of the case," we will affirm the grant of summary judgment. *Sublett v. Hipps*, 330 Ark. 58, 65, 952 S.W.2d 140, 144 (1997).

Accordingly, because Appellant's own words contradict the very basis of his claim against Shelter, we conclude that the trial court was correct in ruling that Shelter was entitled to summary judgment. We will affirm the ruling of the trial court if it reached the right result, even though it may have been for a different reason. *Nettleton Sch. Dist. v. Owens*, 329 Ark. 367, 948 S.W.2d 94 (1997).

Affirmed.

Leo DARROUGH *v.* STATE of Arkansas

CR 96-1514 957 S.W.2d 707

Supreme Court of Arkansas
Opinion delivered December 18, 1997

Clarence W. Cash, Jr., for appellant.

Winston Bryant, Att'y Gen., by: *Mac Golden*, Asst. Att'y Gen., for appellee.

ROBERT L. BROWN, Justice. Appellant Leo Darrough was convicted of possession of a controlled substance with intent to deliver. He was sentenced to eighty years' imprisonment as a habitual offender with four or more prior offenses. His sole assignment of error concerns the sufficiency of the evidence supporting his conviction. We affirm.

At trial, Little Rock Police Department Narcotics Detective Bruce Jones testified that he executed a search warrant for an address on Highway 365 on December 21, 1994. He stated that the structure he entered was a double-door garage, and upon entry, he found Darrough and another man who he believed to be Roderick Darrough. He searched the garage and discovered a small pill bottle wrapped in black duct tape on the garage floor about three feet behind Leo Darrough. The pill bottle contained numerous off-white, rock-like substances which he assumed was crack cocaine. His belief was confirmed by the State Crime Lab. On cross-examination, Detective Jones admitted that there may have been more people in the garage than the two men and that he did not know who owned the building.

Officer Austin Lynch, who was then a member of the Little Rock Police Department's Narcotics Division, testified that he orchestrated a controlled buy in the garage about 30 to 45 minutes before executing the search warrant. As part of the subsequent search, he found $230 on Leo Darrough, which included a $20 bill that matched the serial number of a $20 bill used in the controlled buy. According to Officer Lynch, though Darrough did not reside in the residence located just northeast of the garage, some of his relatives did. On cross-examination, Officer Lynch admitted that he did not enter the garage as part of the controlled buy but, rather, the buy was accomplished by a confidential informant. Officer Lynch also related that the informant told him that he made the purchase from a person matching Leo Darrough's physical description and the clothes Darrough was wearing and that there were two other people in the garage. He testified that the informant bought one-quarter gram of crack cocaine.

At the conclusion of the State's case, Darrough's counsel moved for a directed verdict on two grounds: (1) that there was insufficient evidence connecting him to the cocaine found in the garage, and (2) that the chain of custody was not maintained in a proper fashion. The motion was denied, and Darrough put on no proof.

Darrough now argues that the trial court erred in denying his directed-verdict motion because the evidence presented by the State was insufficient. The standard of review for an appeal from a denial of a motion for directed verdict was reiterated recently in *Williams v. State*, 329 Ark. 8, 16, 946 S.W.2d 678, 682 (1997):

> A motion for directed verdict is treated as a challenge to the sufficiency of the evidence. *Peeler v. State*, 326 Ark. 423, 932 S.W.2d 312 (1996). When a defendant challenges the sufficiency of the evidence convicting him, the evidence is viewed in the light most favorable to the State. *Dixon v. State*, 310 Ark. 460, 839 S.W.2d 173 (1992). Evidence, whether direct or circumstantial, is sufficient to support a conviction if the evidence is forceful enough to compel reasonable minds to reach a conclusion one way or the other. *Peeler v. State, supra; Dixon v. State,*

> *supra.* Only evidence supporting the verdict will be considered. *Moore v. State*, 315 Ark. 131, 864 S.W.2d 863 (1993).

Id.

Under our law, it is clear that the State need not prove that the accused physically possessed the contraband in order to sustain a conviction for possession of a controlled substance if the location of the contraband was such that it could be said to be under the dominion and control of the accused, that is, constructively possessed. *Heard v. State*, 316 Ark. 731, 876 S.W.2d 231 (1994); *Crossley v. State*, 304 Ark. 378, 802 S.W.2d 459 (1991). We have further explained:

> Constructive possession can be implied when the controlled substance is in the joint control of the accused and another. Joint occupancy, though, is not sufficient in itself to establish possession or joint possession. There must be some additional factor linking the accused to the contraband. The State must show additional facts and circumstances indicating the accused's knowledge and control of the contraband.

Hendrickson v. State, 316 Ark. 182, 189, 871 S.W.2d 362, 365 (1994) (citations omitted). *See also Jacobs v. State*, 317 Ark. 454, 878 S.W.2d 734 (1994); *Nichols v. State*, 306 Ark. 417, 815 S.W.2d 382 (1991). When seeking to prove constructive possession, the State must establish (1) that the accused exercised care, control, and management over the contraband, and (2) that the accused knew the matter possessed was contraband. *Darrough v. State*, 322 Ark. 251, 908 S.W.2d 325 (1995); *Plotts v. State*, 297 Ark. 66, 759 S.W.2d 793 (1988).

Darrough relies primarily on *Osborne v. State*, 278 Ark. 45, 643 S.W.2d 251 (1982), where this court held that the State's proof of constructive possession was insufficient to support the appellant's convictions for possession of various controlled substances. That case, however, is factually distinguishable. In *Osborne*, police officers searched the appellant's residence while he was across the street at his parents' home. The police officers discovered phentermine pills in a bedroom dresser and in a suitcase in the hall as well as marijuana on a tray in the living room where the appellant's wife and others were present. This court reversed the

appellant's convictions for possession of these items because the State presented no evidence linking him to the contraband other than proof that the home was his residence. We concluded that in that case the relationship between the appellant and the contraband was speculative. Here, Darrough argues that, as in *Osborne*, there was no proof linking him to the pill bottle found on the garage floor.

Darrough's argument is unavailing. Unlike *Osborne v. State, supra,* in the instant case there was substantial evidence to support the jury's verdict that he exercised dominion and control over the pill bottle and knew that the pill bottle contained contraband. *See Darrough v. State, supra; Plotts v. State, supra.* To summarize that evidence once more, Detective Jones testified that he discovered the pill bottle within three feet of Darrough on the floor. Officer Lynch told the jury that a $20 bill matching the serial number from the previous controlled buy was found on Darrough and that he matched the physical description of the seller as well as the description of the seller's clothing which were given to him by the confidential informant.

Darrough makes a number of peripheral arguments, including an assertion that this court should not consider Officer Lynch's testimony about the confidential informant's description because it was hearsay evidence. We note, however, that there was no hearsay objection at trial, and this court has stated repeatedly that hearsay evidence admitted without objection may constitute substantial evidence. *See, e.g., Sanders v. State*, 326 Ark. 415, 932 S.W.2d 315 (1996); *Clemmons v. State*, 303 Ark. 265, 795 S.W.2d 927 (1990); *Johnson v. State*, 298 Ark. 617, 770 S.W.2d 128 (1989).

Finally, Darrough contends that the State failed to present additional evidence to the jury such as fingerprint evidence with respect to the pill bottle and the confidential informant's testimony. Be that as it may, we are only called upon to decide whether the evidence actually presented by the State was substantial, and we conclude that it was.

Affirmed.

Brian John WHITE *v.* STATE of Arkansas

CR 96-955 958 S.W.2d 519

Supreme Court of Arkansas
Opinion delivered December 18, 1997
[Petition for rehearing denied January 22, 1998.]

Sam Sexton III, for appellant.

Winston Bryant, Att'y Gen., by: *Sandy Moll*, Asst. Att'y Gen., for appellee.

ROBERT L. BROWN, Justice. This appeal arises out of the conviction of appellant, Brian White, for the offense of sexual abuse in the first degree. White received a sentence of eighteen years. He raises multiple points on appeal, none of which has merit. We affirm.

On June 29, 1994, White allegedly had sexual intercourse with a 12-year-old female, NE. The incident was reported to the police on July 9, 1994. At the time, White was on probation due to pleas of guilty that were deferred under Act 346 of 1975, the First Offenders Act.

At trial, the evidence presented by the State consisted primarily of the testimony of the victim together with medical and physical evidence. The victim testified that on the date in question, White, who was the uncle of the victim, was sent to pick up the victim and another minor, Rachel White, who was the 12-year-old aunt of the victim.[1] According to the testimony, White and his girlfriend, Barbara Frazee, took the two girls back to his apartment where they offered the girls alcohol and marijuana,

[1] Though the age of both the victim and Rachel White was 12, Rachel White was indeed the aunt of the victim.

which the girls accepted. The victim testified that she went to sleep in White's bedroom and awoke to find White fondling her. White, she stated, eventually had sexual intercourse with her against her will. Although neither of them actually witnessed the alleged rape, the testimony of Rachel White and Barbara Frazee confirmed certain aspects of the victim's testimony.

The prosecutor also presented physical evidence of the crime. Several items of clothing, including the underwear that the victim claimed to have been wearing that night, were introduced into evidence. These clothing articles were collected by Rogers Police Detective Gary Armstrong and sent to the State Crime Lab for testing. The prosecutor also presented the testimony of two technologists who conducted tests to determine if White and the victim suffered from any sexually transmitted diseases. The tests showed that both the victim and White had chlamydia on July 11 and 12, 1994, respectively. A pharmacist also testified that White had purchased an antibiotic on July 17, 1994, which could be used to cure chlamydia.

I. Discovery Delay

For his first issue White protests the refusal of the trial court to allow the jury to be informed or, alternatively, to instruct the jury that the prosecutor did not turn over the test results on the victim's underwear and hairs found in the underwear conducted by the State Crime Lab until the day before the trial. The test results had been sent to the Rogers Police Department on May 26, 1995. In spite of White's motion to compel discovery filed on January 23, 1995, White had not been told about the tests. The defense moved to exclude the evidence. Recognizing that a violation of Ark. R. Crim. P. 17.1 had occurred, the trial court offered the defense a continuance to allow time to examine the evidence and to have tests performed pursuant to Ark. R. Crim. P. 19.7. White declined and insisted that the trial proceed. The test results were admitted as part of the State's case.

During the trial, White's counsel first tried to cross-examine Detective Gary Armstrong on the failure of the prosecutor to make the Crime Lab report available to him until just before trial.

The trial court ultimately refused to allow defense counsel to inquire into the matter and also refused to instruct the jury on when the defense received the test results. Then, during closing arguments, defense counsel argued to the jury that the reason the prosecutor had not performed DNA tests on hairs found in the victim's underwear was that the State knew White was innocent. The prosecutor responded in his rebuttal argument that White could have performed his own tests, and White's counsel objected based on the fact that the defense did not have time to perform any tests.

The trial court ruled that White had an opportunity to do his own tests and, in effect waived his right to argue that he did not have sufficient time to perform tests on the underwear or the hairs. We agree. The trial court's choice of remedy under Ark. R. Crim. P. 19.7 will not be disturbed absent an abuse of discretion. *Nooner v. State*, 322 Ark. 87, 907 S.W.2d 677 (1995). In *Esmeyer v. State*, 325 Ark. 491, 930 S.W.2d 302(1996), this court addressed a situation where the State failed to disclose a witness before trial:

> [A] failure to disclose that information will not warrant a reversal of a conviction absent a showing of prejudice. *Alford v. State*, 291 Ark. 243, 724 S.W.2d 151 (1987); *Snell v. State*, 290 Ark. 503, 721 S.W.2d 628 (1986). When the State fails to provide the information, the burden is on the appellant to show that the omission was sufficient to undermine the confidence in the outcome of the trial. *Bray v. State*, 322 Ark. 178, 908 S.W.2d 88 (1995). Prejudice, though, does not exist when the defendant already has access to the information that the State did not disclose. *See Johninson v. State*, 317 Ark. 431, 878 S.W.2d 727 (1994).

Esmeyer, 325 Ark. at 499, 930 S.W.2d at 307.

Here, White has been unable to show that the discovery violation resulted in any prejudice because he was offered a continuance to correct any potential prejudice. White argues that the offer of continuance was unacceptable because accepting a continuance would have, in some way, waived his speedy-trial claim. This is simply not true. A continuance charged to the

defendant would have had no effect on any speedy-trial claims that may have existed at that time.

Moreover, the trial court is in the best position to evaluate the potential for prejudice based on the prosecutor's remarks. *Bullock v. State,* 317 Ark. 204, 876 S.W.2d 579 (1994). In the instant case, counsel for the defense invited the State's response in closing argument by implying that the State did not conduct further tests because it knew that White was innocent or because it did not care enough to conduct the tests. The prosecutor's reply that White could have conducted his own tests was warranted and an accurate statement of the situation. There was no misrepresentation by the prosecutor and no abuse of discretion by the trial court in refusing to instruct the jury about the delay in furnishing the test results. *See Lee v. State,* 326 Ark. 529, 932 S.W.2d 756 (1996).

II. Exclusion of Medical Record

For his next point, White contends that the trial court was in error in not allowing his medical record that he tested negative for chlamydia into evidence. The record in question was the result of a chlamydia test performed on him on July 21, 1994. The record was excluded at trial because the trial court found that a proper foundation had not been laid concerning the chain of custody and the protocol followed in collecting the samples. White argues on appeal, however, that a medical record can come in under the business-record exception to the hearsay rule [Ark. R. Evid. 803(6)], and laying a foundation is not required.

We disagree with White's conclusion. The law governing the foundation required for the introduction of evidence and chain of custody is well established:

> Evidentiary matters regarding the admissibility of evidence are left to the sound discretion of the trial court and rulings in this regard will not be reversed absent an abuse of discretion. *Hubbard v. State,* 306 Ark. 153, 812 S.W.2d 107 (1991). We have consistently agreed that the purpose of establishing a chain of custody is to prevent the introduction of evidence that is not authentic or that has been tampered with. *Pryor v. State,* 314 Ark. 212, 861

> S.W.2d 544 (1993). However, the trial court must be satisfied that, in reasonable probability the evidence has not been tampered with; it is not necessary that the State eliminate every possibility of tampering. (citations omitted).

Harris v. State, 322 Ark. 167, 176, 907 S.W.2d 729, 734 (1995).

We conclude that there was no abuse of discretion in the trial court's finding that the testimony presented to establish a foundation for White's independent test was inadequate. Both of the witnesses called by the defense testified that the procedures at the lab were reliable. Yet, neither of the witnesses could testify as to who collected the samples from White and if that person actually followed an established protocol. The sum and substance of the testimony was the trial court could not be assured of how the samples were collected, when they were collected, or even if they were taken from White. Something more must be done to establish the legitimacy of the tests than was done in this case. We have often stated that proof of the chain of custody for interchangeable items like blood must be more conclusive. *See, e.g., Crisco v. State*, 328 Ark. 388, 943 S.W.2d 582 (1997). The same would hold true for a swabbed sample taken in connection with a chlamydia test.

Furthermore, we agree with the State that any error caused by the exclusion of the medical record was harmless because the evidence of a test conducted on July 21, 1994, was irrelevant.

Here, the relevant dates, as shown at trial, are as follows:

- June 19, 1994 — date of the sexual intercourse.
- July 11, 1994 — the victim tested positive for chlamydia.
- July 12, 1994 — White tested positive for chlamydia.
- July 17, 1994 — White purchased an antibiotic that could cure chlamydia.
- July 21, 1994 — White's independent test allegedly showed that he tested negative for chlamydia.

Dr. Denman, the State's expert in pathology, testified that antibiotics could cure chlamydia in as little as two to three days. White's independent test was conducted on July 21, 1994, four days after

purchasing an antibiotic that could cure chlamydia. The fact that he did not have chlamydia on that particular date shed no light on whether he had chlamydia on July 12, 1994.

III. Falsification of Evidence — Collateral issue

White next claims that the trial court erred in refusing to allow testimony about a concerted effort to have NE falsify evidence. White and Carol White, his sister-in-law, worked at a pawnshop owned by White's parents. Carol White was also the grandmother of the victim, NE.

During the direct examination of Chris Fisher, defense counsel elicited testimony that the victim told Fisher that she did not have sex with White and that her grandmother, Carol White, was pressing her to pursue charges against White. Defense counsel later called Carol White as his own witness and asked her leading questions about why she encouraged the victim to press false charges. Specifically, defense counsel asked whether Carol White pursued the charges against White (through NE) "to get Brian White out of the picture." She denied this and also denied that the charges were instigated by her to "get even" with White's mother for not giving her the pawn shop. Defense counsel asked Carol White if she had been stealing from the pawn shop where she and White both worked, it being the theory of the defense that Carol White wanted White out of the pawn shop so she could continue stealing. The prosecutor objected to the question on grounds of relevancy and also on grounds that this was a collateral matter. The trial court sustained the objection.

Defense counsel next sought to call Katherine Ann McElroy and Ellen Wadene White (White's mother) to prove that Carol White wanted the pawn shop, was refused it, and found a way to get even with White's mother for not giving the pawn shop to her. The trial court, after objection by the prosecutor, refused the testimony.

Our Rules of Evidence provide that extrinsic evidence is not admissible to attack the credibility of a witness. Ark. R. Evid. 608(b). However, if collateral evidence is introduced for the purpose of showing the bias of a witness, it is admissible. *Bowden*

v. State, 297 Ark. 160, 761 S.W.2d 148 (1988); *Kellensworth v. State*, 275 Ark. 252, 631 S.W.2d 1 (1982).

We view this issue as being whether proof of Carol White's motives for bringing pressure to bear on NE to institute false charges against White is a proper area for development before the jury. We hold that the trial court did not abuse its discretion in ruling as it did. Defense counsel was allowed to question Carol White about her motives. It was only when the issue of her stealing was raised that the questioning was curtailed. At that point, we agree with the trial court that defense counsel was roaming far afield. Nor do we view these circumstances where encouraging false testimony is alleged as falling within the bias exception.

With respect to extrinsic evidence to impeach Carol White herself, defense counsel attempted to call two witnesses (Katherine Ann McElroy and Ellen Wadene White) to show that Carol White had lied in her answers about wanting the pawn shop and wanting White out of the shop. To call witnesses to show that Carol White had lied about wanting White out of the pawn shop and that that was a motive for pressuring NE to accuse White falsely seems not only collateral but a confusing and convoluted area to explore before the jury. The trial court did not abuse its discretion in refusing this collateral testimony. *See* Ark. R. Evid. 608(b); *Barnes v. State*, 287 Ark. 297, 698 S.W.2d 504 (1985).

IV. Prior Felonies

White contends that the trial court erred in allowing the jury to consider during the sentencing phase the fact that he had previously been found guilty of nine other felonies and was, therefore, a habitual offender. The essence of his argument is that he had not been found guilty of the previous crimes because his guilty pleas were withheld or deferred under Act 346 of 1975, the First Offender Act.

The wording of the Habitual Offender Statute is apposite in resolving this issue:

> (a) A previous conviction or *finding of guilt* of a felony may be proved by any evidence that satisfies the trial court beyond a

> reasonable doubt that the defendant was convicted or found guilty.

Ark. Code Ann. § 5-4-504 (1987) (emphasis ours). Accordingly, if the trial court is convinced beyond a reasonable doubt that a defendant was found guilty of a felony, this may be considered by the jury in sentencing.

During the sentencing phase, but prior to the trial court's instructing the jury, counsel made their arguments to the trial court as to whether the nine Act 346 sentences should be considered by the jury for habitual offender purposes in light of the fact that the convictions were deferred. The trial court found that there was a finding of guilt by the original trial court, following the guilty pleas for habitual-offender purposes.[2] Indeed, in the Order of Probation, the trial court had determined that the guilty pleas were voluntary and that there was a "factual basis" for the pleas. The State, as a result, urges that this meets the finding-of-guilt requirement under § 5-4-504, because the trial court in the instant case ruled that evidence of prior guilt existed beyond a reasonable doubt.

Though this is the first time that we have confronted this precise issue, we conclude that the trial court's finding of sufficient evidence of prior guilt in this case for habitual-offender purposes was not clearly erroneous. We affirm the trial court on this point as well.

V. Speedy Trial

For his next point, White contends that his right to a speedy trial under Ark. R. Crim. P. 28.1 was violated. Both parties concede that White was tried more than twelve months after his arrest, and, therefore, the burden is placed on the State to show sufficient excluded periods under Ark. R. Crim. P. 28.3. White was arrested on July 10, 1994, and his trial began on January 22, 1996, for a total of 561 days between arrest and trial.

In meeting its burden, the State lists the following as excluded time periods:

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[2] The judge was the same person in both instances.

- 14 days – September 19, 1994, to October 3, 1994. Defendant's failure to appear. Agreed to by both parties.
- 14 days – October 3, 1994, to October 17, 1994. Defendant's request.
- 14 days – November 21, 1994, to December 5, 1994. Arraignment order with time charged to defendant.
- 12 days – March 3, 1995, to March 15, 1995. Pre-trial order with time charged to defendant.
- 76 days – March 15, 1995, to May 30, 1995. Pre-trial order continuance granted on motion from defendant.
- 48 days – May 30, 1995, to July 17, 1995. Pre-trial order in which time was allotted to defendant to receive mental evaluation.
- 79 days – July 17, 1995, to October 4, 1995. Pre-trial order with time charged to defendant.
- 83 days – October 25, 1995, to January 16, 1996. Order excluding time due to the unavailability of the victim.

This provides a total of 340 excluded days, which is more than sufficient for the State to comply with Rule 28.

The only time period that White appears to preserve for appeal was the continuance allowed for the unavailability of the victim, NE, to testify. On October 24, 1995, the trial court entered an order granting the State a continuance because the victim was unavailable and the State had shown that it had employed due diligence in an effort to obtain the victim as a witness. The trial court stated in its order that the time would be excluded for speedy-trial purposes. White now argues that the time should not have been excluded for two reasons. First, Ark. R. Crim. P. 28.3 only allows time to be excluded when "evidence" is unavailable and a witness is not evidence. In swift fashion, however, White concedes that this proposition is contrary to our current caselaw. *See Henson v. State*, 38 Ark. App. 155, 832 S.W.2d 269 (1992). *See also Meine v. State*, 309 Ark. 124, 827 S.W.2d 151 (1992).

Secondly, White contends that the time should not be excluded because the witness was, in fact, available. According to White, the only reason the victim was "unavailable" was that she was pregnant and in a drug rehabilitation program in California. The State responds by emphasizing that defense counsel did not ask for a hearing on this precise question until the day of the trial,

almost three months after the order granting the continuance was entered. The trial court refused to revisit its decision that the State had used due diligence to obtain the witness for trial. The trial court correctly applied the due diligence standard. *Meine v. State, supra.* Hence, there was no abuse of discretion on the part of the trial court in excluding the time attributed to the unavailability of NE.

VI. Inappropriate Testimony

Two comments by witnesses denied him a fair trial, according to White. During her direct testimony, VW, who was 16 years old, testified about her sexual relationship with White when she was 12. She testified that at one point White asked her to convince the victim, NE, to go out for the night and rent a room with him. The State asked the witness what she thought when White asked her to do that. She replied: "He was crazy." White's counsel objected, and the trial court overruled the objection. White contends that the trial court's failure to instruct the jury to disregard the statement constitutes reversible error because the witness was not qualified to give an opinion on his mental state.

We disagree. There is no indication that allowing the testimony of VW without an admonition was an abuse of the trial court's discretion. *See Nooner v. State, supra.* There are many things that the witness could have meant by her statement. A conclusion by a teenager that White was "crazy" falls more readily into the category of a non-technical conclusion than a medical opinion. The trial court was in the best position to determine the context and meaning of the statement, and on this point, we will defer to the trial court's ruling.

White's second issue relates to the direct examination of Rachel White, who testified that after charges were filed against White, his parents evicted her from a house they owned. The prosecutor asked her if she knew why she was evicted by White's father. She replied: "Because his son raped my niece." White objected and asked for a declaration of a mistrial. The motion was denied. White then asked the trial court to admonish the jury to disregard the statement, which the trial court did. White now

contends that the statement by Rachel was so prejudicial that only a mistrial could have remedied the prejudice.

We have often stated that a mistrial is such an extreme remedy that it should not be declared unless there has been error "so prejudicial that justice cannot be served by continuing the trial or when the fundamental fairness of the trial itself has been manifestly affected." *See, e.g., Puckett v. State*, 324 Ark. 81, 89, 918 S.W.2d. 707, 711 (1996). A trial court's discretion to grant or deny a mistrial will not be disturbed absent a showing of an abuse of discretion, and a motion for declaration of a mistrial should only be granted when an admonition to the jury would be ineffective. *Id.* We have also held that an admonition can cure any possible prejudice resulting from prosecutorial misconduct. *See, e.g., Sullinger v. State*, 310 Ark. 690, 840 S.W.2d 797 (1992); *Porter v. State,* 308 Ark. 137, 823 S.W.2d 846 (1992).

We conclude that the prosecutor did not ask the question in bad faith. But even if the prosecutor's question was inappropriate, the trial court's admonishment cured any semblance of prejudice. There was no abuse of discretion in denying the mistrial motion.

Affirmed.

CORBIN, J., not participating.

Ronald R. DOUGAN *v.* STATE of Arkansas

CR 97-189 957 S.W.2d 182

Supreme Court of Arkansas
Opinion delivered December 18, 1997

S. Kyle Hunter, for appellant.

Winston Bryant, Att'y Gen., by: *Sandy Moll*, Asst. Att'y Gen., for appellee.

ANNABELLE CLINTON IMBER, Justice. A jury sentenced Ronald Dougan to forty years' imprisonment for rape. Dougan raises four arguments for reversal. Finding no merit to these arguments, we affirm Dougan's conviction.

Ronald Dougan was charged by information with raping his sixteen-year-old stepdaughter on February 20, 1994. At trial, the victim testified that Dougan sexually violated her on five occasions prior to February 20, 1994. According to the victim, Dougan touched her in a sexually explicit manner once when she was six years old, and twice when she was eleven. The victim claimed that in August of 1991, when she was twelve years old, Dougan had sexual intercourse with her. The victim reported the crime to the police, and carnal abuse charges were filed against Dougan. According to the victim, the charges were dropped because her mother forced her to sign a statement declaring that the rape never occurred. Dougan had sexual intercourse with the victim again when she was fourteen years old.

The victim testified that on February 20, 1994, she and her two siblings were sleeping at Dougan's home. The victim claimed that early that morning Dougan came into her room and forced her to have sexual intercourse. The next morning, the victim's aunt, Mary Ann Hemrick, picked-up the children and brought them to her home. A few days later, Dougan called the victim and told her that her five-year-old sister was going to live with him. In response, the victim became hysterical and started crying. The victim then told her aunt that Dougan had raped her, and that she feared he would do the same to her sister. Mary Ann

Hemrick took the victim to a therapist who reported the rape to the Department of Human Services ("DHS"). DHS investigated the matter, and the incident was eventually reported to the police.

Dougan testified in his own defense, and denied having any sexual contact with the victim. Dougan explained that the victim fabricated the August 1991 incident to get attention, and that she lied about the February 1994 incident so that her five-year-old sister could live with her and her aunt.

Jayme Dougan, Ronald Dougan's fourteen-year-old son, testified at trial on behalf of the defense. Jayme testified that he could not sleep the night of February 20, 1994. Jayme claimed that he saw his father sleeping on the couch when he went to the kitchen several times that night. Finally, Jayme testified that he would have seen his father pass his bedroom in order to get to the victim's bedroom.

Based on this evidence, the jury found Dougan guilty of raping the victim on February 20, 1994, and sentenced him to forty years' imprisonment. On appeal, Dougan does not challenge the sufficiency of the evidence to support his conviction. Instead, Dougan asserts that he was denied effective assistance of counsel, that the court erred when it allowed the State to introduce evidence of his prior sexual contact with the victim, and that the court erred when it allowed a witness to read from a DHS report. Because we find no merit in Dougan's arguments, we affirm his conviction.

I. Ineffective Assistance of Counsel

For his first argument on appeal, Dougan asserts that he was deprived of effective assistance of counsel during jury selection because his attorney did not adequately poll the potential jurors and failed to exercise a single peremptory strike. In order for a defendant to argue ineffective assistance of counsel on direct appeal, he must first have presented the claim to the lower court either during the trial or in a motion for new trial. *Chavis v. State*, 328 Ark. 251, 942 S.W.2d 853 (1997); *Smith v. State*, 328 Ark. 249, 943 S.W.2d 234 (1997); *Hicks v. State*, 327 Ark. 652, 941 S.W.2d 387 (1997). Dougan failed to pursue either of these

options, and accordingly we are precluded from addressing this argument on direct appeal.

II. Previous Sexual Misconduct

Next, Dougan claims that the trial court committed reversible error when it allowed the State to introduce evidence of five other instances of alleged sexual misconduct because the State only charged him with raping the victim on February 20, 1994. Specifically, Dougan contends that the testimony was inadmissible pursuant to Ark. R. Evid. 404(b) as character evidence that had no relevance except to show his propensity to commit the crime charged, and that the prejudicial effect of the evidence outweighed its probative value under Ark. R. Evid. 403.

This argument has no merit because we have consistently recognized the "pedophile exception" which states that evidence of similar sexual acts with the same child or other children in the same household is admissible to show a "proclivity toward a specific act with a person or class of persons with whom the accused has an intimate relationship" or to "prove the depraved sexual instinct of the accused." *Douthitt v. State*, 326 Ark. 794, 935 S.W.2d 241 (1996); *Mosely v. State*, 325 Ark. 469, 929 S.W.2d 693 (1996); *Clark v. State*, 323 Ark. 211, 913 S.W.2d 297 (1996); *Thompson v. State*, 322 Ark. 586, 910 S.W.2d 694 (1995). Thus, we conclude that the trial court did not abuse its discretion when it allowed evidence of the five prior instances of sexual misconduct.

III. Disclosure of the DHS Report

Next, Dougan states in passing that his conviction should be reversed because the State failed to disclose the existence of the DHS report, and it did not include a copy of the report in its investigative file. When an appellant does not cite authority or make a convincing argument, and when it is not apparent without further research that the point is well taken, we will affirm. *Qualls v. Ferritor*, 329 Ark. 235, 947 S.W.2d 10 (1997); *Williams v. State*, 329 Ark. 8, 946 S.W.2d 678 (1997). On appeal, Dougan has failed to cite a single authority or make a con-

vincing argument in support of his allegation. In fact, Dougan only mentioned the alleged nondisclosure in a subheading of his brief. Accordingly, we are unable to address the merits of his contention.

IV. The DHS Report as Hearsay

Finally, Dougan asserts that the trial court committed reversible error when it allowed a witness to read portions of a DHS report about the February 20, 1994, incident. As previously mentioned, Jayme Dougan testified that his father did not enter the victim's bedroom on the night of the rape. On cross-examination, the State attempted to impeach Jayme by reading portions of a statement he gave to a DHS social worker a few days after the alleged rape, and the following colloquy occurred:

STATE:	[Reading from the DHS report] "Stated he saw his dad go to [the victim's] bedroom."
JAYME:	He just stuck his head in the door.
STATE:	"And he heard [the victim] saying, 'stop, stop.'"
JAYME:	No, I didn't.
STATE:	She [the social worker] made that up?
JAYME:	I guess she did, 'cause I didn't say that.
STATE:	"Stated he, his dad, was in [the victim's] room for about 30 minutes."
JAYME:	No, he wasn't, either.
STATE:	You didn't say that; she made it up?
JAYME:	I guess she made it up, because he didn't go in there.
STATE:	"Stated he knew it was about 30 minutes by watching his clock in his room."
JAYME:	He never did go in there, so I don't know where they got that from.
STATE:	So that's another lie the Social Worker made up?
JAYME:	I guess it is.

Dougan did not object to any of the above questions or testimony.

Thelma Bean, a Protective Services Supervisor for DHS, testified during the State's case in rebuttal. Bean identified the

report made by the DHS social worker who investigated the February 20, 1994 rape. Bean explained that she did not write the report, but as a supervisor it was a regular business practice for her to keep such reports in her office. The State then asked Bean if the report contained a statement regarding whether Jayme saw his father enter the victim's bedroom. Dougan objected on the basis that the report was hearsay. The State argued that the report fell under the business-record exception to the hearsay rule, and the judge overruled Dougan's objection. Thelma Bean then read the following statement from the DHS report:

> He [Jayme Dougan] stated he saw his dad go into [the victim's] bedroom, and heard [the victim] saying "Stop, stop." Stated he, his dad, was in [the victim's] bedroom for about 30 minutes. Stated he knew it was about 30 minutes from watching his clock in his room.

On appeal, Dougan argues that the trial court committed reversible error when it allowed Thelma Bean to read this portion of the DHS report because it was hearsay that did not fall under the business-record exception. We do not need to address the merits of this argument because we have said on numerous occasions that when hearsay is erroneously admitted, we will not reverse if it is cumulative of other evidence admitted without objection. *Weber v. State*, 326 Ark. 564, 933 S.W.2d 370 (1996); *Luedemann v. Wade*, 323 Ark. 161, 913 S.W.2d 773 (1996); *Caldwell v. State*, 319 Ark. 243, 891 S.W.2d 42 (1995). Of particular importance are *Zufari v. Architecture Plus*, 323 Ark. 411, 914 S.W.2d 756 (1996), and *Hooper v. State*, 311 Ark. 154, 842 S.W.2d 850 (1992), where we refused to consider whether a statement fell under the business-record exception to the hearsay rule, Ark. R. Evid. 803(6), because the same or similar evidence was admitted at trial without objection.

In this case, the relevant portions of the DHS report were already admitted without objection during the impeachment of Jayme Dougan. Hence, as in *Zufari* and *Hooper*, we need not address whether Thelma Bean's testimony fell under the business-record exception because the same evidence was already admitted at trial without objection.

Affirmed.

Jimmy SEEK *v.* STATE of Arkansas

CR 97-472 957 S.W.2d 709

Supreme Court of Arkansas
Opinion delivered December 18, 1997

Stuart Vess, for appellant.

Winston Bryant, Att'y Gen., by: *David R. Raupp*, Sr. Asst. Att'y Gen., for appellee.

RAY THORNTON, Justice. Jimmy Seek, appellant, pleaded guilty to charges of residential burglary, kidnapping, and sexual abuse, for which he received a fifteen-year sentence to the Arkansas Department of Correction. After the trial court entered its judgment and commitment order, Seek filed a motion to withdraw his guilty pleas pursuant to Ark R. Crim. P. 26.1. He alleged that the pleas were not voluntarily and intelligently made because Lewis Littlepage, his attorney, misled him as to the punishment he would receive. After a hearing, the trial court denied Seek's motion on its merits, finding that he had voluntarily entered his pleas after being fully informed. We agree and affirm.

On appeal, Seek maintains that Littlepage advised him that he would receive a prison term, consistent with the sentencing guidelines, of about twenty-four months. He contends that, but for that advice, he would not have entered guilty pleas. Seek concedes that the court informed him prior to the guilty pleas that he was facing possible sentence of five to twenty years for the burglary and kidnapping offenses, and three to ten years for the sexual abuse offense. He argues, however, that Littlepage failed to inform him that the sentencing guidelines were not mandatory and could be ignored by the court.

Seek was charged with the offenses after he confessed to the police. He described entering his neighbor's house, wearing a ski mask, at midnight through an unlocked door. Upon finding the victim in bed, he tied her hands behind her back and then sexually molested her. He left forty-five minutes later. During the confession, Seek consented to a police search of his home and car. The police subsequently found a rope in Seek's car that matched the description of the rope used in the crime.

Jurisdiction is proper in the supreme court when an appeal is based on a petition for postconviction relief under Ark. R. Crim. P. 37. Ark. R. S. Ct. 1-2(a)(4). We have so held even after the original petition was brought under Rule 26.1 of the Ark. R. Crim. P., and entitled "Motion to Withdraw a Guilty Plea." *McCuen v. State*, 328 Ark. 46, 941 S.W.2d 397 (1997); *Johninson v. State*, 330 Ark. 381, 953 S.W.2d 883 (1997). A motion to withdraw a guilty plea, under Rule 26.1, is untimely when filed after sentencing and entry of judgment. *McCuen*, 328 Ark. at 55, 941 S.W.2d at 402. When these petitions come to us on appeal, we treat them as motions for postconviction relief under Rule 37. *Id.* at 56, 941 S.W.2d at 402; *Johninson*, 330 Ark. at 385, 953 S.W.2d at 884. In the case before us, we therefore review the petition as a motion for postconviction relief, even though it was brought as a motion to withdraw a guilty plea.

We do not reverse a trial court's denial of postconviction relief unless the ruling was clearly erroneous. *Rowe v. State*, 318 Ark. 25, 26-27, 883 S.W.2d 804, 805 (1994). When a guilty plea is challenged, the issue is whether the trial court erred

in finding that the plea was intelligently and voluntarily entered with the advice of competent counsel. *McCuen*, 328 Ark. at 58, 941 S.W.2d at 403. To determine the competency of counsel, we apply the standard adopted in *Strickland v. Washington*, 466 U.S. 668 (1984), in which the petitioner must prove that "counsel's performance fell below an objective standard of reasonableness and that, but for counsel's errors, there is a reasonable probability that the outcome would have been different." *McCuen*, 328 Ark. at 58, 941 S.W.2d at 403. The petitioner carries the burden of overcoming the presumption that counsel is competent. *Id.*

Given the facts of this case, we cannot say the trial court committed clear error when it found that Seek did not meet this burden. Littlepage testified that, in addition to advising Seek that he had a good chance to receive the prison term indicated in the sentencing guidelines, he also informed Seek that the court did not have to follow them. By contrast, Seek put on no evidence to support his claim. Seek did not testify, nor did he offer witnesses to testify on his behalf.

Even if Littlepage was acting unreasonably in advising Seek, Seek did not offer proof that the outcome would have been different if he had not pleaded guilty and the case had gone to trial. Evidence in the record suggests otherwise. In confessing to the crime, Seek gave a detailed description of the events that transpired during the commission of the crimes. The rope that the police found in Seek's truck was also incriminating. We can appreciate that Seek was unhappy about the sentence he received, however, he is not entitled to have his pleas withdrawn, after the sentence has been announced, solely because he received a sentence greater than he expected. *Johninson*, 330 Ark. at 390, 953 S.W.2d at 887 (quoting *Stobaugh v. State*, 298 Ark. 577, 580, 769 S.W.2d 26, 28 (1989)).

Neither can we find clear error in the trial court's conclusion that Seek was fully informed about the entire range of possible punishment. The evidence in the record before us shows that, in signing the plea statement, Seek acknowledged that he read and understood the possible sentences for the charged offenses, that he discussed the case fully with his attorney and was

satisfied with his attorney's services, and that he understood that the judge was not required to follow the sentencing guidelines discussed by Seek and his attorney. The record also shows that, during the plea proceeding, the court reviewed with Seek the possible sentences he could receive for each of the offenses. At that time, Seek stated that he was not induced to plead guilty by any promises made to him and that he was pleading guilty because he was guilty. Based on this evidence, we affirm the trial court's ruling that Seek's pleas were intelligently and voluntarily entered with the advice of competent counsel.

Affirmed.

William T. STEWARD and Jeannine G. Steward *v.* Jerry Eugene McDONALD and Professional Services Industries, Inc.

97-137 958 S.W.2d 297

Supreme Court of Arkansas
Opinion delivered December 18, 1997

Warner, Smith & Harris, PLC, by: *Joel D. Johnson*, for appellants.

Eddie H. Walker, Jr., and *Stephen M. Sharum*, for appellee Jerry Eugene McDonald.

RAY THORNTON, Justice. The issue in this case is whether a landlord owes a duty of care to his tenant's employees. Appellants William T. Steward and Jeannine G. Steward ("Landlords") leased a building to appellee Professional Services Industries, Inc. (PSI). PSI employed appellee Jerry Eugene McDonald, who was injured when a riser broke while he was carrying boxes weighing approximately 120 pounds up a flight of stairs in the leased building. The stairway did not have a handrail at the time the injury occurred. After the accident, McDonald received benefits under the Arkansas Workers' Compensation Act.

McDonald filed a complaint against the Landlords, alleging that they had failed to maintain, repair, and construct the stairway in violation of our general unsafe-place-to-work statute, Ark. Code Ann. § 11-2-117 (1987), and that the Landlords were negligent in failing to provide guardrails, toeboards, and handrails as required by OSHA. McDonald later amended his complaint to allege violations of the Arkansas Department of Labor Basic Safety Manual. The Landlords then filed a third-party complaint against PSI, as the tenant, based on the principle of implied indemnification. The Landlords and PSI both filed motions for summary judgment. The trial court granted summary judgment in favor of PSI; however, it denied the Landlords' motion, and McDonald's claim against them proceeded to trial. The jury returned a general verdict in favor of the Landlords.

McDonald then filed a motion for new trial, on the basis that the verdict was "clearly contrary to the preponderance of the evidence or . . . contrary to the law." Ark. R. Civ. P. 59(a)(6). The trial court premised its order granting a new trial on its interpretation of our general unsafe-place-to-work statute, Ark. Code Ann. § 11-2-117 (Repl. 1996), which states in pertinent part:

> Every employer and *every owner of a place of employment*, place of public assembly, or public building, now or hereafter constructed, shall construct, repair, and maintain it so as to render it safe.

Ark. Code Ann. § 11-2-117(b) (emphasis added). The trial court found that the statute applied to the Landlords and created a duty to provide a safe place to work. It further found that the jury's failure to find the Landlords negligent on that basis was clearly against a preponderance of the evidence.

In construing the statute, we have determined that the general assembly did not intend for the phrase "every owner of a place of employment" to expand or extend a landlord's duty to provide a safe place to work for his tenant's employees. We have not previously had occasion to interpret the meaning of this phrase in the context of this statute.

In his complaint, McDonald alleged that this statute imposes a duty on property owners, who lease a place of employment, to construct, repair, and maintain the property in a manner that renders it reasonably safe. McDonald based this argument solely on the statutory language. The trial court's order granting a new trial indicates that the court likewise found "that the jury finding that the Defendants were not negligent in failing to provide a safe place to work as required by Ark. Code Ann. § 11-2-117 is clearly against the preponderance of the evidence."

McDonald also argued that the lease agreement, which contained language stating that the Landlords were responsible for major repairs and the tenant for minor repairs, could be interpreted to mean that the Landlords had a contractual duty to repair the stairs. This question was submitted to the jury for determination, and the jury found that the Landlords were not negligent. However, the trial court's order granting a new trial was not based

on any assertion of duty imposed under the terms of the lease agreement, but rather that a duty was imposed by statute and by the safety regulations. Therefore, we confine our discussion to the issues on which the trial court predicated its order in granting a new trial.

We have followed the common-law rule that a lessor owes no duty to the lessee to repair the premises. *Majewski v. Cantrell*, 293 Ark. 360, 737 S.W.2d 649 (1987). However, we have elaborated that a lessor can be held liable where he agrees to undertake the repairs. *Id.* In *Majewski*, we followed the majority rule, stating that:

> A landlord is subject to liability for physical harm caused to the tenant and others upon the leased property with the consent of the tenant or his subtenant by a condition of disrepair existing before or arising after the tenant has taken possession if: (1) the landlord, as such, has contracted by a promise in the lease or otherwise to keep the leased property in repair; (2) the disrepair creates an unreasonable risk to persons upon the leased property which the performance of the landlord's agreement would have prevented; and (3) the landlord fails to exercise reasonable care to perform his contract.

Id. at 362-63, 737 S.W.2d at 651.

Similarly, in *Bartley v. Sweetser*, 319 Ark. 117, 890 S.W.2d 250 (1994), we noted that since 1932, we have adhered to the rule that a landlord is under no legal obligation to a tenant for injuries sustained in common areas, absent a statute or agreement. *See also* 52 C.J.S. *Landlord and Tenant* § 417 (1968). A party who gratuitously undertakes a duty can, however, be liable for negligently performing that duty. *Keck v. American Employment Agency, Inc.*, 279 Ark. 294, 652 S.W.2d 2 (1983); *see also* RESTATEMENT (SECOND) OF TORTS § 323 (1965). We have recognized that a duty can also arise, in certain circumstances, under the terms of a lease between a landlord and tenant. *Bartley v. Sweetser, supra.*

It is well settled that statutes will not be taken in derogation of the common law unless the act shows that such was the intent of the legislature. *White v. State*, 290 Ark. 130, 717 S.W.2d 784 (1986); *Gray v. Nations*, 1 Ark. (1 Pike) 557 (1839). We

strictly construe statutes that impose duties or liabilities unknown at common law in favor of those upon whom the burden is sought to be imposed, and nothing will be taken as intended that is not clearly expressed. *Hartford Ins. Group v. Carter*, 251 Ark. 680, 473 S.W.2d 918 (1971); *see also* NORMAN J. SINGER, 3 SUTHERLAND STAT. CONST. § 61.01, at 171 (5th ed. 1992).

McDonald's argument would require us to conclude that the legislature intended section 11-2-117 to subject all landowners who lease property to employers of more than five employees to liability for negligence in failing to provide and maintain a safe workplace. If we accept McDonald's interpretation of section 11-2-117, the resulting rule would clearly be in derogation of the common-law rule regarding a landlord's duty of care owed to a tenant. Therefore, we must strictly construe the statute in an attempt to give effect to the legislature's intent.

The legislature enacted almost all of Subchapter 2 of Title 11 through Act 161 of 1937, our Labor Department Act. 1937 Ark. Acts 161 (codified at Ark. Code Ann. §§ 11-2-101 — 121); *Horn v. Shirley*, 246 Ark. 1134, 441 S.W.2d 468 (1969). The primary function of the Act is clearly expressed in its title:

> AN ACT to Create a Department of Labor; to Create the Office of Commissioner of Land and to Define the Duties of the Commissioner as Administrative Head of the Department of Labor; to Provide for the Arbitration and Conciliation of Labor Disputes; to Authorize the Commissioner to Make Investigations and to Collect Statistics for the Purpose of Enforcing the Labor Laws of the State of Arkansas; to Empower the Board to Make Rules Relating to Health and Safety in Places of Employment; to Provide for the Review of Such Rules; to Provide Penalties for the Proper Enforcement of this Act and to Repeal all Laws in Conflict Herewith.

1937 Ark. Acts 161. We gain further insight into the legislature's purpose from the Act's Emergency Clause:

> It is found and determined by the General Assembly that the present laws relating to labor in this State are not sufficient to meet present conditions; that in order for this State to coordinate its activities concerning labor with Federal Agencies on unemployment and security benefits, it is necessary that a Department

> of Labor be created with the powers and duties prescribed by this Bill; THEREFORE, an emergency is hereby declared to exist and this Act shall take effect and be in full force and effect from and after its passage and approval.

1937 Ark. Acts 161, § 26. The portion of the Act that is at issue here remains essentially unchanged from its form at inception. § 9(b) (codified at Ark. Code Ann. § 11-2-117(b)).

Clearly, from the foregoing words of the general assembly, we may deduce that section 11-2-117 had its origin in legislation creating the Department of Labor with all its incidental powers and duties, granting the State the authority to enforce the statute with civil or criminal penalties, and establishing standards to be used in assessing whether a violation has occurred. Had the legislature intended a radical change in the law to extend causes of action for negligence based on a landlord's duty to his tenant, the Act would have expressed such an intention in some plain and unmistakable terms.

Instead, the Act speaks of causes of action brought by the State against employers and owners of places of employment, places of public assembly, or public buildings. The Labor Department Act clearly contemplates bringing a cause of action against an "employer," which is defined within this subchapter as "includ[ing] every person, . . . having *control or custody of any . . . place of employment*, or of any employee." Ark. Code Ann. § 11-2-102(1) (emphasis added). Reading section 11-2-117(b) in conjunction with section 11-2-102(1), we cannot ascertain a legislative intent to impose greater liability on an owner of a place of employment than that imposed on an employer. Applying the rules of strict construction, we cannot say that the legislature plainly intended that the responsibility for a safe workplace is greater on an owner of a place of employment than it is on an employer, who may be penalized under the statute for having an unsafe workplace under its "control or custody."

We hold that, without an assumption of responsibility for repairs, there was no common-law duty under which we may impose liability on the Stewards, as landlords, to provide a safe workplace for the employees of their tenant and that none was

created by the statute. We will reverse a trial court's order granting a motion for a new trial only if there is a manifest abuse of discretion. *Ray v. Green*, 310 Ark. 571, 839 S.W.2d 515 (1992). A clearly erroneous interpretation of the law or a clearly erroneous application of a law or rule can constitute such manifest abuse of discretion. *Ford Motor Co. v. Nuckolls*, 320 Ark. 15, 894 S.W.2d 897 (1995). We conclude that the trial court misinterpreted section 11-2-117 in its order granting new trial, and that this misinterpretation of the law constitutes a manifest abuse of discretion. Because of our decision, the remaining issues that appellant raises on appeal are rendered moot.

Accordingly, we reverse the trial court's order granting a new trial and dismiss this appeal.

BROWN, J., concurs.

ROBERT L. BROWN, Justice, concurring. I write to concur because I believe the majority has given an unduly restrictive construction to Ark. Code Ann. § 11-2-117(b) (Repl. 1996). Section 11-2-117(b) reads:

> Every employer and *every owner of a place of employment*, place of public assembly, or public building, now or hereafter constructed, shall construct, repair, and maintain it so as to render it safe.

Id. (emphasis added). In my judgment, this provision establishes a statutory duty on the part of the Stewards, who own a building used as a workplace, to turn the premises over to PSI in a safe condition. This duty attaches even though the owners are landlords because of the clear reference in the statute to "owner." Here, the issue of premises safety was submitted to the jury, and the jury found for the Stewards. For that reason, I concur in the result.

The Supreme Court of West Virginia was faced with a similar issue in *Pack v. Van Meter*, 354 S.E.2d 581 (W.Va. 1986). In that case, Ms. Pack, who was employed by a dress shop that leased space in a building owned by the Van Meters, was injured when she fell down a set of stairs that did not have a handrail, which violated § 21-3-6 of the West Virginia Code. That code provision

mandated proper and substantial handrails in all mercantile establishments. Because the statute was silent on whether this duty was owed by the Van Meters, the Supreme Court looked to its safe-workplace statute for guidance:

> W.Va.Code, 21-3-1, is the introductory section in the part of our Code relating mainly to the safety and welfare of employees in the workplace and contains this provision with regard to the owner of certain premises: "Every employer and *every owner of a place of employment*, place of public assembly, or a public building, now or hereafter constructed, shall so construct, repair and maintain the same as to render it reasonably safe." (Emphasis added). This language clearly imposes a duty on both the employer and the owner of a place of employment, place of public assembly, or a public building to maintain such places in a reasonably safe condition.

Id. at 585.

The West Virginia Supreme Court noted that finding a duty on the part of the Van Meters was necessary; otherwise, the "every owner" language of the safe-workplace statute would be rendered meaningless. *Id.* at 586.

The *Pack* case is instructive because of the factual similarities to the present case, and also because both the Arkansas and West Virginia legislatures took action in 1937 to include the "every owner" language in their respective safe-workplace statutes. While I agree that statutes in derogation of the common law must be strictly construed, it is settled law that the intent of the General Assembly must be garnered from the plain meaning of the language used. *Masterson v. Stambuck*, 321 Ark. 391, 902 S.W.2d 803 (1995); *Hercules, Inc. v. Pledger*, 319 Ark. 702, 894 S.W.2d 576 (1995); *Pugh v. St. Paul Fire & Marine Ins. Co.*, 317 Ark. 304, 877 S.W.2d 577 (1994); *Worthen Nat'l Bank v. McCuen*, 317 Ark. 195, 876 S.W.2d 567 (1994). Because it is undisputed that the Stewards were landlords *and* owners of the building leased by PSI, and because they had an opportunity to cure the structural defect prior to surrendering the property, a duty attached under the plain meaning of § 11-2-117(b).

The question then is whether the trial court was within its discretion in awarding McDonald a new trial on the ground that the jury's finding that the Stewards did not violate their statutory duty was clearly contrary to the preponderance of the evidence. *See* Ark. R. Civ. P. 59(a)(6); *Young v. Honeycutt*, 324 Ark. 120, 919 S.W.2d 216 (1996).

In this case, although the stairs did not comply with Rules 21 and 24 of the Arkansas Department of Labor Basic Safety Manual due to the absence of handrails, these violations are only evidence of negligence and not negligence *per se*, *see Berkeley Pump Co. v. Reed-Joseph Land Co.*, 279 Ark. 384, 653 S.W.2d 128 (1983), *reh'g denied*, 279 Ark. 401-A, 653 S.W.2d 128 (1983). In contrast, it was plain and obvious to PSI that the stairs had no handrail when PSI assumed control of the premises, and there was no request by PSI for the Stewards to provide a handrail for the benefit of PSI's employees. The jury could have determined that both PSI and the Stewards believed the stairs to be in a safe condition.

I conclude that while a duty exists on the part of the Stewards to turn the premises over to PSI in a safe condition, the question of whether the premises were safe was decided in favor of the Stewards, and the verdict was not clearly contrary to the preponderance of the evidence. Accordingly, I would affirm the jury's decision.

Stephen V. HENDERSON *v.* Sandra K. HENDERSON

97-699 955 S.W.2d 911

Supreme Court of Arkansas
Opinion delivered December 18, 1997

Callis L. Childs, for appellant.

Helen Rice Grinder, for appellee.

PER CURIAM. On September 25, 1997, appellee Sandra K. Henderson filed a motion to dismiss appeal, asserting appellant Stephen V. Henderson failed to file a timely record. The Faulkner County Chancery Court had entered its decree on November 25, 1996, and appellant filed a timely notice of appeal on December 26, 1996. While appellant obtained an extension until June 24, 1997 to file his transcript, he failed to do so until June 25, 1997. Accordingly, we dismissed appellant's appeal from the November 25, 1996 decree because he tendered his transcript late.

Now, appellee contends appellant's second and third notices of appeal were untimely. On March 12, 1997, appellant filed his second notice of appeal from the November 25, 1996 decree, and on October 23, 1997, he filed a third notice of appeal from the November 25, 1996 decree, but added a January 31, 1997 order, a February 25, 1997 supplemental decree, and an order filed on October 3, 1997. Obviously, the March 12, 1997 notice of appeal was filed outside the time for appealing the trial court's November

25, 1996 decree, and from what we can glean from the record, his October 23, 1997 notice of appeal was also untimely from all other decrees or orders named except the designated October 3, 1997 order. *See* Rule 3 of the Appellate Procedure—Criminal. The October 3 order was signed and entered by Judge Gardner regarding contempt and Rule 11 issues.

Based upon this record and appellee's new motion to dismiss, we dismiss as untimely the appeals from the November 25, 1996 decree, January 31, 1997 order, and February 25, 1997 decree. The appeal from the October 3, 1997 order is timely.

B.J. McADAMS, Managing Agent for Colonial Ballroom, Inc.
v. PULASKI COUNTY CIRCUIT COURT; Honorable Marion A. Humphrey, Honorable Chris Piazza, Honorable John Ward, Honorable John Langston, Honorable Morris W. Thompson, Honorable David B. Bogard, and Honorable John B. Plegge

97-1467 956 S.W.2d 869

Supreme Court of Arkansas
Opinion delivered December 18, 1997

Bob McAdams, for petitioner.

Winston Bryant, Att'y Gen., by: *Brian G. Brooks*, Asst. Att'y Gen., for appellee.

PER CURIAM.

Petitioner, B.J. McAdams as "managing agent" for Colonial Ballroom, Inc., petitions this court to issue a writ of mandamus to the Pulaski County Circuit Court and to the individual judges serving on the Pulaski County Circuit Court. Specifically, he asks that we direct the judges and the court to reverse a denial of his motion for a temporary restraining order to prohibit the North Little Rock Police Department from enforcing a curfew on an establishment owned by Colonial Ballroom, Inc.

We note initially that the petition requests this court to direct the judges and the circuit court to do more than perform ministerial acts. The petition asks this court to direct a reversal of a prior decision by using the extraordinary writ of mandamus. Mandamus clearly does not lie for such purposes. *See Wilson v. Neal*, 329 Ark. 125, 947 S.W.2d 338 (1997); *Sanders v. Neuse*, 320 Ark. 547, 898 S.W.2d 43 (1995).

We also deny the petition for an additional reason. Based on the style of the case and the signature at the end of the petition, Colonial Ballroom, Inc., is not represented by counsel. Bob McAdams, who is not a licensed attorney, has signed the petition filed in this court. We have held that corporations must be represented by licensed attorneys. *See All City Glass & Mirror, Inc. v. McGraw Hill Information Sys. Co.*, 295 Ark. 520, 750 S.W.2d 395 (1988); *Arkansas Bar Assn v. Union Nat'l Bank*, 224 Ark. 48, 273 S.W.2d 408 (1954).

In sum, we deny the petition for failure of the corporation to have legal representation as well as for the fact that mandamus does not lie under these circumstances.

Writ denied.

M.H. *v.* STATE of Arkansas

97-1439 955 S.W.2d 911

Supreme Court of Arkansas
Opinion delivered December 19, 1997

Lewis Littlepage, for appellant.

No response.

PER CURIAM. The appellant, M. H., has filed a motion for rule on the clerk. His attorney, Lewis W. Littlepage, admits fault for tendering the record late in his client's juvenile delinquency case.

We find that such an error, admittedly made by the attorney here, is good cause to grant the motion. *See Hansberry v. State*, 318 Ark. 757, 887 S.W.2d 308 (1994). A copy of this opinion will be forwarded to the Committee on Professional Conduct.

Anthony SANDERS *v.* STATE of Arkansas

CR 97-961 956 S.W.2d 868

Supreme Court of Arkansas
Opinion delivered December 18, 1997

Jerry Larkowski, for appellant.

No response.

PER CURIAM. In accordance with our mandate, the trial court conducted a hearing to determine whether appellant

Anthony Sanders had requested his trial counsel, Mark Jesse, to file an appeal from his conviction. After hearing conflicting testimony on this issue, the trial court found Sanders informed Mr. Jesse to appeal, but that Sanders failed to make arrangements to pay for transcript costs, nor would Sanders execute a truthful affidavit in order to pursue the appeal as an indigent.

Rule 16 of the Appellate Procedure—Criminal provides that trial counsel, whether retained or court appointed, shall continue to represent a convicted defendant throughout any appeal, unless permitted by the trial court or supreme court to withdraw in the interest of justice or for other sufficient cause. After the notice of appeal has been filed, the supreme court shall have exclusive jurisdiction to relieve counsel and appoint new counsel. *Id.*

Here, defense counsel Mark Jesse has never been relieved as attorney of record. Moreover, if Mr. Jesse believed the appeal had no merit, he was obligated to either obtain permission from the trial court to withdraw before the notice of appeal was filed or file a motion to withdraw in this court after the notice of appeal was filed. *Gay v. State*, 288 Ark. 589, 707 S.W.2d 320 (1986).

The failure to perfect an appeal in a criminal case where the defendant desires an appeal constitutes a denial of effective assistance of counsel and is good cause for granting a belated appeal. *Id.* Here, Mr. Jesse failed to withdraw or file an appeal, but new counsel, Jerry Larkowski, appears as retained counsel on Sanders's behalf. Apparently Sanders filed a pro se notice of appeal before retaining Larkowski, who has filed a motion for belated appeal for Sanders. Sanders's motion for belated appeal shall be granted contingent upon Jesse's filing a motion to be relieved as counsel in this court with a request to substitute Mr. Larkowski in his stead.

Linda STREET *v.* STATE of Arkansas

CR TEN-97-1 956 S.W.2d 866

Supreme Court of Arkansas
Opinion delivered December 18, 1997

No response.

Winston Bryant, Att'y Gen., by: *David R. Raupp*, Sr. Asst. Att'y Gen., for appellee.

PER CURIAM. Appellee, the State of Arkansas, by and through counsel, Winston Bryant, Attorney General, and David R. Raupp, Senior Assistant Attorney General, has filed a motion to dismiss Appellant's appeal.

On August 30, 1996, Appellant Linda Street conditionally pleaded guilty to two counts of possession of a controlled substance with intent to deliver and one count of possession of drug paraphernalia. Appellant filed a notice of appeal the same date. Appellant was granted a thirty-day extension to lodge her transcript, but she failed to lodge it by its due date on December 28, 1996.

By letter dated January 3, 1997, the clerk of this court advised Appellant's attorney that a motion for rule on the clerk would be necessary to get the record filed and to proceed with the appeal. Appellant's attorney has taken no action in the appeal since tendering the transcript late on January 2, 1997.

We find that Appellant's failure to perfect this appeal in a timely manner is good cause to grant appellee's motion to dismiss the appeal.

The motion is, therefore, granted.

A. Wayne Davis, attorney for Appellant, is also ordered to appear before this court on the 15th day of January, 1998, at 9:00 a.m. to show cause why he should not be held in contempt of this court for his failure to perfect Appellant Street's appeal in a timely manner.

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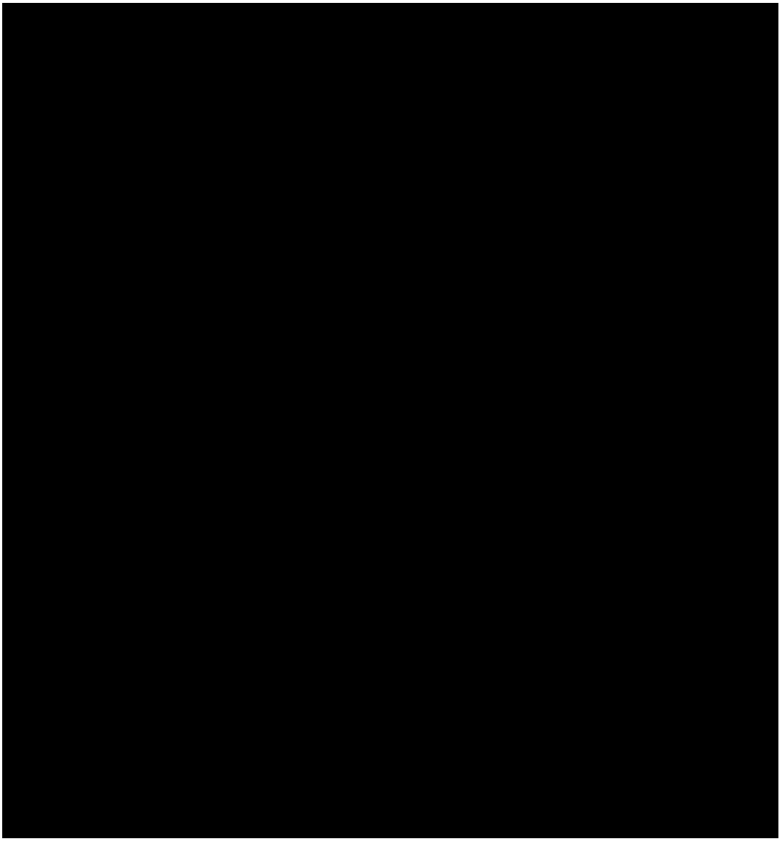

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