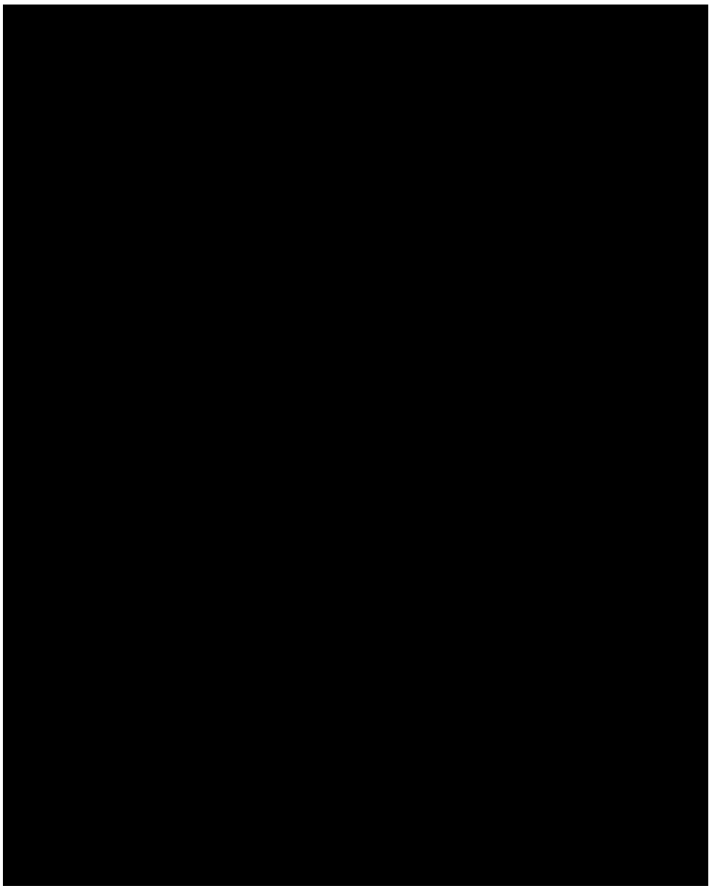

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Kevin Allen LLOYD *v.* STATE of Arkansas

CR 97-154 962 S.W.2d 365

Supreme Court of Arkansas
Opinion delivered February 26, 1998

Dunham & Faught, P.A., by: *James Dunham*, for appellant.

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

W.H. "DUB" ARNOLD, Chief Justice. The appellant, Kevin Allen Lloyd, was convicted of the capital murder of his father, Ken Lloyd, and was sentenced to life imprisonment without parole. His sole argument on appeal is that there was insufficient evidence of premeditation and deliberation to support his conviction. We disagree, and affirm appellant's conviction and sentence.

On October 19, 1995, the body of Ken Lloyd was found in his home on Crow Mountain in Pope County. He had been shot three times with a sawed-off twelve-gauge pump shotgun. Sergeant Aaron Duvall of the Pope County Sheriff's Office located the murder weapon on the living room floor of the residence. He determined that two different types of shells had been fired — double-00 buckshot and number-six game-load. He further

explained that, after the shotgun was fired, the shooter had to eject the empty casing by bringing the pump down, then back up to pump another round into the chamber to fire another shot. According to Sergeant Duvall, a person had to make a conscious effort to pump the shotgun and fire it.

After learning that appellant lived at the victim's residence, Pope County Sheriff Jay Winters and Arkansas State Trooper Jerry Roberts began searching for him and eventually developed him as a suspect. They found appellant in a large metal drainage tile in an area north of Interstate 40. After being advised of his *Miranda* rights, appellant admitted that he had shot his father three times because he was mad at him. In a later taped statement, appellant stated that his father was asleep when he shot him the first time, and that he shot him two more times after he got up.

Appellant's sister, Christy Lloyd, testified that appellant had talked about killing their father for six months to a year, and that his remarks intensified prior to the victim's death. Specifically, appellant told Christy that he hated their father, wished he were dead, and that he was going to kill him. Prior to the murder, the appellant told Christy that he had obtained a shotgun from a friend. He took the shotgun to the shed, sawed the barrel off, and showed the gun to her. Appellant, who did not wear his glasses in spite of his poor eyesight, explained to Christy that he had sawed the barrel off because he could point it and "hit stuff easier," as a sawed-off shotgun was easier to aim because you could point and shoot it without seeing the target. According to Christy, appellant demonstrated this for her by shooting some spray-paint cans.

Tim Ramsden, a friend of appellant's, testified that, at 12:50 p.m. on October 18, 1995, the day of the murder, appellant telephoned his residence and asked if his jacket was in his (Ramsden's) room. According to Ramsden, who did not drive, appellant wanted the shells that were in the jacket. Appellant asked Ramsden to have another friend, Shiloh McClure, who had a car, to bring the jacket to appellant's house.

Dennis Brown, another friend of appellant's, was also present at Ramsden's house when appellant made the telephone inquiry about his jacket. Brown rode with McClure to appellant's house.

Upon arrival, appellant approached the car and retrieved his jacket from Brown. According to Brown, appellant "looked and acted demonic" and had an "evil glare." Appellant took three shotgun shells out of his jacket and stated that he did not need the rest of them. He then walked away from the car. Brown and McClure had been waiting in the car for approximately twenty minutes when Brown heard three shotgun blasts that appeared to come from the house. According to Brown, the first and second shots were one second apart, but the third blast occurred some ten to fifteen seconds later. Appellant then ran to the car and climbed inside. According to Brown, appellant stated that he felt "evil" and felt good about killing his father. Appellant described how he was "relieved" and felt his life was "complete and that it was over." McClure drove for approximately ten to fifteen minutes before dropping appellant off.

Dr. Stephen A. Erickson, Associate Medical Examiner of the State Crime Lab, examined the victim's body and determined that the death was the result of a homicide. One of the three shotgun wounds was located around the upper left leg, lower left abdomen, left groin, and genitalia. A second wound was located on the victim's right leg. Buckshot pellets created separate entrance wounds into the leg that broke the ends of the femur, tibia, and fibula bones. According to Dr. Erickson, this wound caused massive damage to the victim's leg, destroying all the vasculature. The third and final wound was located on the victim's right forearm and created an "explosive-type injury" that destroyed the muscles, bones, arteries, and nerves in the arm. It was Dr. Erickson's testimony that these multiple gunshot wounds caused bleeding, which led to shock, vascular collapse, and, ultimately, the victim's death.

At the close of the State's case in chief, appellant moved for directed verdict on the ground that the State had failed to show sufficient evidence of premeditation and deliberation. The trial court denied the motion. Appellant rested without presenting any evidence. After hearing all the evidence, the jury was instructed on capital murder, as well as the lesser-included offenses of first-degree murder and second-degree murder.

We have recently reviewed the guidelines for reviewing challenges to the sufficiency of the evidence in *Green v. State*, 330 Ark. 458, 466-7, 956 S.W.2d 849 (1997); *quoting McGehee v. State*, 328 Ark. 404, 410, 943 S.W.2d 585, 588 (1997):

> 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).

See also Stewart v. State, 331 Ark. 359, 961 S.W.2d 750 (1998). Specifically, appellant maintains that his capital-murder conviction should be reversed because the State failed to prove premeditation and deliberation. *See* Ark. Code Ann. § 5-10-101(a)(4) (Repl. 1997). "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." *Green*, 330 Ark. at 467; *citing Key v. State*, 325 Ark. 73, 923 S.W.2d 865 (1996); *Kemp v. State*, 324 Ark. 178, 919 S.W.2d 943 (1996), *cert. denied*, 117 S.Ct. 436 (1996).

On appeal, appellant argues that the only evidence of premeditation and deliberation came from the testimony of Dennis Brown, who appellant claims was an accomplice. Thus, according to the appellant, Brown's testimony regarding premeditation and deliberation must have been corroborated. During cross-examination of Brown, appellant requested at a side-bar conference that the trial court declare the witness an accomplice as a matter of law. The trial court refused to do so, stating that whether Brown was an accomplice was a mixed question of law and fact. The trial court did indicate, however, that it could foresee an accomplice

instruction being included at the end of the trial. However, no accomplice instructions were requested or submitted to the jury. Thus, Brown was never found to be an accomplice.

Appellant bears the burden of proving that a witness is an accomplice whose testimony must be corroborated. *Cole v. State,* 323 Ark. 8, 913 S.W.2d 255 (1996). An accomplice is one who, with the purpose of promoting or facilitating the commission of an offense, either solicits, advises, encourages, or coerces the other person in planning or committing it, or fails to make a proper effort to prevent the commission of the offense, provided he has a legal duty to prevent it. *Id.* Appellant contends that the evidence was insufficient to corroborate Brown's testimony. Because Brown was never found to be an accomplice whose testimony must be corroborated, we do not address this argument. *See Vickers v. State,* 313 Ark. 64, 852 S.W.2d 787 (1993). Appellant failed to request that accomplice instructions, including the instruction on corroboration, be submitted to the jury for consideration. Thus, appellant has not preserved this issue for our consideration. *Id.*

Viewing the evidence in this case in the light most favorable to the State, there was substantial evidence that appellant acted with premeditation and deliberation in causing his father's death. Appellant shot the victim three times with a sawed-off twelve-gauge shotgun. He had to deliberately expel a spent shell and pump another round into the chamber between shots. At least one of the victim's wounds was inflicted with buckshot. Dennis Brown testified that approximately ten to fifteen seconds elapsed between the second and third shots. Appellant's sister testified that appellant had been talking about killing their father for months. According to Christy Lloyd, appellant sawed off the barrel of the shotgun in order to improve his chances of hitting his target, and practiced shooting the shotgun at cans. Shortly before the murder, appellant telephoned his friend Tim Ramsden for the purpose of retrieving shotgun shells that were in a jacket at Ramsden's residence. Upon receiving the shells, appellant took only three shells, stating that he did not need the rest. After the shooting, appellant made statements that he felt both "good" and "relieved" about the killing. Finally, appellant confessed to shoot-

ing his father because he was mad at him. When considering this evidence, the jury could have concluded, without resorting to speculation or conjecture, that appellant's killing of his father was a premeditated and deliberate act.

The record has been examined under Ark. Sup. Ct. R. 4-3(h) for reversible error, and none has been found.

Affirmed.

Dechay WILSON *v.* STATE of Arkansas

CR 97-873 962 S.W.2d 805

Supreme Court of Arkansas
Opinion delivered February 26, 1998

Claudell Woods, for appellant.

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

DAVID NEWBERN, Justice. Dechay Wilson stands convicted of theft of property, residential burglary, aggravated robbery, and rape. A jury fixed his sentence at one year for theft and thirty years for burglary. Because the jury could not agree on a sentences for aggravated robbery and rape, the Trial Court sentenced Mr. Wilson for those offenses. The sentences were imprisonment for life for rape and sixty years for aggravated robbery. Mr. Wilson argues that the evidence was insufficient to support a finding of guilt. We reject this argument due to the testimony of Mr. Wilson's accomplice that Mr. Wilson committed the crimes and corroborating scientific evidence. Mr. Wilson also contends that the Trial Court erred in sentencing him to life in prison.

Although Mr. Wilson makes several arguments in support of that contention, we decline to review all but one of them, as they were not made to the Trial Court. We consider only the argument that the Trial Court should not have sentenced Mr. Wilson due to the Trial Court's awareness that he was not co-operating with defense counsel. The judgment is affirmed.

Helen Morris, the sixty-nine-year-old victim, testified that on the night of April 20, 1996, she was dozing in her living room after coming home from work. She noticed that some items in the room looked as if they had been moved, but she did not see anyone. Then, she saw two men standing in her dining room. One was taller than the other, and each wore something over his head. Mr. Wilson is about the size of the shorter of the two. They asked her where her money was and told her to be still. One threw a quilt over her head while they went through her house and threw items around. After the two men rummaged through her house, the shorter man raped her. Then, the taller man raped her. After raping her, they forced her to look for her purse. When she found the purse, the shorter man grabbed it, emptied it, and counted the money. They left her home with the money.

After the police arrived at Ms. Morris's home, a family member took her to the hospital where she was examined. Oral, vaginal, and rectal swabs, a saliva disk, a blood tube, and pubic hairs were collected.

Jared Woodley, who had pleaded guilty to theft, residential burglary, aggravated robbery, and rape, initially testified that Mr. Wilson did not accompany him. He admitted, however, that in two prior statements to investigating officers and when he entered his guilty plea, he said that Mr. Wilson went with him to the home of Ms. Morris, and that Mr. Wilson stole her money and raped her. Ultimately, Mr. Woodley gave detailed testimony about his and Mr. Wilson's acts, including raping Mrs. Morris and stealing her money at knife point.

Kermit Channell, DNA supervisor for the State Crime Laboratory, testified that the DNA that he recovered from the rectal swab was consistent with the DNA that was recovered from the blood sample from Mr. Wilson. He testified that the probability of

someone else leaving that particular stain on the rectal swab is approximately one in 210,000 in the black population. He testified that the DNA that was extracted from the vaginal swab was consistent with DNA from Mr. Wilson, and the probability of someone else leaving that semen would be one in 160,000,000 in the black population. He testified that the population numbers for the rectal swab and the vaginal swab differ because, with the rectal swab, he only obtained results from six of seven possible tests due to a degradation of a particular chromosome, but with the vaginal swab, he obtained results from all seven tests.

Donald E. Smith, a criminalist with the State Crime Laboratory, testified that he discovered a hair fragment in Ms. Morris's home that, in his opinion, was a pubic hair from Mr. Wilson.

1. *Sufficiency of the evidence*

Following the State's presentation of its case, defense counsel moved for a directed verdict by stating the following:

> Judge, I move for a directed verdict and the basis for that is that there's been an insufficient amount of evidence produced at this point by the prosecution to support their charges or to support it going to a jury of the charges that the defendant committed the acts of rape, aggravated — I'm sorry, aggravated robbery, theft of property or burglary. *And the basis for this the disparity between the amount of evidence collected versus that actually that purports to point to the defendant as the person committing the acts.* (Emphasis added.)

The Trial Court denied the motion. The renewed motion was also denied.

Mr. Wilson argues that the Trial Court erred in denying his motion for a directed verdict because the only evidence that tended to incriminate Mr. Wilson was not credible based on the following: (1) Mr. Woodley gave varying statements about Mr. Wilson's participation; (2) the scientific evidence was not sufficiently specific; and (3) the victim was unable to identify the appellant.

[redacted] 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 the evidence that supports the verdict. *Walker v. State*, 330 Ark. 652, 955 S.W.2d 905 (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.* We do not, however, weigh the evidence presented at trial, as that is a matter for a factfinder. *Id.* Nor will we weigh the credibility of the witnesses. *Id.*

The State contends that Mr. Wilson's sufficiency argument is not preserved for our review because his motion for directed verdict was not sufficiently specific. A motion for a directed verdict in a criminal case must state the specific ground of the motion. *Walker v. State*, 318 Ark. 107, 883 S.W.2d 831 (1994), interpreting Ark. R. Crim. Pro. 36.21 (now Rule 33.1). Rule 33.1 provides:

> . . . A motion for a directed verdict based on insufficiency of the evidence must specify the respect in which the evidence is deficient; a motion merely stating that the evidence is insufficient for conviction does not preserve for appeal issues relating to a specific deficiency such as insufficient proof on the elements of the offense. . . .

See Bragg v. State, 328 Ark. 613, 946 S.W.2d 654 (1997).

Mr. Wilson's motion sufficiently specified that the evidence was insufficient for a conviction because the element of identity was missing. *See Green v. State*, 310 Ark. 16, 832 S.W.2d 494 (1992). The Trial Court did not err in denying Mr. Wilson's directed verdict motion in view of the scientific evidence and the testimony of Mr. Woodley.

2. *Sentencing*

Mr. Wilson argues that the Trial Court erred in sentencing him to life imprisonment. There is no contention that it was error for the Trial Court to assume the sentencing role after the jury reported its inability to reach a sentence on two of the offenses of which Mr. Wilson stood convicted. Rather, the objection had to do with the Trial Court's awareness that defense counsel had experienced difficulties in representing Mr. Wilson due to his failure to cooperate; apparently an argument of bias. At a pretrial

proceeding, defense counsel stated that Mr. Wilson had not cooperated with him in planning a strategy for trial or in compiling a witness list to support Mr. Wilson's claim that he had an alibi. The Trial Court stated that his knowledge of that fact would have nothing to do with his decision.

The Trial Court pronounced the sentences of thirty years for residential burglary and one year in the Nevada County jail for theft of property, in accordance with the jury's recommendations. He then sentenced Mr. Wilson to life imprisonment for the rape conviction and to sixty years for the aggravated robbery conviction.

Mr. Wilson's sentencing argument is without merit. There is no evidence that defense counsel's statements at the pretrial proceeding caused the Trial Court to be prejudiced against Mr. Wilson.

Finally, on this point, we note that, although the sentences for aggravated robbery and rape are to be served consecutively, the one-year misdemeanor theft sentence is to be served concurrently with the thirty-year sentence for burglary. It thus will be satisfied by service of the felony sentence. *See* Ark. Code Ann. § 5-4-403(c) (Repl. 1997); *Howard v. State*, 289 Ark. 587, 715 S.W.2d 440 (1986).

4. Rule 4-3(h)

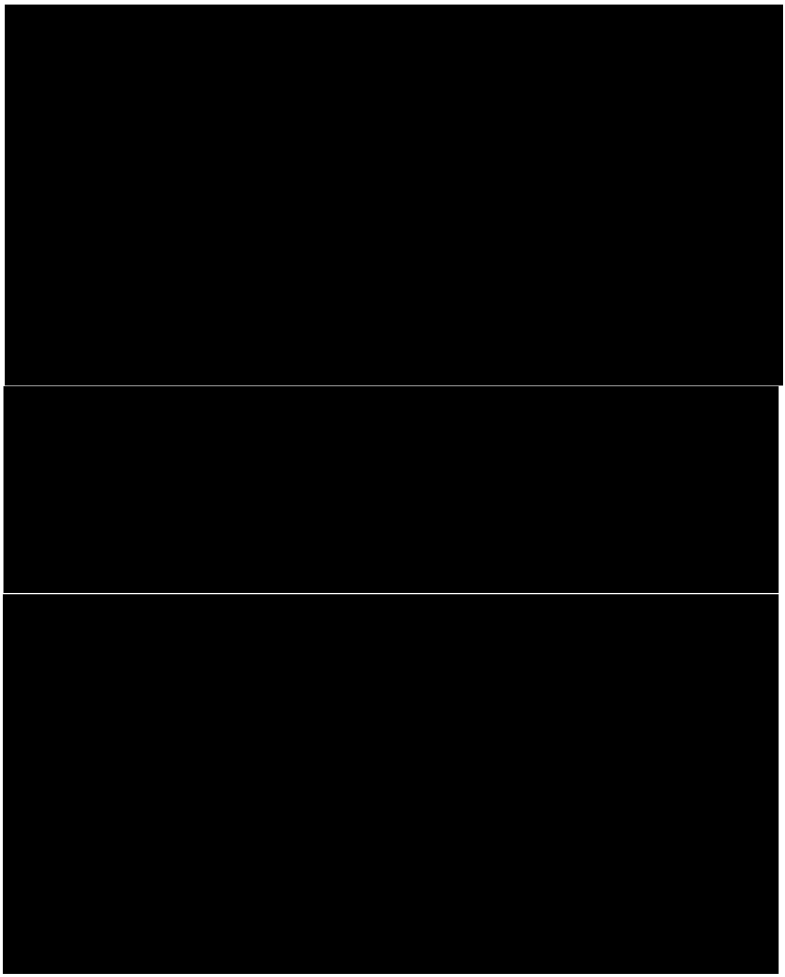
In accordance with Ark. Sup. Ct. R. 4-3(h), the record has been reviewed for erroneous rulings prejudicial to Mr. Wilson, and none has been found.

Affirmed.

John Wesley SHAVER *v.* STATE of Arkansas

CR 97-520 963 S.W.2d 598

Supreme Court of Arkansas
Opinion delivered February 25, 1998



Paul Petty, for appellant.

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

TOM GLAZE, Justice. Appellant John Wesley Shaver brings this appeal after entering a conditional plea of guilty of possession of methamphetamine with intent to deliver and receiving a sentence of 120 months in the department of correction. His sole point for reversal is that the trial court erred in failing to grant his motion to suppress evidence recovered as a result of an unlawful search and seizure. We affirm the trial court's ruling.

Shaver's arrest ensued from incidents that occurred at 2:40 a.m. on July 7, 1996. Greg Henry was driving Shaver's truck 76 miles per hour in a 55-mile-per-hour zone when Officers Larry Mitchell and Phillip Hydron stopped Henry for speeding. Shaver was a passenger in his truck. After Henry exited the vehicle and gave his driver's license to Officer Mitchell, Mitchell saw what appeared to be leather straps next to the passenger seat, and noticed that Shaver was seated with an old tee shirt or towel over his lap. Mitchell asked Henry if there were any weapons in the vehicle, and Henry responded, saying Shaver had two. Mitchell then alerted Officer Hydron of the presence of the guns and asked him to remove Shaver from the truck. Hydron obliged, had Shaver place his hands on the truck, and began to pat him down. As Hydron reached to pat Shaver down, he noticed a bulge in Shaver's front pocket. At the same time, Shaver "bowed up," causing Hydron to press him against the truck and to tell Shaver to calm down and keep his hands on the truck. Officer Hydron then decided to reach inside Shaver's pocket to determine what caused the bulge. Hydron pulled out a bag of white powdery substance, and he told Officer Mitchell that "it looks like we have discovered contraband." Hydron continued to pull out a substance from both of Shaver's pockets that he suspected was methamphetamine. Hydron testified that, initially, he had no idea what was in Shaver's pockets, but only knew there was a "big bulge." Hydron said that the bulge did not feel like a weapon, but added he was uncertain

what the contents were. On cross examination, Hydron related that his intent was to pull everything out of Shaver's pockets, regardless.

Recently, the Supreme Court held that an officer making a traffic stop may order passengers to get out of the vehicle pending completion of the stop. *Maryland v. Watson*, 117 S.Ct. 882 (February 19, 1997); *see also Wright v. State*, 327 Ark. 558, 940 S.W.2d 432 (1997). We have also held that, after a lawful stop, the police are permitted to search the outer clothing of an individual and the immediate vicinity for weapons if the facts available to an officer would warrant a person of reasonable caution to believe that a limited search was appropriate. *State v. Barter*, 310 Ark. 94, 833 S.W.2d 372 (1992); *Stout v. State*, 304 Ark. 610, 804 S.W.2d 686 (1991); A.R.Cr.P. Rule 3.4. Stated in slightly different terms, when an officer is justified in believing that an individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officers or others, a patdown search may be conducted to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm. *Terry v. Ohio*, 395 U.S. 1 (1968).

In seeking suppression of the drugs found on Shaver, Shaver relies heavily on *Minnesota v. Dickerson*, 508 U.S. 366 (1993), for his argument that Hydron's patdown of him exceeded the lawful bounds of *Terry*. In *Dickerson*, an officer responded to complaints of drug sales taking place at an apartment building, and when the officer arrived, he saw the defendant outside the building. The defendant attempted to evade the officer, and because the defendant had just left an apartment building known for cocaine traffic, the officer stopped and conducted a patdown of him. The officer felt a small lump in the front pocket, and as he examined it with his fingers, it slid and was felt to be a lump of crack cocaine in cellophane. The officer then pulled a plastic bag containing crack cocaine from the defendant's pocket and arrested him. Defendant Dickerson moved to suppress, but the trial court denied his motion. The Minnesota Court of Appeals reversed, and the Supreme Court ultimately reviewed Dickerson's case to consider the question concerning whether police officers may seize non-

threatening contraband detected during a protective patdown search of the sort permitted by *Terry*. The Court determined that officers may do so, so long as their search stays within the bounds of *Terry*.

In its review of Dickerson's case, the Supreme Court held that the officer overstepped his bounds because the officer's continued exploration of Dickerson's pocket, after having concluded that it contained no weapon, was unrelated to the sole justification of the search under *Terry* — the protection of the police officers and others nearby.

The *Dickerson* holding is simply not controlling here. We first point out that, in reviewing a trial judge's ruling on a motion to suppress, this court reviews the evidence most favorable to the appellee. *Johnson v. State*, 325 Ark. 197, 926 S.W.2d 837 (1996). This court reviews a trial court's suppression ruling under the totality of the circumstances, deferring to the superior position of that court to evaluate questions of credibility, and reverse only if the ruling is clearly against a preponderance of the evidence. *See Beshears v. State*, 320 Ark. 573, 898 S.W.2d 49 (1995); *State v. Osborn*, 263 Ark. 554, 566 S.W.2d 139 (1978); *Grant v. State*, 267 Ark. 50, 589 S.W.2d 11 (1979).

In the instant case, the trial court found Officers Mitchell and Hydron credible when describing their traffic stop of Shaver's truck and subsequent patdown of Shaver, and concluded the actions taken were reasonable to insure their safety. The officers became immediately aware that Shaver had two weapons inside the stopped vehicle, and Officer Mitchell had seen a leather holster next to where Shaver was seated. Mitchell also saw Shaver had a tee shirt or towel in his lap. After Shaver was directed to get out of the truck, and when Officer Hydron commenced a patdown, Shaver "bowed up," causing Hydron to tell him to "calm down" and again place his hands on the truck. Because of these actions and events, the trial court found it was reasonable for Hydron to reach into Shaver's pockets to determine what was causing the bulges. The trial court further concluded that, although Hydron felt a plastic bag with a rock-like substance in it, the officer still was unaware of what else was in Shaver's pocket

because he could not feel the entire contents of his pocket. The trial court ruled this uncertainty of Hydron as to what else was in Shaver's pocket was sufficient reason with all other circumstances for Hydron to search Shaver's pocket.

In his argument, Shaver places emphasis on Hydron's testimony that, when he searched Shaver's pocket, the bulge "did not feel like a weapon" and that his "intent was to pull everything out of Mr. Shaver's pockets, regardless." In doing so, however, he ignores the circumstances leading to the patdown of Shaver — that guns were present, Shaver was seen next to a leather holster with a tee shirt or towel in his lap, and Shaver appeared "a bit agitated" and was ordered to "calm down." To insure the officers' safety, Officer Hydron felt compelled to check the "big bulge" in Shaver's pocket, and while, in doing so, he found a bag of white powdery substance, Hydron remained uncertain regarding what else was in Shaver's pockets. Under these described circumstances, we cannot say the trial court was clearly wrong in finding Officer Hydron was justified in conducting a limited search to determine that Shaver had no weapon on his person.

NEWBERN and IMBER, JJ., dissent.

DAVID NEWBERN, Justice, dissenting. When Officer Hydron reached into the front pocket of appellant John Wesley Shaver's blue jeans and seized its contents, he violated Mr. Shaver's right under the Fourth Amendment to be free from unreasonable searches and seizures. We should reverse the conviction and direct the Trial Court to suppress the items seized by Officer Hydron.

The majority opinion erroneously asserts that Officer Hydron's actions may be condoned under the rule announced by the United States Supreme Court in *Terry v. Ohio*, 392 U.S. 1 (1968). In the *Terry* case, the Supreme Court held that a police officer may stop and detain an individual, even in the absence of probable cause to arrest, if the officer has a "reasonable suspicion," based upon "specific and articulable facts," that the individual is involved in criminal activity. The *Terry* case further held that, if the officer also reasonably suspects that the person he has detained is "armed and presently dangerous," the officer is "entitled for the protection of himself and others in the area to conduct a carefully

limited search of the outer clothing" of the individual "in an attempt to discover weapons which might be used to assault him." *Id.* at 30. If, during the exterior "weapons frisk," the officer detects an item that he reasonably believes is a weapon, he may, according to the *Terry* case, seize the item.

A *Terry* weapons frisk is not "justified by any need to prevent the disappearance or destruction of evidence of crime." *Id.* at 29. Rather, its "sole justification . . . is the protection of the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer." *Id. See Adams v. Williams,* 407 U.S. 143, 146 (1972) ("The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence . . . .").

Thus, even if an officer is reasonable in *commencing* a *Terry* weapons frisk, the scope of the search that follows "must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible." *Terry v. Ohio,* 392 U.S. at 19. "A search for weapons in the absence of probable cause to arrest . . . must . . . be strictly circumscribed by the exigencies which justify its initiation. Thus it must be limited to that which is *necessary* for the discovery of weapons which might be used to harm the officer or others nearby . . . ." *Id.* at 26 (emphasis added). "[E]vidence may not be introduced if it was discovered by means of a seizure and search which were not reasonably related in scope to the justification for their initiation." *Id.* at 29. *See Minnesota v. Dickerson,* 508 U.S. 366, 373 (1993)("If the protective search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under *Terry* and its fruits will be suppressed."), *citing Sibron v. New York,* 392 U.S. 40, 65-66 (1968).

We have followed the *Terry* case in several of our own decisions. *See, e.g., State v. Barter,* 310 Ark. 94, 833 S.W.2d 372 (1992); *Stout v. State,* 304 Ark. 610, 614, 804 S.W.2d 686 (1991); *Wright v. State,* 300 Ark. 259, 778 S.W.2d 944 (1989); *Cooper v. State,* 297 Ark. 478, 763 S.W.2d 645 (1989); *Hill v. State,* 275

Ark. 71, 628 S.W.2d 285 (1982); *Webb v. State*, 269 Ark. 415, 601 S.W.2d 848 (1980).

Our rules of criminal procedure have codified the principles discussed in the *Terry* case. Under Ark. R. Crim. P. 3.1, an officer may stop and detain a person upon reasonable suspicion that the person "is committing, has committed, or is about to commit (1) a felony, or (2) a misdemeanor involving danger of forcible injury to persons or of appropriation of or damage to property." "'Reasonable suspicion' means a suspicion based on facts or circumstances which of themselves do not give rise to the probable cause requisite to justify a lawful arrest, but which give rise to more than a bare suspicion; that is, a suspicion that is reasonable as opposed to an imaginary or purely conjectural suspicion." Ark. R. Crim. P. 2.1. If an officer has detained an individual pursuant to Rule 3.1, he then may proceed under Rule 3.4, which provides as follows:

> If a law enforcement officer who has detained a person under Rule 3.1 reasonably suspects that the person is armed and presently dangerous to the officer or others, the officer or someone designated by him may search the outer clothing of such person and the immediate surroundings for, and seize, any weapon or other dangerous thing which may be used against the officer or others. In no event shall this search be more extensive than is reasonably necessary to ensure the safety of the officer or others.

Thus, the *Terry* case and our rules of criminal procedure allow an officer to commence a weapons frisk when the officer (1) has detained the suspect based on reasonable suspicion that he is involved in criminal activity, and (2) reasonably believes the suspect is armed and dangerous. However, a weapons frisk also may be permissible where the reason for the initial detention is *not* that the suspect is involved in criminal activity. Under *Pennsylvania v. Mimms*, 434 U.S. 106 (1997), and *Maryland v. Wilson*, 117 S. Ct. 882 (1997), a driver or passenger, even one who is not suspected of any criminal activity, may be ordered from a vehicle following a valid traffic stop and thus "detained" for Fourth Amendment purposes. If the officer then develops reason to believe the driver or passenger is armed and dangerous, he may conduct a *Terry* weapons frisk.

Under the rule announced in *Minnesota v. Dickerson*, 508 U.S. 266 (1993), an officer may seize even contraband if its incriminating nature becomes immediately apparent to him "through the sense of touch during an otherwise lawful" *Terry* search. In approving this "plain-feel" exception to the Fourth Amendment's warrant requirement, the Court in *Dickerson* observed that, "[i]f a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons; if the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plain-view context." *Id.* at 376-77.

In light of the above principles and the factual circumstances recited in the majority opinion, I am willing to concede, for the sake of argument, that Officer Hydron was reasonable in detaining Mr. Shaver and in further concluding that Mr. Shaver was armed and dangerous. Thus, I do not dispute the majority's suggestion that Officer Hydron was permitted by the *Terry* case to commence a weapons frisk of Mr. Shaver's outer clothing.

The facts mentioned by the majority, however, only justify the *commencement* of a *Terry* search, not Officer Hydron's subsequent intrusion into Mr. Shaver's pocket. Based on Officer Hydron's own testimony, it is clear that he exceeded the scope of the search that he was permitted by the *Terry* case to undertake when he reached into Mr. Shaver's pocket. Officer Hydron testified that, when he "reached to pat Mr. Shaver down," he noticed a bulge in Mr. Shaver's front pocket. Officer Hydron testified that he "was uncertain as to what it was." Significantly, he testified that the item "*did not feel like a weapon.*" The officer said that he "didn't know or have any idea what was in his pockets. All I knew was that there was a big bulge, so that is why I decided to reach inside the pocket." He emphasized that he would have emptied Mr. Shaver's pockets "regardless."

By his own admission, Officer Hydron intruded into Mr. Shaver's inner clothing without first concluding that the item he had detected in the course of the pat-down was a weapon. That

fact renders the officer's entry into the pocket illegal under the Fourth Amendment. In approving the officer's conduct in the *Terry* case, the Court was careful to note that the officer "did not place his hands" in the suspects' "pockets or under the outer surface of their garments until he had felt weapons, and then he merely reached for and removed the guns." *Terry v. Ohio,* 392 U.S. at 30.

In *Sibron v. New York, supra,* which was a companion case to the *Terry* case, the Court invalidated the officer's search of the petitioner's pocket because that extension of the initial, exterior pat-down was not based on a reasonable suspicion that a weapon would be found there. The Court in *Sibron* distinguished the *Terry* case as follows:

> The search for weapons approved in *Terry* consisted solely of a limited patting of the outer clothing of the suspect for concealed objects which might be used as instruments of assault. *Only when he discovered such objects* did the officer in *Terry* place his hands in the pockets of the men he searched. In this case, with no attempt at an initial limited exploration of arms, Patrolman Martin thrust his hand into Sibron's pocket and took from him envelopes of heroin. His testimony shows that he was looking for narcotics, and he found them. *The search was not reasonably limited in scope to the accomplishment of the only goal which might conceivably have justified its inception—the protection of the officer by disarming a potentially dangerous man.*

New York v. Sibron, 392 U.S. at 65 (emphasis added). *See also Bailey v. State,* 246 Ark. 362, 367, 438 S.W.2d 321, 324-25 (1969) (reversing appellant's conviction and stating officer's search of appellant's pocket and seizure of pocketbook was invalid and had "no reasonable relation to the object of the search, that being for a weapon"; *Leopold v. State,* 15 Ark. App. 292, 297, 692 S.W.2d 780, 784 (1985) ("An officer has the right to frisk a detainee's possessions under *Terry* if there is a reasonable suspicion that there is a weapon located there.").

The decisions of courts in other jurisdictions also require that an officer conducting a *Terry* search must, before moving the search from the exterior to the interior of a suspect's clothing, have a reason to believe that the item he has detected is a weapon.

In *People v. Collins,* 463 P.2d 403, 406 (Cal. 1970), the Supreme Court of California held that the scope of an exterior pat-down "cannot be exceeded at the mere discretion of an officer, but only upon discovery of tactile evidence particularly tending to corroborate suspicion that the suspect is armed." The court observed that "[f]eeling a soft object in a suspect's pocket during a pat-down, absent unusual circumstances, does not warrant an officer's intrusion into a suspect's pocket to retrieve the object." *Id.*

Numerous other cases are in accord. *See, e.g., Ellis v. State,* 573 So. 2d 724, 725 (Miss. 1990)("When an object is soft or does not reasonably resemble a weapon, the *Terry* analysis does not justify removing it from the suspect's clothing and searching it."); *United States v. Santillanes,* 848 F.2d 1103 (10th Cir. 1988); *State v. Collins,* 679 P.2d 80 (Ariz.App. 1984); *Blackburn v. State,* 414 So.2d 651, 652 (Fla.App. 2d Dist. 1982)(seizure of item that caused a "bulge" in appellant's shirt pocket held "not permissible when the officer does not reasonably believe that what he is finding is a weapon"); *Francis v. State,* 584 P.2d 1359, 1363 (Okl.Cr. 1978)("When in course of a frisk the officer feels an object, he is not justified in seizing it unless it reasonably resembles an offensive weapon."); *People v. McCarty,* 296 N.E.2d 862 (Ill.App. 1973) . *See generally* 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 9.5(c), at pp. 276-80 (3d ed. 1996).

Thus, even if Officer Hydron could have legitimately commenced a *Terry* search of Mr. Shaver's outer clothing, the officer's testimony shows that he never concluded, as a result of his initial pat-down, that the "bulge" he detected in Mr. Shaver's pocket was a weapon. It follows that the officer's entry into Mr. Shaver's pocket was "not reasonably related to the circumstances which provoked the protective search for weapons." *United States v. Del Toro,* 464 F.2d 520, 522-23 (2d Cir. 1972). The search, therefore, did not comply with the *Terry* case, and the evidence seized as a result of the search should be suppressed. Nor can Officer Hydron's intrusion into Mr. Shaver's pocket be justified under the "plain-feel" exception approved by the Supreme Court in *Minne-*

sota v. Dickerson, supra. Nothing in the officer's testimony suggests that the "incriminating nature" of the bulge became "immediately apparent" to the officer during his pat-down of Mr. Shaver's outer clothing. The officer testified he "had no idea" what was there.

In the darkness of 2:40 a.m. on a July morning in the presence of two men whose vehicle containing weapons has been stopped for speeding, police officers are undoubtedly entitled to take reasonable measures to protect themselves from the possibility of being wounded if one of the men, removed from the vehicle, has a weapon in his pocket. The law must zealously provide for the officers' protection. At least equal zeal must, however, be applied to the protection of this principle: "The right of the people to be secure in their persons . . . and effects, against unreasonable searches and seizures shall not be violated . . . ." U.S. Const., amend. 4. Obviously, a balance must be achieved by interpreting the word "unreasonable," and then a line must be drawn.

To avoid the Fourth Amendment being swallowed by the need to protect the officers, and to avoid the need to protect the officers from being swallowed by the Fourth Amendment, the United States Supreme Court has drawn the line, described in the cases cited above, to be followed by all courts, including this one. In this instance this Court has clearly overstepped that boundary.

I respectfully dissent.

IMBER, J., joins in this dissent.

JOHN NORRELL ARMS, INC. *v.* Curtis HIGGINS

97-610 962 S.W.2d 801

Supreme Court of Arkansas
Opinion delivered February 26, 1998

Joel Taylor, for appellant.

Kemp, Duckett, Spradley & Curry, by: *James M. Duckett*, for appellee.

ROBERT L. BROWN, Justice. This appeal by appellant John Norrell Arms, Inc., arises out of a dismissal of Norrell Arms's complaint against appellee Curtis Higgins due to lack of personal jurisdiction by the trial court over Higgins. Norrell Arms contends on appeal that the trial court erred in dismissing its complaint. We affirm the dismissal.

The facts leading up to the dismissal are these. Higgins is a resident of the State of Oklahoma and sole shareholder of an Oklahoma corporation, S & H Arms of Oklahoma, Inc. Norrell Arms is an Arkansas corporation with its principal place of business in Little Rock. A third person not a party to this action is Thomas Seslar, a resident of Carroll County, who was doing business as S & H Arms Manufacturing Company, apparently a sole proprietorship, at the time of the events in question.

On March 28, 1995, an Oklahoma default judgment in favor of Higgins and against Seslar was filed in Carroll County. In that judgment, the Oklahoma trial court found that Higgins and Seslar had been in business together as a fifty-fifty partnership engaged in the manufacture and sale of firearms and that Seslar took certain inventory which belonged to Higgins when the partnership was dissolved. That inventory included 330 autosears, which are parts that convert a semi-automatic firearm into a machine gun. The judgment provided that Seslar should return the 330 autosears, as

well as other inventory to Higgins, and that Seslar should pay Higgins $15,776.30 in attorney fees and $82,500.00 for lost sales.

On October 6, 1995, a writ of execution was issued to the Sheriff of Carroll County to pick up "Firearms, autosears . . . and all other property of the Defendant, Thomas Seslar." On October 14, 1995, the Sheriff issued his return showing that property of Seslar had been seized, and that return was filed on December 11, 1995.

On October 29, 1996, Norrell Arms sued Higgins in Pulaski County Chancery Court seeking declaration of ownership of 60 Ruger 1022 autosears for which Norrell Arms claimed it had paid Seslar $18,500. Norrell Arms further claimed that the 60 autosears were part of the 330 autosears referenced as inventory in the Higgins judgment taken against Seslar. According to allegations in the Norrell Arms complaint, Seslar was incarcerated in federal prison. For its second claim, Norrell Arms alleged that Higgins had tortiously interfered with its contract to buy the 60 autosears from Seslar by registering his Oklahoma judgment in Arkansas and prayed for compensatory and punitive damages.

Higgins entered a special appearance in Pulaski County Chancery Court to contest personal jurisdiction and subject-matter jurisdiction as well. Discovery ensued, and the trial court conducted a hearing in which Higgins and John Norrell testified. The trial court concluded that it had no personal jurisdiction over Higgins. In reaching that conclusion, the trial court made these findings in its order:

- The whereabouts of the autosears at issue is unknown, except they may be in Oklahoma.
- Only 36 of the autosears Norrell Arms purchased from Seslar were involved in the Higgins judgment.
- Higgins has never done business in Arkansas or advertised in any magazine within Arkansas or owned property in Arkansas.
- Higgins incorporated S & H Arms of Oklahoma, Inc., in Oklahoma, but the corporation has never been registered in

Arkansas.[1] The corporation has no agent for service in Arkansas or employees in the state.

- S & H Arms of Oklahoma, Inc., has done business in Arkansas through the mail and U.P.S. but has not initiated calls to people in Arkansas.
- Over the past 3 years, S & H Arms of Oklahoma, Inc., has derived between $10,000 and $15,000 in business income from Arkansas. The corporation's annual gross income is $100,000 to $150,000.
- There is insufficient proof that S & H Arms of Oklahoma, Inc., is an alter ego of Higgins.

The trial court then dismissed Norrell Arms's complaint.

Norrell Arms maintains on appeal that the trial court erred in its findings and was wrong in concluding that it lacked personal jurisdiction over Higgins. We disagree.

Under the state's "long arm" statute, Arkansas courts may assert *in personam* jurisdiction over a nonresident party:

> B. PERSONAL JURISDICTION. The courts of this state shall have personal jurisdiction of all persons, and all causes of action or claims for relief, to the maximum extent permitted by the due process of law clause of the Fourteenth Amendment of the United States Constitution.

Ark. Code Ann. § 16-4-101(B) (Supp. 1997).

The U.S. Supreme Court has held that in order for state courts to maintain personal jurisdiction over a nonresident person under the Due Process Clause of the Fourteenth Amendment, a party must satisfy two prongs. The party, first, must show that the nonresident has had sufficient "minimum contacts" with this state and, secondly, must show that the court's exercise of jurisdiction would not offend "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). In this same vein, the Court has held that personal jurisdiction over a nonresident defendant generally exists when the defendant's contacts with the state are continuous, systematic, and substantial. *Helicopteros Naciaonales de Columbia, S.A.*

[1] The trial court, in its order, referred to this corporation as S & H Arms, Inc.

v. Hall, 466 U.S. 408 (1984). *See also Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952). It is essential for a finding of personal jurisdiction that there be some act by which the defendant purposefully avails himself or herself of the privilege of conducting business in the forum state. *Hanson v. Denckla*, 357 U.S. 235 (1957). Moreover, the contacts should be such where a defendant would have a reasonable anticipation that he or she would be haled into court in that state. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

The Eighth Circuit Court of Appeals has established a five-factor test for determining the sufficiency of a defendant's contacts with the forum state so as to result in personal jurisdiction:

> (1) the nature and quality of contacts with the forum state; (2) the quantity of such contacts; (3) the relation of the cause of action to the contacts; (4) the interest of the forum state in providing a forum for its residents; and (5) convenience of the parties.

Burlington Industries, Inc. v. Maples Industries, Inc. 97 F.3d 1100 (8th Cir. 1996). *See also Glenn v. Student Loan Guar. Found.*, 53 Ark. App. 132, 920 S.W.2d 500 (1996). We agree with the Eighth Circuit and our court of appeals that these factors are helpful in the minimum-contact analysis.

Based on the facts asserted in Norrell Arms's complaint and the testimony of witnesses, it is clear that the only contact that Higgins had with Arkansas prior to the Norrell Arms complaint was the filing of an Oklahoma judgment against an Arkansas resident (Seslar) and the issuance of a writ of execution based on that judgment. We do not believe that such brief encounters with the State for the purpose of enforcing a judgment are the type of continuous, systematic, and substantial contacts envisioned by the U.S. Supreme Court to satisfy due process considerations. *See Helicopteros Naciaonales de Columbia, S.A. v. Hall, supra.*

But Norrell Arms goes further and urges that S & H Arms of Oklahoma, Inc., is the alter ego of Higgins and that irrespective of Higgins's slight connection with the State, the corporation has had sufficient contacts with Arkansas which should subject its sole shareholder to the jurisdiction of our courts. As an

initial matter, we cannot say that the trial court clearly erred in finding that the proof submitted was insufficient to establish the corporation as Higgins's alter ego. *See* Ark. R. Civ. P. 52(a). *See also Rano v. SIPA Press, Inc.*, 987 F.2d 580 (9th Cir. 1993). But even assuming alter ego status, we do not agree that the corporation's contacts with Arkansas are sufficient to justify personal jurisdiction over Higgins.

Our conclusion appears to comport with the holdings of analogous cases. For example, in the *Helicopteros* case, the Court refused to hold that personal jurisdiction existed over a defendant corporation even though a representative of that corporation had actually traveled to the forum state to negotiate a contract for the sale of helicopters and had sent people to the forum state for training. *See Helicopteros Naciaonales de Columbia, S.A. v. Hall, supra.* In addition, this court has declined to affirm personal jurisdiction over a Texas lawyer who represented a client from Arkansas. *See Marchant v. Peeples*, 274 Ark. 233, 623 S.W.2d 523 (1981). In *Marchant,* we said:

> The undisputed facts are that Peeples is a Texas lawyer licensed only to practice in Texas. He has had no contacts in Arkansas, except with Mrs. Marchant, and those have been by telephone or mail. He has not solicited any business in this state nor provided any services in this state. He did not initiate contact with Mrs. Marchant.

Id. at 234. And, finally, we agree with the reasoning of the court of appeals, which held that "the use of arteries of interstate mail and banking facilities, standing alone, is insufficient to satisfy due process in asserting long-arm jurisdiction over a nonresident." *Glenn v. Student Loan Guar. Found.*, 53 Ark. App. at 134, 920 S.W.2d at 501.

As the trial court found in its order, S & H Arms of Oklahoma, Inc., is not registered in Arkansas. It has no employees here. It has no agent for service in Arkansas. And it has never initiated contact with people in Arkansas. The only contact that S & H Arms of Oklahoma, Inc., has had with this state has been sales to Arkansas residents, set in motion by Arkansas residents and merchandise delivered to Arkansas residents by mail or UPS.

These contacts are manifestly insufficient to warrant general personal jurisdiction over S & H Arms of Oklahoma, Inc., much less over Higgins.

We are aware that the U.S. Supreme Court has found in certain instances that personal jurisdiction over a nonresident defendant did not violate due process, even though the defendant had had only one contact with the forum state. *See Burger King Corp. v. Rudzewicz,* 471 U.S. 462 (1985); *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957). In *Burger King*, the Court held that specific personal jurisdiction is applicable when the defendant has purposefully established a contact with the forum state and the litigation results from alleged injuries that arise out of or are related to that contact. In the instant case, Norrell Arms contends that its complaint is related to and arises out of Higgins's contacts with this State, which are the registration of his foreign judgment and his attempt to collect on that judgment.

In response, Higgins cites this court to one case that, he contends, is factually similar to the instant case, *Frasca v. Frasca*, 330 S.E.2d 889 (Ga. 1985). In *Frasca*, the Georgia Supreme Court refused to subject a nonresident to jurisdiction based solely on the registration of a New York divorce decree in Georgia. The Georgia Supreme Court concluded that the registration of a judgment did not constitute the transaction of business as contemplated by Georgia's "long arm" statute. Because the Georgia decision appears to have been bottomed on a "transaction of business" rationale under Georgia's statute as opposed to a "minimum contacts" examination, it does not appear to be particularly helpful in deciding this case.

Norrell Arms makes two claims to support its theory that its complaint against Higgins arises out of the registration of Higgins's judgment against Seslar. First, Norrell Arms maintains that this lawsuit is related to the Higgins judgment because the judgment is based on the same property that Norrell Arms claims to have purchased from Seslar. Norrell Arms argues briefly, as a second proposition, that jurisdiction should obtain in Arkansas because when Higgins registered the judgment, he tortiously interfered with Norrell Arms's contract to purchase the autosears.

He cites no authority to support either claim, and we are not persuaded by the arguments. If the registration of a foreign judgment alone is sufficient contact with a forum state, then every person who has ever registered a judgment in Arkansas is subject to suit in this State by any person claiming to have an interest in that property. This would be so, according to Norrell Arms's reasoning, even when the claim is by a third party not involved in the registered judgment and even when the property at issue is no where to be found. That goes too far in our judgment and, again, Norrell Arms cites us to no case to support its contention.

There is a policy consideration in all of this which is important to our analysis. The State of Arkansas must give full faith and credit to foreign judgments under the U.S. Constitution. U.S. Const. art. 4, § 1. *See also* Ark. Code Ann. § 16-66-602 (Supp. 1995). Subjecting those like Higgins who seek to enforce a foreign judgment in Arkansas to lawsuits by third parties when the property at issue may not even be located in Arkansas could well impede this basic constitutional principle.

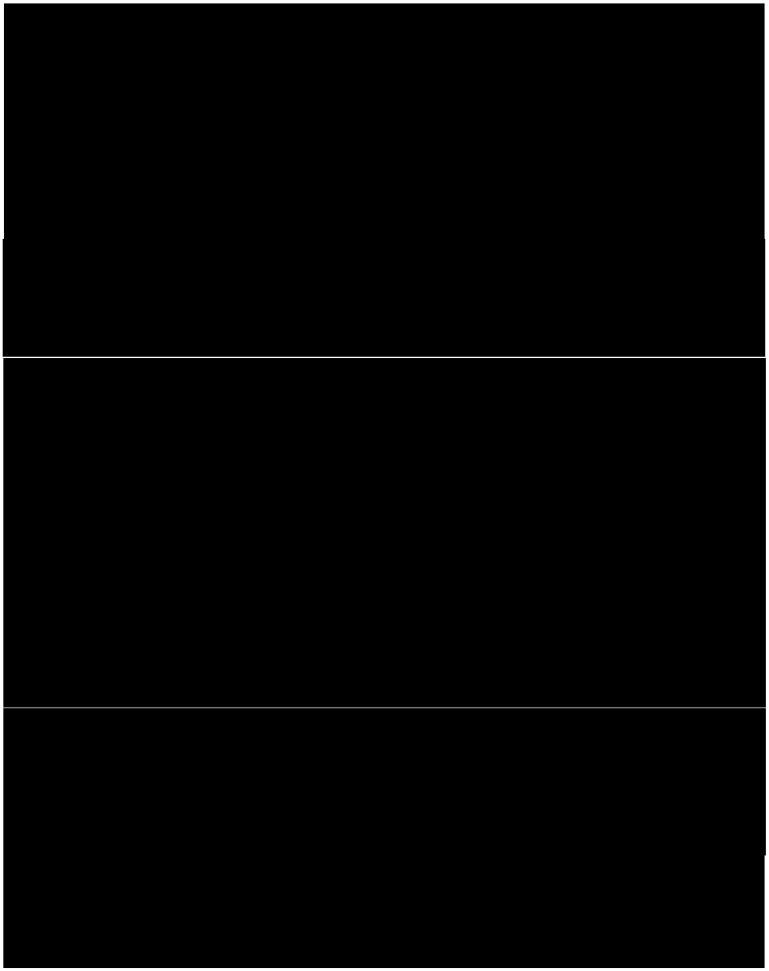
We hold that the trial court did not clearly err in finding that Higgins did not have minimum contacts with the State of Arkansas. *See* Rule 52(a). *See also Rano v. SIPA Press, Inc., supra.* We further hold that the trial court correctly concluded, based on its findings, that it lacked personal jurisdiction over Higgins. Because we decide this matter based on the first prong of the *International Shoe* test, there is no need for us to examine the second prong of fair play and substantial justice.

Affirmed.

Scotty Ray GARDNER *v.* STATE of Arkansas

CR 97-785 963 S.W.2d 590

Supreme Court of Arkansas
Opinion delivered February 26, 1998



Alvin Schay, for appellant.

Winston Bryant, Att'y Gen., by: *Brad Newman*, Asst. Att'y Gen., for appellee.

ANNABELLE CLINTON IMBER, Justice. This case presents a question concerning the law of prosecutorial vindictiveness. The appellant purported to enter a guilty plea which was subsequently vacated on federal habeas review. On retrial, the appellant was charged as a habitual offender based on prior felony convictions, most of which had occurred prior to the appellant's initial plea attempt. The trial court denied the appellant's motion to dismiss the habitual charge based on prosecutorial vindictiveness. We find no error and affirm.

On November 8, 1990, Scotty Ray Gardner was charged with two counts of criminal attempt to commit first-degree murder in Arkansas County Circuit Court. While the case was set for a jury trial on November 15, 1991, Gardner purported to enter a guilty plea to the two counts at a hearing on October 23, 1991. On October 30, 1991, the trial court sentenced Gardner to two concurrent terms of thirty years' imprisonment, with seven years of each term suspended.

In an unpublished opinion, this court affirmed the denial of Gardner's Rule 37 petition and his petition to withdraw the plea. *Gardner v. State*, No. CR 94-559 (Ark. slip op. Feb. 27, 1995). However, the United States District Court, Eastern District of Arkansas, found that the trial court failed to establish a factual basis for the guilty plea, and impermissibly sentenced Gardner without his presence or the presence of counsel. Accordingly, on January 11, 1996, the District Court ordered the issuance of a writ of habeas corpus conditioned on Gardner's rearraignment and retrial.

On February 13, 1996, the prosecuting attorney filed an amended information charging Gardner as a habitual offender with four or more felonies pursuant to Ark. Code Ann. § 5-4-501 (Repl. 1997). While at trial on July 11, 1996, Gardner objected to the amendment of the habitual-offender count, arguing that the amendment constituted a penalty for the exercise of his rights. He moved that the case should proceed as originally charged. The prosecutor explained as follows:

> The Court is well aware that a lot of times we don't complete our review of somebody's criminal record until well — until just before trial, and it's not at all uncommon for me to amend to allege habitual status a week before trial, just as long as I let defense counsel know. In this case also, we have an additional conviction after Mr. Gardner — after we all thought Mr. Gardner had plead [sic] guilty, which changed the — changed the statue even more. He has Oklahoma convictions; he has Fort Smith convictions. He has Cleveland County charges that were dismissed as a result of what we thought was a plea here. And then he subsequently had escape charges in Arkansas County. He is a habitual offender. And I think the State is entitled — he walked up there and we thought plead [sic] guilty. And I think the State is entitled to amend at any point in time. And I have told [defense counsel], well, I think I amended probably in January or February, as soon as I found this thing was being remanded, and I was able to complete my — complete my checking of his — of his past record.

The trial court asked whether Gardner could have been charged as a habitual before, to which the prosecutor responded in the affirmative for "small habitual." When asked again why Gardner

was not charged as a habitual offender initially, the prosecutor stated that:

> Your Honor, I had never gotten that far along. He walked up — we had never gotten that far along in — in trial preparation. There are a lot of times that we don't — until I see a case is going to trial I don't get certified copies of these things simply because they charge me every time I get a copy from Oklahoma, or Fort Smith, or wherever. We didn't get close enough to trial. We walked up there and plead [sic] guilty to the Court. I didn't — [defense counsel] might have an argument if I had extended him an offer of twenty-three years, and that was based upon a plea arrangement that we reached and then he set it aside. He refused, or rejected my first offer. And I did not tell the Court I wasn't going to extend him an offer. I said, "He has rejected my offer. I don't feel obligated to extend him another one.
>
> * * *
>
> And since then I have talked to the victims, and the victims have both said they want their day in court. And — and in this type of situation, I think I have got to give them — give them some deference, Judge.

Following jury selection, an in-chambers hearing was held where the prosecutor further explained that:

> [A]fter we discussed the issue of the alleged prosecutorial vindictiveness, I went back to and looked at the escape Information that was charged — filed against Mr. Gardner in 1991, to which he pled and received a sentence of four years. He was charged as a habitual offender at that time. That was well before there was any guilty plea set aside or anything else. And based upon that, I would — I would offer that as further evidence that there is no prosecutorial vindictiveness in this case.

Following the close of the State's case-in-chief, Gardner again objected to the increase in severity and moved that the case be submitted only on the original charges. The prosecutor responded with the escape information that he filed against Gardner in 1991, stating that he charged Gardner as a habitual "some five — four or five years before this guilty plea was set aside." While the jury was deliberating during the guilt phase, defense

counsel once again objected to the addition of the habitual charge. The prosecutor responded as follows:

> To bring anybody who ever uses this record up to date, Mr. Gardner was arrested in November. He was ordered committed to the State Hospital — the Southeast Arkansas. That was done, examination on 12-10. They recommend that he be seen at the State Hospital. All of which delays any — any decision. He was out on bond, he was seen and examined by them, that — that report came down May the eighteenth, or May of '91, sometime. Mr. Gardner then went to Oklahoma. His bond was revoked. Upon his return to the state of Arkansas he pled open-ended to the Court. Now, I don't know that there was ever a trial date set in this case.[1] I believe I have got the option to amend the habitual status at any point as long as the defendant has reasonable notice. It's also very important to point out that when he was charged with the escape in November of '91, that was an allegation of the habitual offender status, well before he filed any motion with the Federal Court. I have said he is manipulating the system speaking solely about what he has told the various mental health professionals that have dealt with him. I would also point out that the Amended Information was filed in February of 1996. As soon as I found out this case had been remanded, I knew that I was intending to charge Mr. Gardner as a habitual and I amended. It's not like I did it just before trial. [Defense counsel] has known about it.

The trial court ultimately denied Gardner's request that the case be submitted as originally charged. The felony convictions given to the jury in support of the habitual count included a 1983 Oklahoma larceny of merchandise from a retailer plea, and an Oklahoma unauthorized use of a vehicle plea on the same date. Gardner had also pleaded guilty in 1986 to theft of property in Sebastian County, and to a 1992 second-degree escape in Arkansas County.

Following the trial, the jury found Gardner guilty of one count of criminal attempt to commit murder in the first degree and one count of battery in the first degree, and imposed sen-

[1] As already stated, the record shows that the case was in fact set for trial on November 15.

tences in the amount of thirty and twenty years' imprisonment, respectively. The jury also recommended that these sentences run consecutively. The trial court entered a judgment and commitment order reflecting these sentences, and ordered that they be served consecutively.

As set forth in Gardner's sole point on appeal, his only argument for reversal is that the trial court erred in allowing the prosecutor to amend the information to add the habitual-offender charge. However, a fair reading of the remainder of Gardner's brief suggests that he additionally contends that the trial court was vindictive in imposing consecutive sentences, as opposed to the concurrent sentences originally imposed when the purported guilty plea was entered. To the extent that this is a claim that the trial court was vindictive in imposing consecutive sentences, we agree with the State that this argument was waived by the failure to object to the imposition of consecutive sentences, and more particularly by the failure to object that the imposition of consecutive sentences violated his due-process rights. We now turn to Gardner's claim that he was denied due process when the prosecutor amended the information against him to add the habitual-offender count. We review a trial court's finding regarding prosecutorial vindictiveness for clear error. *Horne v. State*, 12 Ark. App. 301, 677 S.W.2d 856 (1984).

In *North Carolina v. Pearce*, 395 U.S. 711 (1969), *overruled in part*, *Alabama v. Smith*, 490 U.S. 794 (1989), the Supreme Court fashioned a prophylactic rule to protect against a sentencing authority imposing a greater sentence following a defendant's exercise of his right to appeal. When a defendant has successfully attacked his first conviction, due process requires that vindictiveness "play no part in the sentence he receives after a new trial." *Id.* The Court also held that due process requires that a defendant "be freed of apprehension" of a retaliatory motivation on the part of the sentencing judge so that the defendant will not be deterred from exercising his right to appeal or collaterally attack his first conviction. In order to "assure the absence of such a motivation," the Court concluded that whenever a judge imposes a more severe sentence after a new trial, the "reasons for his doing so must affirmatively appear." *Id.* Moreover, "[t]hose reasons

must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made a part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed upon appeal." *Id.*

Pearce's prophylactic rule was extended to prosecutors in *Blackledge v. Perry*, 417 U.S. 21 (1974). In *Blackledge* the respondent, already an incarcerated prisoner, was initially charged in North Carolina District Court with misdemeanor assault with a deadly weapon. Following a bench trial, the respondent was given a six-month sentence to be served following the expiration of the time he was already serving. Respondent then exercised his statutory right to trial *de novo* in North Carolina Superior Court. Following the filing of the notice of appeal, the prosecuting attorney obtained an indictment (based on the same conduct) for felony assault with a deadly weapon with intent to kill and inflict serious bodily injury. Respondent pleaded guilty to the indictment in Superior Court, and was sentenced to a term of five to seven years to be served concurrently with time already being served.

The Supreme Court granted certiorari to consider whether the "indictment on the felony charge constituted a penalty for his exercising his statutory right to appeal" in violation of the Due Process Clause of the Fourteenth Amendment. *Id.* Respondent's due process arguments were "derived substantially" from *Pearce*, *supra*. *Blackledge*, *supra*. While the *Blackledge* Court acknowledged that there was no evidence of prosecutorial bad faith or maliciousness in seeking the felony indictment, "[t]he rationale of our judgment in the *Pearce* case, however, was not grounded upon the proposition that actual retaliatory motivation must inevitably exist. Rather, we emphasized that 'since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of his right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge.'" *Blackledge*, *supra* (quoting *Pearce*, *supra*). The *Blackledge* Court reasoned that the same considerations applied so that a person convicted of an offense should be free of apprehen-

sion of the substitution of a more serious charge, subjecting that person to increased penalties and other collateral consequences, once that person exercised his statutory right to a *de novo* trial. Thus, due process required that "such a potential for vindictiveness" not enter North Carolina's two-tiered appellate process. *Blackledge, supra.* "We hold, therefore, that it was not constitutionally permissible for the State to respond to [respondent's] invocation of his statutory right to appeal by bringing a more serious charge against him prior to the trial *de novo.*" *Blackledge, supra.*

United States v. Goodwin, 457 U.S. 368 (1982), limited the holdings of *Pearce* and *Blackledge* insofar as they related to a presumption of vindictiveness. In *Goodwin*, the "question presented [was] whether a presumption that has been used to evaluate a judicial or prosecutorial response to a criminal defendant's exercise of a right to be retried after he has been convicted should also be applied to evaluate a prosecutor's pretrial response to a defendant's demand for a jury trial." The respondent in *Goodwin* was initially charged with several misdemeanor offenses, but was subsequently indicted with felony offenses arising out of the same conduct once plea negotiations broke down. Respondent moved to set aside the verdict on the ground of prosecutorial vindictiveness, alleging that the indictment on the felony charge "gave rise to an impermissible appearance of retaliation." *Id.*

The *Goodwin* Court declined to apply the *Blackledge* prophylactic rule. Examining its prior holdings, the Supreme Court stated that in *Pearce* the Court "applied a presumption of vindictiveness, which may be overcome only by objective information in the record justifying the increased sentence." *Goodwin, supra.* Likewise, in *Blackledge*, "the Court held that the likelihood of vindictiveness justified a presumption that would free defendants of apprehension of such a retaliatory motive on the part of the prosecutor." *Goodwin, supra.* Distinguishing *Pearce* and *Blackledge*, the *Goodwin* Court explained that "[t]he decisions in these cases represent a recognition by the Court of the institutional bias inherent in the judicial system against the retrial of issues that have already been decided." The case was more like *Bordenkircher v. Hayes*, 434 U.S. 357 (1978), where the Court held that there was no due process prohibition against a prosecutor carrying out a threat made

during plea negotiations, to bring additional charges should the defendant refuse to plead guilty to the offense as originally charged. Like *Bordenkircher*, the facts in *Goodwin* arose "from a pretrial decision to modify the charges against the defendant." *Goodwin, supra.* However, unlike *Bordenkircher*, there was no evidence in the record to support a claim of actual vindictiveness on the part of the prosecutor, "the prosecutor never suggested that the charge was brought to influence the respondent's conduct." *Goodwin, supra.* Because there was no evidence of actual vindictiveness, the *Goodwin* case turned on whether a presumption of vindictiveness would apply.

Here the Supreme Court was wary of adopting an "inflexible presumption of prosecutorial vindictiveness in a pretrial setting":

> In the course of preparing a case for trial, the prosecutor may uncover additional information that suggests a basis for further prosecution or he simply may come to realize that information possessed by the State has a broader significance. At this stage of the proceedings, the prosecutor's assessment of the proper extent of prosecution may not have crystallized. In contrast, once a trial begins — and certainly by the time a conviction has been obtained — it is much more likely that the State has discovered and assessed all of the information against an accused and has made a determination, on the basis of that information, of the extent to which he should be prosecuted. Thus, a change in the charging decision made after an initial trial is completed is much more likely to be improperly motivated than is a pretrial decision.
>
> In addition, a defendant before trial is expected to invoke procedural rights that inevitably impose some "burden" on the prosecutor. Defense counsel routinely file pretrial motions to suppress evidence; to challenge the sufficiency and form of an indictment; to plead an affirmative defense; to request psychiatric services; to obtain access to government files; to be tried by jury. It is unrealistic to assume that a prosecutor's probable response to such motions is to seek to penalize and to deter. The invocation of procedural rights is an integral part of the adversary process in which our criminal justice system operates.

Goodwin, supra.

The timing of the prosecutor's action suggested that a presumption of vindictiveness was not warranted. "A prosecutor should remain free before trial to exercise the broad discretion entrusted to him to determine the extent of the societal interest in prosecution . . . the initial charges filed by a prosecutor may not reflect the extent to which an individual is legitimately subject to prosecution." *Goodwin, supra.* While the respondent initially expressed interest in plea negotiations, he later opted for a jury trial in District Court, forcing the Government to "bear the burdens and uncertainty of a trial." *Goodwin, supra.* "Perhaps most importantly, the institutional bias against the retrial of a decided question that supported the decisions in *Pearce* and *Blackledge* simply has no counterpart in this case." *Goodwin, supra.*

The Supreme Court further limited the *Pearce* holding in *Alabama v. Smith,* 490 U.S. 794 (1989). In *Smith* the respondent pleaded guilty to charges of burglary and rape, and the prosecutor dropped a sodomy charge in exchange. The trial court sentenced him to two thirty-year terms of imprisonment to be run concurrently. Later, the respondent successfully got his guilty plea vacated and the case was remanded for retrial. The case was reassigned to the same trial judge, and the case went to trial on the three original charges, including the sodomy charge. The jury found respondent guilty on all three counts, and the trial court imposed a sentence of life imprisonment on the burglary conviction, in addition to a concurrent term of life imprisonment on the sodomy conviction and a consecutive term of 150 years' imprisonment on the rape conviction. The trial court explained that it imposed "a harsher sentence than it had imposed following respondent's guilty plea because the evidence presented at trial, of which it had been unaware at the time it imposed sentence on the guilty plea, convinced it that the original sentence had been too lenient." *Id.*

[redacted] The Supreme Court held that the Alabama Supreme Court erroneously applied the *Pearce* prophylactic rule to presume vindictiveness on the part of the trial court. The *Smith* Court explained that the *Pearce* presumption of vindictiveness was limited in *Goodwin* to circumstances in which there was a "'reasonable likelihood'. . . that the increase in sentence is the product of actual

vindictiveness on the part of the sentencing authority. Where there is no such reasonable likelihood, the burden remains upon the defendant to prove actual vindictiveness." *Alabama v. Smith, supra* (quoting *Goodwin, supra*). Following this reasoning, the Court concluded that "when a greater penalty is imposed after trial than was imposed after a prior guilty plea, the increase in sentence is not more likely than not attributable to the vindictiveness of the sentencing judge. Even when the same judge imposes both sentences, the relevant sentencing information available to the judge after the plea will usually be considerably less than that available after a trial." *Alabama v. Smith, supra.* While the same judge that sentenced following a guilty plea may be imposing sentence following trial, the judge is not "do[ing] over what it thought it had already done correctly." *Alabama v. Smith, supra.* The Court went so far as to overrule *Simpson v. Rice*, the companion case to *Pearce, supra*, since it involved an application of the presumption of vindictiveness in a case where an increased sentence was imposed following the vacation of a guilty plea. "[T]here is no basis for a presumption of vindictiveness where a second sentence imposed after trial is heavier than a first sentence imposed after a guilty plea." *Alabama v. Smith, supra.*

The upshot of the Supreme Court cases is that a defendant can establish a claim for prosecutorial vindictiveness in charge selection in two ways. First, the defendant may establish actual vindictiveness by "prov[ing] objectively that the prosecutor's charging decision was motivated by a desire to punish him for doing something that the law plainly allowed him to do." *Goodwin, supra.* Of course, this is an extremely difficult burden for the defendant to satisfy, given that it involves proving the prosecutor's state of mind.[2] In the present case, there is little objective evidence of actual vindictiveness in the record. While at one time defense counsel alleged that the prosecutor's remarks during trial that Mr. Gardner was "abusing the system" constituted evidence

[2] In *Pearce, supra*, the Supreme Court noted that it would be "extremely difficult" to prove retaliatory motivation in an individual case. Likewise, in *Goodwin, supra*, the Court quoted from the Government's brief in acknowledging that it would be a "rare case" in which the defendant could successfully demonstrate that enhanced charges were in actuality a penalty for the exercise of a procedural right.

of actual vindictiveness, this evidence fails to satisfy the defendant's burden to prove actual vindictiveness.

Rather, Gardner must rely on the *Blackledge* presumption of vindictiveness, which was applied where the prosecutor substituted a "more serious charge for the original one, thus subjecting [the defendant] to a significantly increased potential period for incarceration" following the exercise of a "right." *Blackledge, supra.* In the present case, the State amended the information against Gardner to add a habitual-offender charge, exposing Gardner to a greater range of punishment than he was exposed to when he pleaded guilty to the initial charges. Professor LaFave writes that a charge is "obviously" "more serious" for *Blackledge* purposes when a count is added under a habitual-criminal act. Wayne R. LaFave and Jerold H. Israel, *Criminal Procedure*, § 13.7(c) (1984 and Supp. 1991) (citing *James v. Rodriguez*, 553 F.2d 59 (10th Cir. 1977)(holding that "tactical" filing under the New Mexico Habitual Criminal Act on defendant's retrial violated the defendant's right of appeal where the State "made no attempt to justify the increased punishment")).

We hold that Gardner has established a prima facie due process violation by showing that the State added a charge against him so as to expose him to a greater range of punishment following the successful collateral attack of his guilty plea.[3] Thus, this case turns on whether the State sufficiently rebutted a presumption of vindictiveness.

In *Blackledge, supra,* the Supreme Court provided an example of when the State may permissibly substitute a more serious charge on retrial — when it was "impossible" to bring the increased charge at the first trial — for example when a homicide victim had not yet died at the time of the first trial, thus making it impossible to bring a homicide charge. The *Goodwin* Court, in reviewing the *Pearce* holding (on which *Blackledge* was based), stated that "the [*Pearce*] Court applied a presumption of vindictiveness, which may be overcome only *by objective information in the*

[3] The State concedes as much in its brief, writing that "The question to be decided is whether the amendment constituted vindictiveness by the prosecutor. The State bears the burden of overcoming a presumption of vindictiveness."

record justifying the increased sentence." *Goodwin, supra.* (emphasis added). In a later footnote reviewing the *Blackledge* opinion, the *Goodwin* Court stated that "[t]he presumption again could be overcome by *objective evidence justifying the prosecutor's action.*" *Goodwin, supra* (emphasis added). Further guidance can be found in *Texas v. McCullough*, 475 U.S. 134 (1986), where a majority of the Supreme Court refused to technically limit the sentencing authority's ability to rebut a presumption of vindictiveness with information obtained after the initial trial. The *Pearce* opinion was not "intended to describe exhaustively all of the possible circumstances in which a sentence increase could be justified. Restricting justifications for a sentence increase to only 'events that occurred subsequent to the original sentencing proceedings' could in some circumstances lead to absurd results." *McCullough, supra.*

Professor LaFave writes that other jurisdictions vary as to what showing will suffice to rebut the presumption. LaFave, *supra.* He identifies approaches that range from a requirement that a prosecutor merely state a nonvindictive reason when charges are added, *e.g., Jackson v. Walker*, 585 F.2d 139 (5th Cir. 1978), to a stringent requirement that the prosecutor "dispel any appearance of prosecutorial vindictiveness." *E.g., United States v. Burt*, 619 F.2d 831 (9th Cir. 1980). As an attractive "middle ground," LaFave suggests an approach set forth in *United States v. Andrews*, 633 F.2d 449 (6th Cir. 1980), holding that where counts are added, the prosecutor must produce an "objective explanation" for his actions. "[O]nly objective, on-the-record evidence can rebut a finding of realistic likelihood of vindictiveness." *United States v. Andrews, supra.* As examples of explanations that could rebut the presumption, the *Andrews* court explained that a prosecutor could not rebut the presumption by stating that she had merely "made a mistake," but could prevail by showing governmental discovery of previously unknown evidence, or previous legal impossibility. *United States v. Andrews, supra.*

We agree that in the case of added counts, a prosecutor should be able to rebut a presumption of vindictiveness with an objective, on-the-record explanation. In the present case, there is more than a simple subjective assertion of the prosecutor's

good faith. Rather, the prosecutor explained that "a lot of times" he did not completely review a case "until just before trial." He stated that the cost of obtaining these records was a factor in waiting until trial was imminent. Because the case did not proceed to trial, the prosecutor did not discover the existence of the prior convictions. Moreover, the prosecutor pointed out that when he filed the information against Gardner on the escape count, prior to the federal grant of habeas relief, he charged Gardner as a habitual offender. Thus, this also arguably rebuts a likelihood of vindictiveness given that the prosecutor had charged Gardner as a habitual offender before the exercise of his federal habeas rights. In sum, the prosecutor produced objective, on-the-record evidence from which the trial court could find a sufficient justification for the addition of the habitual count. Based on these facts, we cannot say that the trial court was clearly erroneous in allowing the State to amend the information to add the habitual count.

Affirmed.

NEWBERN and BROWN, JJ., dissenting.

ROBERT L. BROWN, Justice, dissenting. I agree with the majority opinion that a *prima facie* case of a due process violation was made by the prosecutor's adding the habitual offender count on retrial. I also agree that our test should be whether the prosecutor offered an objective explanation for why the enhancement charge was not originally made. *United States v. Goodwin*, 457 U.S. 368 (1982). And I, finally, agree that a mere mistake by the prosecutor in not filing the habitual offender count initially is not sufficient to rebut the presumption. *See United States v. Andrews*, 633 F.2d 449 (6th Cir. 1980), *cert. denied*, 450 U.S. 927 (1981).

The problem in this case is that the facts do not warrant a rebuttal of the presumption under the law set out by the majority. First, the only explanation by the prosecutor as to why he did not initially charge Gardner as a habitual offender is that the matter never came to trial and he usually checked for other convictions and amended the criminal information, if appropriate, a week before trial. This explanation falls short of an objective explanation and falls more readily into the category of a mistake. The

prosecutor attended the plea, and what could be of greater importance to the sentencing judge than the fact that the defendant had a prior record? Yet, the trial judge did not have this information available when he first sentenced Gardner.

There is also the point that there is no indication that the trial court used the presumption-of-vindictiveness standard or sought an objective explanation from the prosecutor to rebut that presumption. What the trial court did was rely on *Aaron v. State*, 319 Ark. 320, 891 S.W.2d 364 (1995), which is distinguishable from this case on the facts. In *Aaron*, the prosecutor tried to amend the criminal information in the first trial to charge the defendant as a habitual offender and the trial court sustained the defendant's objection that the prosecutor was too late. We reversed the conviction, and prior to retrial, the prosecutor "corrected its oversight" and amended the information. *Aaron*, 319 Ark. at 323, 891 S.W.2d at 365. We held that this correction was not evidence of prosecutorial vindictiveness. Contrary to the facts in *Aaron*, in the instant case, there was no effort by the prosecutor to amend Gardner's information before his plea and sentence.

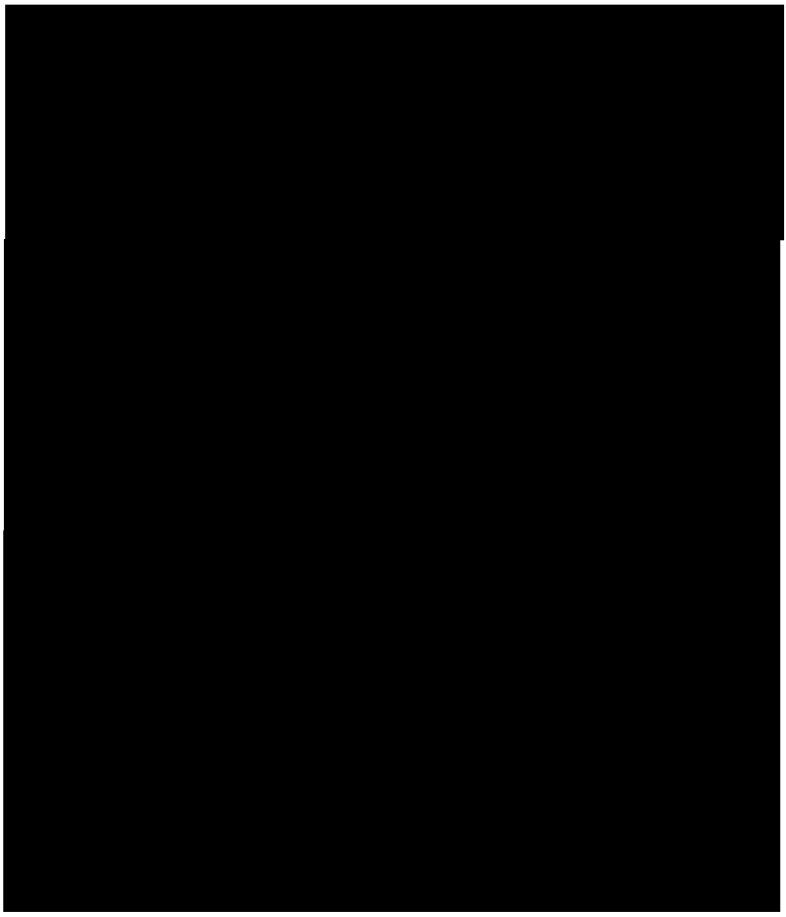
In sum, we are talking merely about a mistake made by the prosecutor to rebut the presumption of vindictiveness. That is not sufficient under *United States v. Andrews, supra.* Accordingly, I dissent.

NEWBERN, J., joins.

Timothy LEATHERS, In His Official Capacity as Commissioner of Revenues, Arkansas Department of Finance and Administration, Office of Driver Control *v.* William W. COTTON

97-619 961 S.W.2d 32

Supreme Court of Arkansas
Opinion delivered February 26, 1998



Daniel S. Smith, for appellant.

Ray Hodnett, for appellee.

ANNABELLE CLINTON IMBER, Justice. This case presents a question of statutory interpretation. It specifically concerns the effect of a final adjudication of a lesser-included DWI offense on the administrative suspension of a driver's license.

The undisputed facts are as follows. On October 26, 1994, Cotton was convicted of DWI first offense in Fort Smith Municipal Court. On October 13, 1996, Cotton was charged with DWI second offense in Van Buren Municipal Court. Pursuant to Ark. Code Ann. § 5-65-104 (Repl. 1997), Cotton's license was temporarily suspended by the Office of Driver Services of the Revenue Division of the Department of Finance & Administration, and Cotton subsequently exercised his right to an administrative hearing. Cotton, a sales manager for a distributing company, would lose his job without a driver's license or a permit. While he did not contest the suspension of his license, he did request a work permit due to hardship. Following a hearing on October 28, 1996, the hearing officer found that there had been a violation of Act 802 of 1995, and imposed second-offense sanctions, suspending Cotton's license for sixteen months, and denying the work permit "as it [was] more than DWI 1st offense within three years."

On November 14, 1996, Cotton filed a petition for *de novo* review in Sebastian County Circuit Court pursuant to section 5-

65-104(c). On January 8, 1997, the Van Buren Municipal Court found Cotton guilty of DWI first offense. Given that the municipal court had acquitted him of DWI second offense, Cotton asserted that the trial court now had jurisdiction to issue a work permit in the administrative review proceeding. Following a hearing on the matter, the trial court entered an order finding that Cotton's acquittal on the DWI second-offense charge in municipal court had "turned this charge into a First Offense Driving While Intoxicated." The court further found that "[s]ince this is a First Offense Driving While Intoxicated case by finding of the Van Buren Municipal Court, the Office of Driver Control cannot suspend the Plaintiff's drivers license for sixteen (16) months." Accordingly, the trial court ordered DF&A to suspend Cotton's license for 120 days "for Driving While Intoxicated, First Offense, in accordance with the Judgment of the Van Buren Municipal Court." Because this time period had already expired given the effective date of suspension, October 28, 1996, the trial court ordered Cotton's license reinstated. DF&A brings the present appeal.

DF&A's sole argument for reversal is that the trial court erroneously interpreted section 5-65-104. Specifically, DF&A contends that the municipal court's acquittal on DWI second offense did not preclude it from considering the DWI first-offense conviction in calculating the total number of offenses for imposition of second-offense sanctions under section 5-65-104.

Administrative suspension or revocation of driver's licenses, which constitutes a remedial civil sanction, *see Pyron v. State*, 330 Ark. 88, 953 S.W.2d 874 (1997), is primarily governed by section 5-65-104. When DF&A initially suspends or revokes the driving privilege of a person arrested for DWI violating Ark. Code Ann. § 5-65-103 (Repl. 1997), "[t]he suspension or revocation shall be based on the number of previous offenses as follows:"

> (A)(i) Suspension for one hundred twenty (120) days for the first offense of operating or being 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;

* * *

> (B)(i) Suspension for sixteen (16) months, during which no restricted permits may be issued, for a second offense of operating or being 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, within three years of the first offense.

Ark. Code Ann. § 5-65-104(a)(4)(A)–(B). In determining the number of previous offenses a person has in considering suspension or revocation, the Office of Driver Services is required to "consider as a previous offense:"

> (A) Any convictions for offenses of operating or being in actual physical control of a motor vehicle while intoxicated . . . under § 5-65-103 or refusing to submit to a chemical test under § 5-65-202 which occurred prior to July 1, 1996; and
>
> (B) Any suspension or revocation of driving privileges for arrests for operating or being in actual physical control of a motor vehicle while intoxicated . . . under § 5-65-103 or refusing to submit to a chemical test under § 5-65-202 occurring on or after July 1, 1996, where the person was not subsequently acquitted of the criminal charges.

Ark. Code Ann. § 5-65-104(a)(9)(A)–(B). If in a criminal case, a court of law renders any decision "arising from any violation of § 5-65-103," an acquittal "on the charges" will reverse the administrative suspension or revocation of the driver's license suspended or revoked. Ark. Code Ann. § 5-65-104(d)(2)(B).

The basic rule of statutory construction to which all other interpretive guides must yield is to give effect to the intent of the legislature. *Mountain Home Sch. Dist. v. T.M.J. Bldrs.*, 313 Ark. 661, 858 S.W.2d 74 (1993). Where the language of a statute is plain and unambiguous, we determine legislative intent from the ordinary meaning of the language used. *Id.* The first rule in considering the meaning of a statute is to construe it just as it reads, giving the words their ordinary and usually accepted meaning in common language. *Id.*

In determining the number of "previous offenses" on which to base its sanction, DF&A is clearly directed to include

"*[a]ny convictions*" for offenses under section 5-65-103. Ark. Code Ann. § 5-65-104(a)(9)(A) (emphasis added). Under this provision, it is obvious that two separate convictions of DWI first offense, both violations of section 5-65-103, should be counted as two "previous offenses." However, the crux of this case is the effect, if any, of the municipal court's acquittal on the DWI second offense charge in light of section 5-65-104(d)(2)(B). Cotton's position is that this acquittal of DWI second offense precludes DF&A from relying on the DWI first-offense conviction as a basis for imposition of second-offense sanctions. In other words, he was "acquitt[ed] on the charges" as that phrase is used in section 5-65-104(d)(2)(B), requiring reversal of the administrative suspension.

We must reject Cotton's argument because it fails to take into consideration that DWI first offense is just as much a violation of section 5-65-103 as is DWI second offense. The difference is only one of quantity. *See McElhanon v. State*, 329 Ark. 261, 948 S.W.2d 89 (1997); *State v. Brown*, 283 Ark. 304, 675 S.W.2d 822 (1984). While the Van Buren Municipal Court acquitted Cotton of DWI second offense, it certainly did not acquit Cotton of the "charge" of violating section 5-65-103. Once the municipal court convicted Cotton of DWI first offense, he simply had two separate convictions of violating section 5-65-103: one on October 26, 1994, and the other on January 8, 1997. Pursuant to section 5-65-104(a)(9)(A), DF&A was required to consider both of these violations of section 5-65-103 as "previous offenses." There was no "acquittal on the charges" under section 5-65-104(d)(2)(B) because the municipal court never acquitted Cotton of violating section 5-65-103. Given that there was no such acquittal, the decision of the Van Buren Municipal Court had no effect on the administrative suspension. Accordingly, we conclude that the trial court erred in finding that DF&A could not suspend Cotton's license for sixteen months.

As an alternative theory for affirmance, Cotton makes the assertion that "[i]f the Appellant's contention is allowed to stand it would constitute an unlawful delegation of judicial power to the executive branch." His sole citation to authority to support this contention is *Davis v. Britt*, 243 Ark. 556, 420 S.W.2d 863

(1967), where this court held that a statute allowing the state hospital to retain a defendant in custody until he was determined "sane" was an unconstitutional delegation of judicial power to the executive branch. We fail to see how *Davis* is apposite to the present case. Moreover, section 5-65-104 ultimately leaves the factual determination of whether there has been a violation of section 5-65-103 in the hands of the judiciary.

The judgment of the trial court is reversed and the case is remanded for further proceedings consistent with this opinion.

Reversed and remanded.

Mack LANGFORD *v.* STATE of Arkansas

CR 97-976 962 S.W.2d 358

Supreme Court of Arkansas
Opinion delivered February 26, 1998

Mark S. Cambiano, for appellant.

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

RAY THORNTON, Justice. Appellant Mack Langford was convicted of possession of methamphetamine with intent to deliver, simultaneous possession of methamphetamine and a fire-

arm, possession of marijuana with intent to deliver, and possession of drug paraphernalia. A jury sentenced him to two forty-year prison terms and two ten-year prison terms for the respective offenses and imposed fines of $50,000. The trial court ordered the sentences to run concurrently for a total sentence of forty years. Appellant raises four points on appeal. We find no error and affirm.

Around 2:30 a.m. on September 29, 1993, Officer Stephen Brown of the Fifth Judicial Drug Task Force applied for a warrant to search the residence of appellant for various drugs, drug paraphernalia, drug money, related drug documents, and weapons. In support of his application for a warrant, Officer Brown submitted his affidavit and the affidavit of Mary Duncan. In his affidavit, Officer Brown stated that on September 24, 1993, he received information from two confidential informants that appellant was providing methamphetamine for sale and distribution to Doyle Gray and Kathy Buchanan, also known as Mary Duncan. In addition, Officer Brown detailed a controlled drug buy that he arranged for the evening of September 28, 1993. He recounted that the two informants went to Mary Duncan's residence to attempt to buy an "eight ball" of methamphetamine, and, while under police surveillance, Duncan went to appellant's residence and then returned to her home where she delivered an eight ball to the informants. Officer Brown further stated that a subsequent field test on the eight ball revealed methamphetamine.

Officer Brown also declared that both informants had provided information against their penal interests and had provided information that led to the subsequent arrest and prosecution of drug violators. Officer Brown stated that he had verified the informants' information through his personal knowledge, as well as intelligence received and placed in case files of the Fifth Judicial Drug Task Force. Officer Brown also listed several exigent circumstances, which he believed made a nighttime search necessary.

Mary Duncan executed the second affidavit in support of the search warrant. Duncan stated that on September 28, 1993, she gave appellant $325 for the purchase of methamphetamine. She also stated that she had personal knowledge that appellant had

drugs packaged for sale at his residence, which he normally kept in his bathroom cabinets, and that he had provided Doyle Gray with drugs on numerous occasions. Duncan further recounted that she had seen drug paraphernalia and firearms at appellant's residence within the previous week. Finally, she declared that she had personal knowledge that appellant was planning to leave his residence on that day.

Based on this information, Municipal Judge Dennis Sutterfield issued a search warrant that authorized the search of appellant's residence at anytime, day or night. Officer Brown and local law enforcement officers executed the warrant at approximately 3:30 a.m. on September 29, 1993; they seized marijuana, methamphetamine, firearms, cash, and various items of drug paraphernalia.

Appellant filed pretrial motions to suppress the evidence seized during the search and any statements he made to the police during the execution of the warrant. He argued that the affidavits contained insufficient facts to establish probable cause and to justify a nighttime search. Appellant further asserted that the statements were the fruits of an illegal search. The trial court denied the motions.

For his first point for reversal, appellant argues that the trial court erred in denying his motion to suppress the evidence seized from his residence because the affidavits for the search warrant failed to establish the reliability of the informants and how they knew about his alleged illegal drug activities, contained material false statements, and failed to establish the particular place where the drugs or other contraband could be found. We address each of these alleged errors in the affidavits separately.

■ ■ In reviewing a trial court's ruling on a motion to suppress, we make an independent determination based upon the totality of the circumstances; we view the evidence in the light most favorable to the appellee, and we reverse only if the ruling is clearly erroneous or against the preponderance of the evidence. *Mullinax v. State*, 327 Ark. 41, 938 S.W.2d 801 (1997), *cert. denied*, 117 S. Ct. 2411 (1997). We apply the totality-of-the-circumstances analysis when determining whether the issuing magistrate

had a substantial basis for concluding that probable cause existed. *Moore v. State*, 323 Ark. 529, 915 S.W.2d 284 (1996); *State v. Mosley*, 313 Ark. 616, 856 S.W.2d 623 (1993). Under this analysis,

> [t]he task of the issuing magistrate is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for . . . conclud[ing]" that probable cause existed.

Moore, 323 Ark. at 538, 915 S.W.2d at 289-90 (citing *Rainwater v. State*, 302 Ark. 492, 791 S.W.2d 688 (1990)).

Rule 13.1(b) of our Arkansas Rules of Criminal Procedure adopts the totality-of-the-circumstances analysis and provides in part:

> If an affidavit or testimony is based in whole or part on hearsay, the affiant or witness shall set forth particular facts bearing on the informant's reliability and shall disclose, as far as practicable, the means by which the information was obtained. An affidavit or testimony is sufficient if it describes circumstances establishing reasonable cause to believe that things subject to seizure will be found in a particular place. Failure of the affidavit or testimony to establish the veracity and bases of knowledge of persons providing information to the affiant shall not require that the application be denied, if the affidavit or testimony viewed as a whole, provides a substantial basis for a finding of reasonable cause to believe that things subject to seizure will be found in a particular place.

Appellant contends that Officer Brown's affidavit did not meet the requirements of Rule 13.1(b) because he failed to set forth particular facts bearing on the informants' reliability and failed to disclose the basis of the informants' beliefs that appellant was involved in illegal drug activity. Appellant bases his hearsay complaint on Officer Brown's averment that he had received information from two confidential informants alleging that appellant regularly provided methamphetamine to Doyle Gray and

Mary Duncan for resale and distribution. Appellant correctly argues that Officer Brown did not establish how the informants obtained their information. With respect to the informants' reliability, Officer Brown's affidavit contained the following statements:

> CI-A and CI-B have both provided information against their penal interest and both had provided information about other drug violators, which has been verified though affiant's personal knowledge, as well as intelligence received and placed in case files of the Fifth Judicial Drug Task Force. Both informants have provided information which led to the subsequent arrest and prosecution of violators.

Although Officer Brown did not provide specific details about the informants' assistance in previous drug cases, he stated more than a mere conclusion and disclosed enough information to show that the informants were worthy of belief. *See Akins v. State*, 264 Ark. 376, 572 S.W.2d 140 (1978).

In addition, under Rule 13.1(b), failure to establish the bases of knowledge of the confidential informants is not a fatal defect "if the affidavit viewed as a whole provides a substantial basis for a finding of reasonable cause to believe that things subject to seizure will be found in particular places." *Heard v. State*, 316 Ark. 731, 736-37, 876 S.W.2d 231, 234 (1994), (quoting *Mosley v. State*, 313 Ark. 616, 622, 856 S.W.2d 623, 626 (1993)). Here, Officer Brown's affidavit, viewed as a whole, provided a substantial basis to believe that drugs and other contraband would be found at appellant's residence. Officer Brown's personal account of the controlled-drug buy established that the informants went to Mary Duncan's residence to purchase methamphetamine with marked money, Duncan left her house and went to appellant's residence to get the eight ball for the informants, she returned to her house where she gave the drugs to the informants, she was under surveillance during this time, and the drugs tested positive for methamphetamine. Officer Brown's affidavit also established that the informants had been searched for drugs before they went to Duncan's residence and that none was found. Based on this information alone, we conclude that Officer Brown's affidavit provided a substantial basis for a finding of reasonable cause to believe that

drugs and other contraband would be found at appellant's residence.

We turn next to appellant's second argument concerning the insufficiency of the affidavits used to obtain the search warrant. He contends that both affidavits contained numerous material false statements. This court has recognized that, under *Franks v. Delaware*, 438 U.S.154 (1978), a warrant should be invalidated if a defendant shows by a preponderance of the evidence that: (1) the affidavit contained a false statement that was made knowingly, intentionally, or recklessly by the affiant; and (2) the false statement was necessary to a finding of probable cause. *Echols v. State*, 326 Ark. 917, 950, 936 S.W.2d 509, 525 (1996), *cert. denied*, 117 S. Ct. 1853 (1997) (citing *Franks*, 438 U.S. at 155-56). We have further recognized that, if such findings are made, the *Franks* test requires that the false material should be excised and the remainder of the warrant examined to determine if probable cause still exists. *Id.* If the truthful portion of the warrant makes a sufficient showing of probable cause, the warrant will not be invalidated. *Id.*

In this case, we have found several inconsistencies between statements contained in the affidavits and testimony given at the suppression hearing. For example, both affidavits averred that Duncan had purchased an eight ball from appellant on the evening of September 28, 1993. Also, Duncan averred that appellant kept drugs packaged for sale in his bathroom cabinets and that he supplied drugs for resale and distribution to Doyle Gray. However, at the suppression hearing, Duncan testified that, while she got the drugs from appellant's residence, she actually purchased them from someone that she did not know. Duncan further denied knowing that Gray had purchased drugs from appellant or that appellant kept drugs at his residence.

Notwithstanding these and other inconsistencies, appellant has failed to show that the affiants made any false statements "knowingly and intentionally or in reckless disregard of the truth." *Heritage v. State*, 326 Ark. 839, 846, 936 S.W.2d 499, 503 (1996). Even if appellant is correct that certain statements were false, and even if Officer Brown and Mary Duncan knew the

statements to be false, the rest of the affidavits made a sufficient showing to constitute probable cause. The affidavits established that Duncan purchased drugs for the informants at appellant's residence on the evening of September 28, 1993, with marked-buy money, and that appellant was going out of town on September 29. Based on this information alone, there was a sufficient showing for probable cause to issue the search warrant.

Appellant's final argument under his first point is that the affidavits violated Rule 13.1(b) of the Arkansas Rules of Criminal Procedure, which requires that the application for a search warrant describe with particularity the places to be searched. Appellant complains that Officer Brown's affidavit did not establish "items subject to seizure would be found in particular places" and that "the facts set out in Duncan's affidavit would have only warranted a search of the appellant's bathroom." Appellant cites no authority for the proposition that an affidavit is insufficient if it fails to identify the precise room within a residence in which drugs or other contraband may be found, and we conclude that his argument is without merit. The affidavits established sufficient facts to support a finding of probable cause to believe that contraband could be found in the locations described in the warrant.

Appellant's second point on appeal is that the trial court erred in denying his motion to suppress because the evidence was seized as the result of an illegal nighttime search. He contends that the affidavits for the search warrant contained an insufficient factual basis to justify a search at night.

It is well settled that an affidavit must set forth a factual basis as a prerequisite to the issuance of a nighttime warrant and that mere conclusions are insufficient to justify a nighttime search. *Owens v. State*, 325 Ark. 110, 926 S.W.2d 650 (1996); *Richardson v. State*, 314 Ark. 512, 863 S.W.2d 572 (1993). Rule 13.2(c) of the Arkansas Rules of Criminal Procedure provides that the issuing judicial officer may authorize a search at any time, day or night, if there is reasonable cause to believe that:

(i) the place to be searched is difficult of speedy access; or

> (ii) the objects to be seized are in danger of imminent removal; or
> (iii) the warrant can only be safely or successfully executed at nighttime or under circumstances the occurrence of which is difficult to predict with accuracy; . . . .

In reviewing whether the requirements of the rule were met, we make an independent determination based upon the totality of the circumstances and reverse the trial court's ruling only if it is clearly against the preponderance of the evidence. *Echols*, 326 Ark. at 954, 936 S.W.2d at 527.

Officer Brown listed four "exigent circumstances" in support of his application for a nighttime warrant to search appellant's residence:

> (1) There are currently drugs at the Mack Langford residence, which are packaged and maintained in a manner that their destruction or removal can be easily accomplished.
>
> (2) Mack Langford has threatened CI-B with a semi-automatic pistol within the last week and is, therefore, believed to be armed and dangerous, thus making the element of surprise inherent with a nighttime search essential for the safety of the officers executing the warrant.
>
> (3) Affiant has information that Mack Langford will be leaving the morning of 29 September 1993, thus giving rise to affiant's belief that the drugs will be removed, hidden or otherwise disposed of.
>
> (4) The location of the residence is located such as to make speedy access impossible in that it sits on a hill overlooking the road, which provides the only access to the property.

After a careful review of the affidavits presented in this case, we have determined that, under the totality of the circumstances, the trial court's decision to deny the motion to suppress evidence seized in the nighttime search was not clearly against the preponderance of the evidence. The affidavits set forth information that Duncan, while under police surveillance, purchased drugs for the confidential informants at the appellant's residence on the evening of September 28, 1993; that Duncan bought the drugs with marked money; that Duncan had seen drug parapher-

nalia and firearms at appellant's residence within the previous week; that appellant was leaving his residence sometime the morning of September 29; that appellant had threatened one of the informants with a weapon within the last week; and that the location of the residence made speedy access impossible. Based on this information, we hold that there was a sufficient factual basis for a nighttime search.

Appellant next argues that statements he made to officers following their entry into his residence should have been suppressed as "fruits of the poisonous tree" because they were obtained from an illegal search. We have already found that the issuing judge had a substantial basis to conclude there was probable cause to issue the search warrant; therefore, this argument must fail. As we have previously noted, where the tree is not "poisonous," neither is the fruit. *Miller v. State,* 269 Ark. 341, 348, 605 S.W.2d 430, 435 (1980).

For his final contention, appellant argues that remarks made by the State during closing argument of the penalty phase of the trial warrant reversal of the convictions. The pertinent argument and resulting colloquy follow:

> PROSECUTOR: If you went home and you saw a guy give your granddaughter or your grandson or your son or your friends some dope —
>
> DEFENSE: Your Honor, I want to object to that about being the Golden rule argument and the Prosecutor knows that's improper.
>
> THE COURT: Well, it's a form of argument. The jury can reject if they —
>
> PROSECUTOR: — saw a man hand that child some dope, which one among you would not have the nerve to knock that dope out of his hand? Everyone one of you; and you can do the very same thing this afternoon by imposing yourself—your twelve opinions between him and people like him in your community.

Appellant contends that the prosecutor's remarks constituted an impermissible "golden rule" argument and that the trial court

committed reversible error for failing to sustain his objection and for failing to admonish the jury to disregard the remarks.

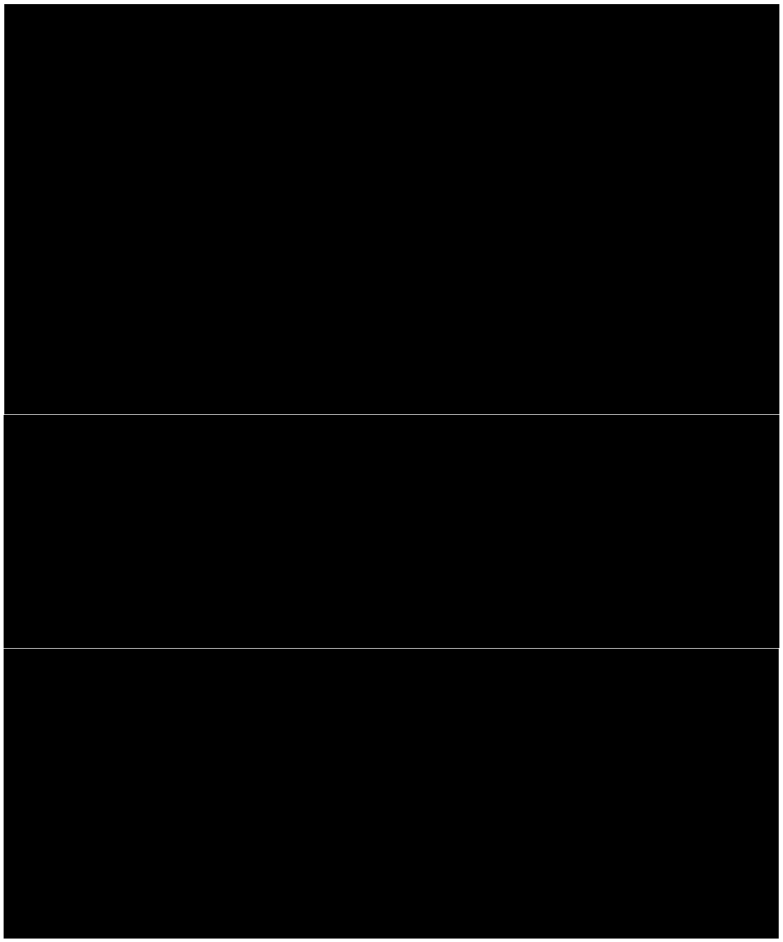
We have repeatedly stated that failure to give an admonition to the jury is not prejudicial error where the instruction or admonition was not requested below. *Gray v. State*, 327 Ark. 113, 937 S.W.2d 639 (1997); *Puckett v. State*, 324 Ark. 81, 918 S.W.2d 707 (1996); *Gunter v. State*, 313 Ark. 504, 857 S.W.2d 156 (1993), *cert. denied*, 114 S.Ct. 391 (1993). In our review of the record, we note that, while appellant objected to the prosecutor's remarks, he did not ask the trial court to admonish the jury. It appears that the trial court was preparing to offer an instruction or an admonition when the prosecutor interrupted his comments. Under these circumstances, appellant should have renewed his objection and asked for an admonition, but he did not do so. We also note that, prior to closing arguments of the guilt phase, the trial court had instructed the jury that "closing arguments of the attorneys are not evidence" and that "[a]ny argument, statements, or remarks of the attorneys having no basis in the evidence should be disregarded by you." In light of the court's instruction and appellant's failure to request an admonition or other curative relief, we conclude that there was no reversible error.

For the reasons stated, the judgment is affirmed.

SOCIAL WORK LICENSING BOARD *v.* Randall C. MONCEBAIZ

97-625 962 S.W.2d 797

Supreme Court of Arkansas
Opinion delivered February 26, 1998



Winston Bryant, Att'y Gen., by: *Leigh Anne Yeargan*, Asst. Att'y Gen., for appellant.

Walter Skelton, for appellee.

RAY THORNTON, Justice. The issue on this appeal is whether appellant Arkansas Social Work Licensing Board (the "Board") erred in denying appellee Randall Moncebaiz licensure in Arkansas. On review, the Polk County Circuit Court reversed the Board's decision denying Mr. Moncebaiz's application to have his Texas "Social Work Associate License" transferred as arbitrary and capricious. We disagree. We hold that the Board's decision was supported by the clear and unambiguous language of our Social Work Licensing Act and was not arbitrary and capricious. Accordingly, we affirm the Board's decision and reverse the order of the circuit court.

On March 11, 1996, Mr. Moncebaiz contacted the Board and applied for transfer of his Texas Social Work Associate License to Arkansas, based on our reciprocity statute, Ark. Code Ann. § 17-46-302 (Repl. 1995). At the time of this contact, he was planning to move from Texas to Mena, Arkansas, to accept a position as a social worker at Alpha Psychological. In a letter dated

April 8, 1996, the Board denied reciprocity based on its determination that Mr. Moncebaiz did not possess "a degree in social work approved by the Council on Social Work Education (CSWE) in order to be approved for licensure." Mr. Moncebaiz requested a hearing to reconsider the Board's decision, and the Board allowed him to appear personally. However, after his appearance, the Board again denied his application, stating that it had "no flexibility at all" with respect to the education requirement.

Mr. Moncebaiz filed a petition for judicial review in the Polk County Circuit Court under our Administrative Procedure Act, Ark. Code Ann. § 25-15-212 (Repl. 1996). The parties met before the Board on November 11, 1996, to create a record for the circuit court's review of the Board's decision because no minutes existed from Mr. Moncebaiz's prior appearance. The record of this hearing establishes that Mr. Moncebaiz was an experienced social worker in Texas. However, the Board based its decision denying him licensure on the facts that Mr. Moncebaiz obtained his degree in behavioral sciences from Concordia College, an Austin, Texas, institution that was not accredited; that he received his degree in a degree program other than social work; and that his license in Texas was an "associate" license, a designation for which our Licensing Act does not provide. In reaching its decision, the Board applied a literal reading of our qualification statute, Ark. Code Ann. § 17-46-306(a)(1) (Repl. 1995).

The Board's sole argument on appeal is that its decision denying Mr. Moncebaiz licensure was not arbitrary and capricious and was supported by substantial evidence. Under the Administrative Procedure Act, we review state agency decisions to determine whether they should be reversed under any of the six criteria set forth in section 25-15-212(h). *Arkansas Dept. of Human Servs. v. Thompson*, 331 Ark. 181, 185, 959 S.W.2d 46 (1998). The test for substantial evidence is whether the proof before the agency was "so nearly undisputed that fair-minded persons could not reach [the same] conclusion." *Arkansas State Highway & Transp. Dep't v. Kidder*, 326 Ark. 595, 598, 933 S.W.2d 794, 795 (1996). We do not review this case under the substantial-evidence standard because the issue is not whether the evidence supports the

Board's finding. Rather, the issue is whether the Board erred in applying the provisions of our Licensing Act, and we review the Board's decision to ascertain whether it was "arbitrary, capricious, or characterized by abuse of discretion." *See* Ark. Code Ann. § 25-15-212(h)(6).

We conclude that the Board's decision finding that Mr. Moncebaiz did not meet the requirements for reciprocity under our statute was not arbitrary and capricious or characterized by an abuse of discretion. We reach this conclusion for two reasons: (1) Mr. Moncebaiz failed to qualify for licensure under section 17-46-306, and thereby failed to meet the requirements for reciprocity; and (2) Mr. Moncebaiz was licensed in Texas as an "associate," a licensing level that is lower than any of our three levels of qualification provided under subsections 17-46-306(a), (b), & (c).

Review of agency decisions by both the circuit court and this court is limited in scope. *Thompson*, 331 Ark. at 185, 959 S.W.2d at 48. Our review is directed toward the decision of the administrative agency, rather than the decision of the circuit court. *Id.* The agency is better equipped "by specialization, insight through experience, and more flexible procedures than courts, to determine and analyze legal issues affecting their agencies." *Id.*

We will not substitute our judgment for that of the agency unless the decision of the agency is arbitrary and capricious. *Arkansas Bank & Trust Co. v. Douglass*, 318 Ark. 457, 461, 885 S.W.2d 863, 865 (1994). To reverse an agency's decision because it is arbitrary and capricious, it must lack a rational basis or rely on a finding of fact based on an erroneous view of the law. *Arkansas Dep't of Human Servs. v. Kistler*, 320 Ark. 501, 508, 898 S.W.2d 32, 36 (1995); *see also Douglass*, 318 Ark. at 460, 885 S.W.2d at 865. Although an agency's interpretation is highly persuasive, where the statute is not ambiguous, no interpretation is warranted. *Junction City Sch. Dist. v. Alphin*, 313 Ark. 456, 463, 855 S.W.2d 316, 320 (1993). Therefore, where we determine that the statute is plain and unambiguous, we will not interpret it to mean anything other than what it says. *Id.*; *see also Arkansas Dep't of Human Servs. v. Wilson*, 323 Ark. 151, 156, 913 S.W.2d 783, 785 (1996).

Because the issue in this case turns on the application of provisions of the Social Work Licensing Act, we must bear in mind our well-settled rules of statutory construction. Our first rule of statutory interpretation is to construe it just as it reads by giving words their ordinary and usually accepted meaning. *Board of Trustees v. Stodola*, 328 Ark. 194, 199, 942 S.W.2d 255, 257 (1997). Wherever possible, we read statutes relating to the same subject matter in harmony. *Id.*

We observe no ambiguity in the provisions of our Licensing Act that are before us. The legislature enacted the Licensing Act for the purpose of "protect[ing] the public by setting standards of qualification, training, and experience for those who seek to represent themselves to the public as social workers and by promoting high standards of professional performance for those engaged in the practice of social work." Ark. Code Ann. § 17-46-102 (Repl. 1995). In accordance with this stated purpose, the general assembly enacted a qualification statute that sets forth the following requirements to receive an Arkansas social-work license:

> (a) The board shall issue a license as a licensed social worker to an applicant who qualifies as follows:
>
> (1) Has a baccalaureate degree in *a social work program accredited* by the Council on Social Work Education or receives before June 17, 1986, a baccalaureate degree in *a social work program from an accredited social work institution*; and
>
> (2) Has passed an examination approved by the board for this purpose and level of practice.

Ark. Code Ann. § 17-46-306(a) (emphasis added).

The legislature also enacted a provision allowing an applicant from another state to be licensed through reciprocity as long as the applicant "meet[s] all of the other requirements of this chapter and who, at the time of application, is licensed as a social worker by a similar board of another state, . . . whose standards, in the opinion of the board, are not lower than those required by this chapter." Ark. Code Ann. § 17-46-302. Under the reciprocity statute, the applicant must meet all of the requirements of the Licensing Act, which includes the requirement that the applicant have a degree either in an accredited social-work program or in a

social-work program at an accredited institution. Ark. Code Ann. § 17-46-306(a)(1).

Mr. Moncebaiz admits that neither the institution from which he received his degree nor the program in which he received his degree were accredited at the time that he attended Concordia College. Under the plain wording of our reciprocity statute, Mr. Moncebaiz must meet "all of the other requirements of this chapter." Because he does not meet the requirement of having "a baccalaureate degree in a . . . program accredited by the Council on Social Work Education" as required under our qualification statute, he was not qualified to receive a social-work license in Arkansas and his application was properly denied.

Second, during the November 11 hearing, some Board members placed emphasis on the fact that Mr. Moncebaiz's Texas license was that of an "Associate Social Work License." Mr. Moncebaiz explained to the Board that the "associate" designation is one that is "given for individuals whose degree is in a related field to social work but not in social work, but who have passed the national licensing test, nonetheless." He further stated that his associate designation did not restrict his practice in the social-work field in Texas.

This "associate" designation is one that exists in Texas, but does not exist in Arkansas. Our Licensing Act has no similar provision giving an individual with a degree in a field *related* to social work the right to even take the examination. Our qualification statute requires that the applicant have a degree in a "social work program," and does not provide a designation for a degree in a related program. Ark. Code Ann. § 17-46-306(a). Our reciprocity statute requires that the applicant must be licensed as a social worker by a board of another state whose standards are "not lower than" the Arkansas Board's standards. Ark. Code Ann. § 17-46-302. Reading our reciprocity statute in harmony with our qualification statute, we conclude that a state that issues a license without requiring a degree in a social-work program has lower standards than those required under section 17-46-306(a) of the Arkansas Social Work Licensing Act. Therefore, Mr. Moncebaiz's license was issued under a lower "associate" standard,

and he was not entitled to reciprocity under our Act. The Board did not err in denying Mr. Moncebaiz's license on this basis.

Because we determine that the Board's decision did not lack a rational basis or rely on a factual finding based on an erroneous view of the law, we conclude that it was not arbitrary and capricious or characterized by abuse of discretion. We reverse the circuit court's decision and remand for the purpose of reinstating the Board's decision denying Mr. Moncebaiz's license.

Henry Lee BRAZIL *v.* STATE of Arkansas

CR 98-109 959 S.W.2d 55

Supreme Court of Arkansas
Opinion delivered February 26, 1998

Robert N. Jeffrey, for appellant.

No response.

PER CURIAM. Henry Lee Brazil, by his attorney, has filed a motion for rule on the clerk. The motion states that the record was not timely filed and that it was no fault of the appellant.

Appellant filed a notice of appeal and designation of record on October 17, 1997, following the entry on September 25, 1997 of terms and conditions of suspended imposition of sentence. Subsequently, on December 12, 1997, the Dallas County Circuit Court entered a judgment convicting appellant of burglary and theft of property. Appellant did not timely file a notice of appeal after entry of the judgment. Appellant's attorney states that the record, as certified by the Dallas County Circuit Clerk on December 23, 1997, did not contain the judgment and commitment order filed on December 12, 1997. Appellant's attorney further suggests that if the Dallas County Circuit Clerk had complied with Administrative Order No. 8, Section III.a, as amended on December 4, 1997, and forwarded a copy of the judgment and commitment order to appellant's counsel of record, he could have filed a timely notice of appeal.

This court has held that we will grant a motion for rule on the clerk, which we will treat as a motion for belated appeal, when the attorney admits that the notice of appeal was not timely filed due to an error on his part. *See, e.g., Tarry v. State*, 288 Ark. 172, 702 S.W.2d 804 (1986). Here, the attorney does not admit fault on his part. We have held that a statement that it was someone else's fault or no one's fault will not suffice. *Clark v. State*, 289 Ark. 382, 711 S.W.2d 162 (1986). Therefore, appellant's motion must be denied.

The appellant's attorney shall file within thirty days from the date of this per curiam a motion and affidavit in this case accepting full responsibility for not timely filing the notice of appeal, and upon filing same, the motion for belated appeal will be granted and a copy of the opinion will be forwarded to the Committee on Professional Conduct. *See Warren v. State*, 329 Ark. 637, 950 S.W.2d 462 (1997).

The present motion for rule on the clerk is denied.

Tommy J. DAVIS *v.* STATE of Arkansas

CR 98-127 959 S.W.2d 54

Supreme Court of Arkansas
Opinion delivered February 26, 1998

Charles E. Davis, for appellant.

No response.

PER CURIAM. Tommy J. Davis, by his attorney, has filed a motion for a rule on the clerk.

His attorney, Charles E. Davis, admits in his motion that the record was tendered late 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 is, therefore, granted. A copy of this opinion will be forwarded to the Committee on Professional Conduct.

Rocky HALTER *v.* STATE of Arkansas

CR 98-119 959 S.W.2d 55

Supreme Court of Arkansas
Opinion delivered February 26, 1998

Darrell F. Brown, for appellant.

No response.

PER CURIAM. Petitioner, Rocky Halter, by his attorney, Darrell F. Brown, has filed a motion for rule on the clerk. His attorney admits that the record 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*, 295 Ark. 964 (1979) (per curiam).

A copy of this per curiam will be forwarded to the Committee on Professional Conduct. *In Re: Belated Appeals in Criminal Cases,* 265 Ark. 964.

Dirk JOHNSON *v.* STATE of Arkansas

CA CR 97-1444 959 S.W.2d 54

Supreme Court of Arkansas
Opinion delivered February 26, 1998

Norman M. Smith, for appellant.

No response.

PER CURIAM. Petitioner, Dirk Johnson, by his attorney, Norman M. Smith, has filed a motion for belated appeal. His attorney admits that he failed to file the notice of appeal on time.

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*, 295 Ark. 964 (1979) (per curiam).

A copy of this per curiam will be forwarded to the Committee on Professional Conduct. *In Re: Belated Appeals in Criminal Cases*, 265 Ark. 964.

David Scott NOGGLE *v.* STATE of Arkansas

CR 97-1474 962 S.W.2d 368

Supreme Court of Arkansas
Opinion delivered February 26, 1998

Petitioner, pro se.

No response.

PER CURIAM. On August 16, 1996, judgment was entered reflecting that David Scott Noggle had entered a plea of guilty to the felony offenses of two counts of rape, intimidating a witness, residential burglary, and terroristic threatening. An aggregate sentence of three hundred months' imprisonment in the Arkansas Department of Correction was imposed.

On October 15, 1996, Noggle filed in the trial court a *pro se* petition for postconviction relief, invoking Criminal Procedure Rule 26 and Criminal Procedure Rule 37, in which he sought to withdraw the guilty plea under Rule 26 or to have the plea and sentence vacated under Rule 37. He subsequently retained an attorney, Jeff Rosenzweig, who was permitted by the court to file an amended petition.

On February 27, 1997, the trial court denied the petition and amended petition. Attorney Rosenzweig filed a timely notice of appeal on March 25, 1997. On June 5, 1997, Rosenzweig filed

a "Notice of Discontinuation of the Appeal." Attached to the notice was a document signed by Noggle which said:

> After consultation with counsel and with my family, I have decided not to appeal the decision of the Circuit Court denying my petition for relief under Rule 26 and Rule 37.

The circuit court entered an order on June 12, 1997, permitting the appeal to be discontinued.

On December 9, 1997, Noggle filed in this court a *pro se* motion for belated appeal and affidavit of indigency pursuant to Criminal Procedure Rule 36.9, which is now Rule 2(e) of the Rules of Appellate Procedure—Criminal, seeking to continue with the appeal. He contends in the motion that he should be permitted to perfect the appeal to this court because his acquiescence in dismissing the appeal was based on his inability to pay his attorney and that he was unaware that he could petition this court to allow him to proceed *in forma pauperis.*

As is the practice of this court when a *pro se* motion is filed to proceed with a belated appeal, an affidavit in response to the allegations in the motion was requested from Mr. Rosenzweig. Rosenzweig avers in his affidavit that there was never an assertion by petitioner Noggle or the Noggle family that petitioner was unable to pay the cost of the appeal. Rather, the decision to drop the appeal was made on the basis of petitioner's fear of obtaining a greater sentence if tried for the offenses and the fact that petitioner had been assigned to a program which allowed him to work at a county jail. Rosenzweig further avers that he spoke directly with petitioner by telephone about the decision and subsequently secured his signature on the request to drop the appeal.

Rosenzweig notes that he received a letter from petitioner, dated October 14, 1997, which is appended to his affidavit, in which petitioner requested that Rosenzweig assist him in having the appeal reinstated by asserting that the appeal was dropped for financial reasons and further stating that he (Rosenzweig) had told petitioner that the appeal could be resumed later if the Noggle family were able to afford it. Rosenzweig has also appended his letter in response to that letter in which he declined to make the statement "because it would not be true."

Rule 2(f) of the Rules of Appellate Procedure—Criminal provides in pertinent part:

> Dismissal of Appeal. If an appeal has not been docketed in the Supreme Court, the parties, with the approval of the trial court, may dismiss the appeal . . . upon a motion and notice by the appellant.

Here, Rosenzweig gave notice to the circuit court before the appeal was docketed in this court that appellant had elected to discontinue the appeal. The notice was accompanied by a statement signed by appellant Noggle verifying that he had made the decision to drop the appeal. The court subsequently entered an order dismissing the appeal. Considering these circumstances, we conclude that counsel followed proper procedure to dismiss the postconviction appeal, and petitioner has not shown good cause to allow its reinstatement.

Motion denied.

Anita Cummings RUSH *v.* STATE of Arkansas

CR 98-115 959 S.W.2d 56

Supreme Court of Arkansas
Opinion delivered February 26, 1998

Robert S. Tschiemer, for appellant.

No response.

PER CURIAM. Appellant Anita Rush, by and through her attorney, has filed a motion for a rule on the clerk. Her attorney, Robert S. Tschiemer, states in the motion that the record was tendered late due to a mistake on the part of appellant's former counsel, Jason Files. In support, the affidavit of Mr. Files, admitting his error, was attached an exhibit to the motion.

We find that such an error, admittedly made by an 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 STEPHENSON *v.* STATE of Arkansas

CR 98-120 959 S.W.2d 56

Supreme Court of Arkansas
Opinion delivered February 26, 1998

Lori A. Mosby, for appellant.

No response.

PER CURIAM. Appellant Larry Stephenson, by his attorney Lori A. Mosby, has filed a motion for belated appeal. Mosby admits by motion that the appeal was not timely filed due to a mistake on her 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 is therefore granted.

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

Louis ETOCH *v.* STATE of Arkansas

97-627 964 S.W.2d 798

Supreme Court of Arkansas
Opinion delivered March 5, 1998

Louis A. Etoch and *Edward W. Chandler*, for appellant.

Winston Bryant, Att'y Gen., by: *Brad Newman*, Asst. Att'y Gen., for appellee.

W.H. "DUB" ARNOLD, Chief Justice. This case presents a question regarding the discipline of attorneys-at-law. The primary issue on appeal arises from the Monroe County Circuit Court's order holding Louis Etoch in contempt of court and fining him $250.00. First, Etoch challenges this contempt order. Second, Etoch contends that the trial court erroneously prompted the State to move for a mistrial. Third, Etoch contests the trial court's charging him $780.00 in juror fees after granting the State's motion for mistrial. Finding no merit in appellant's arguments, we affirm the trial court's contempt order and its order assessing defense counsel juror fees.

Attorneys Louis Etoch and Edward Chandler represented Kimberly Whitaker in criminal charges relating to the death of Jamison Williams. Whitaker was initially charged as an accomplice to capital murder, but the charges were later reduced to accomplice to first-degree murder. During her trial before the Monroe County Circuit Court, which preceded Devrick "Dee" Meachum's trial for the capital murder of Jamison, Whitaker's

defense attorneys suggested that if Whitaker was an accomplice to Meachum, Meachum was acting in self-defense.

In furtherance of its theory, defense counsel Etoch attempted to elicit certain testimony from the State's first witness, Detective Tim Prestwood, the police officer in charge of the Jamison murder investigation. Prior to trial the State and defense counsel had agreed to stipulate to an autopsy report prepared by the state medical examiner. The medical examiner's report included the following notation: "Recovered loosely on the right testicle a plastic bag containing multiple gray-white crystalline, irregular, drug-like material."

Subsequently, the State filed a motion in limine requesting that the language, regarding what was determined to be 1.7 grams of crack cocaine, be struck from the medical examiner's report. Defense counsel objected to the exclusion, arguing that the evidence was relevant to their theory of the case, particularly that the language demonstrated evidence of the victim's violent character. Specifically, the defense contended that the evidence was relevant to the issue of who was the aggressor and whether or not the accused, Whitaker, reasonably believed she was in danger of suffering unlawful deadly physical force. After hearing counsels' arguments, Judge L.T. Simes, II, held that the language regarding the drugs "does not come in" and that the defendant, Whitaker, could not have known at the time of the killing that Jamison had 1.7 grams of cocaine on his right testicle.

During the State's direct examination of Detective Prestwood, Prestwood testified that his investigation indicated that the victim was entering Ned's Café at the time of the shooting and that he had been shot from behind. On cross-examination, Etoch attempted to impeach Detective Prestwood's statement by asking the following question:

> You know Jamison Williams could not enter Ned's Café because of those pictures right there (indicating). Ned does not allow anyone in his café who had drugs on them, and Jamison had 1.7 grams of crack on him when he died, didn't he?

Etoch was referring to a sign by the front door of Ned's Café that stated, "You cannot bring liquor or drugs inside" and the medical

examiner's discovery of the 1.7 grams of crack cocaine on the victim's testicle.

Following the State's objection to Etoch's question, Judge Simes moved the discussion to his chambers, outside the presence of the jury. After allowing the attorneys an opportunity to respond on the record, Judge Simes recalled his ruling on the State's motion in limine. He reiterated that he had examined the Arkansas Supreme Court rules and had advised the parties that he believed the stricken language to be extremely prejudicial. He advised the attorneys that he had ruled on the issue and now found that Etoch had disregarded that ruling.

Moreover, Judge Simes concluded that Etoch's conduct was deliberate with respect to how the question was phrased, particularly in his reference to the items of cocaine. Judge Simes deduced that there was no misunderstanding about his ruling but that defense counsel disagreed with the court's ruling and strategically decided to proceed. Judge Simes also noted that defense counsel did not seek further instructions from the court but specifically went into an area specifically prohibited. Accordingly, the trial judge found Etoch in contempt of court for intentionally disregarding the court's order and fined him $250.00.

Where fines were imposed, as here, and the punishment could not be avoided by an affirmative act, the case is one of criminal contempt. The standard of review in a case of criminal contempt requires this Court to view the record in the light most favorable to the trial judge's decision and to sustain that decision if it is supported by substantial evidence and reasonable inferences. *Hodges v. Gray*, 321 Ark. 7, 901 S.W.2d 1 (1995). If an act interferes with the order of the court's business or proceedings or reflects upon the court's integrity, that act is deemed contemptuous. A court's contempt power may be wielded to preserve the court's power and dignity, to punish disobedience of the court's orders, and to preserve and enforce the parties' rights. Moreover, while an attorney may make a proper objection to a court's ruling, once made, the attorney should abide by that ruling so long as it remains in effect. An attorney should not engage in conduct that offends the dignity of the court. *Hodges*, 321 Ark. at 14.

Significantly, where the failure or refusal to abide by a court's order is the issue, this Court does not look behind the order to determine whether the order is valid. *Carle v. Burnett*, 311 Ark. 477, 845 S.W.2d 7 (1993). In *Carle*, the appellant argued that his constitutional and statutory rights were impinged because the judge conducting the contempt proceedings refused to consider, in defense of the appellant's contempt charge, that the trial court abused its discretion in ordering appellant to proceed to trial. Responding to the appellee's contention that the judge had made a finding that the trial court had not abused its discretion, this Court noted the long-settled law that we do not look at the validity of the underlying order. *Carle*, 311 Ark. at 480.

This Court's decision in *Carle* recalled an earlier decision in *Meeks v. State*, 80 Ark. 579, 98 S.W. 378 (1906), where we upheld a contempt order and refused to review the underlying order. In *Meeks*, we declared that the fact that a decree was erroneous would not excuse disobedience on the part of those bound by its terms until the order was reversed. *Meeks*, 80 Ark. at 582. The United States Supreme Court agreed with this principle in *United States v. Rylander*, 460 U.S. 752 (1983), when it stated:

> It would be a disservice to the law if we were to depart from the long-standing rule that a contempt proceeding does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed and thus become a retrial of the original controversy. The procedure to enforce a court's order commanding or forbidding an act should not be so inconclusive as to foster experimentation with disobedience.

Rylander, 460 U.S. at 756-57 (quoting *Maggio v. Zeitz*, 333 U.S. 56, 69 (1948)).

Notably, there are exceptions to this general rule. If the contemnor was making a legitimate and successful challenge to the validity of the order, we may look beneath the order and recognize substantive error as a defense to contempt. *See Carle*, 311 Ark. at 481-82. However, where the contemnor merely refused to comply with an order that was clearly within the court's jurisdiction and power, we will not look behind that order. *Id.* at 482.

A court order must be in definite, express terms, rather than implied, before a person may be held in contempt for violation of that order. *Hodges*, 321 Ark. at 17. Here, the trial court thoroughly visited, during the pre-trial discussion of the State's motion in limine, the issue of the exclusion of the language regarding the crack cocaine. Again, at the time of the State's objection to Etoch's cross-examination of Detective Prestwood, the trial judge discussed in chambers his prior ruling and gave each party time to respond on the record before reiterating his ruling. The trial judge believed his order was clear and that Etoch deliberately disobeyed that order.

Viewing the record in the light most favorable to the trial judge, there is substantial evidence in the case at bar to support the holding of contempt when Judge Simes clearly instructed Etoch that the language from the state medical examiner's report regarding the crack cocaine "does not come in" because he believed it was extremely prejudicial and that the defendant, Whitaker, had no knowledge that the drugs were on the victim's person. In clear defiance of that order, Etoch proceeded to use the exact language during his cross-examination of Detective Prestwood. Accordingly, we find that the trial court did not err in holding Etoch in contempt and in fining him $250.00.

Etoch also assigns as error the trial judge's comments made prior to the State's motion for mistrial. Specifically, Judge Simes remarked, "I think you all are getting too involved in the defense of your case and making speculations and innuendoes before the jury. The prosecution has not asked for a mistrial, but I want you to know that I think I might grant one anyway." Etoch argues that, in this manner, the trial court improperly prompted the State to move for a mistrial. However, Etoch lacks standing to raise this particular issue on appeal because he fails to explain how the trial court's ruling granting the State's motion for mistrial adversely impacted him, a necessary perquisite to standing. *See Goodwin v. Harrison*, 300 Ark. 474, 483, 780 S.W.2d 518 (1989). Neither does Etoch cite authority or make a convincing argument in support of his position, urging this Court to vicariously review the merits of the trial court's order in the absence of the defendant as the real party in interest. Etoch merely asserts that the trial

court erred by prompting the State's motion for mistrial over the defendant's objection, and he fails to demonstrate his personal stake in the outcome of the controversy. Accordingly, we decline to address appellant's second point on appeal. *See Williams v. State*, 325 Ark. 432, 930 S.W.2d 297 (1996).

In any event, the trial court's order granting the State's motion for mistrial cited Etoch's deliberate violation of the court's ruling regarding the crack cocaine reference and his continued improper comments and characterizations about testimony and evidence, in spite of the court's rulings sustaining the State's objections. Furthermore, the trial court found that Etoch's responses to the State's objections were not posed as legal arguments but constituted attempts to present the jury with objectionable and inadmissible information. The trial judge considered that the cumulative effect on the jury of defense counsels' misconduct tainted the jury and deprived the State of a fair trial.

At the close of its order granting the State's motion for mistrial, the trial judge concluded that the mistrial was a result of defense misconduct and assessed defense attorneys the costs of the trial, namely, juror fees in the amount of $780.00. In his third point on appeal, Etoch contends that this assessment constitutes error. However, Etoch fails to offer any authority or convincing arguments in support of his assertion, and it is not apparent without further research that his argument is well taken. Accordingly, we will not consider this point on appeal. *See Williams,* at 325 Ark.

In conclusion, we affirm the trial court's contempt order, $250.00 fine, and its order assessing defense counsel juror fees in the amount of $780.00.

PULASKI COUNTY *v.* JACUZZI BROTHERS DIVISION, Smith Fiberglass Products, Merico (Act 9 Industries) and City of Little Rock, Arkansas

96-1333 964 S.W.2d 788

Supreme Court of Arkansas
Opinion delivered March 5, 1998

Pat Crossley, for appellant.

Thomas M. Carpenter and *Melinda Raley*, for appellee City of Little Rock.

Friday, Eldredge & Clark, by: *Barry E. Coplin* and *Clifford W. Plunkett*, for appellees Jacuzzi Bros. Div. and Smith Fiberglass.

Grobmyer, Ramsay & Ross, by: *Robert R. Ross*, for appellee Merico.

W.H. "DUB" ARNOLD, Chief Justice. Appellant, B.A. McIntosh, the Pulaski County Assessor, appeals from a judgment of the Pulaski County Circuit Court in favor of Appellees, (the City of Little Rock, Jacuzzi Brothers Division of Jacuzzi, Inc., Smith Fiberglass Products, Inc., and Merico, Inc.), holding that real property owned by the City and leased to Jacuzzi, Smith, and Merico should be removed from the *ad valorem* tax rolls because the property is exempt from taxation pursuant to Article 16, Section 5, of the Arkansas Constitution, and Act 9 of 1960, which implemented Amendment 49 to the Arkansas Constitution. Until 1991 McIntosh recognized that each of the City-owned properties was exempt from *ad valorem* taxes under Article 16, Section 5(b), of the Arkansas Constitution. However, in 1991 McIntosh placed each of the properties on the Pulaski County tax rolls and challenged the continued exemptions, arguing that they were unwarranted after the City's bonds, financing the acquisition of and improvements to the properties, have matured and been fully paid. The appellees sought to abate the tax assessment and prevailed in that action in the Pulaski County Court. On appeal, the Pulaski County Circuit Court agreed that the properties were entitled to the tax exemption. From that decision comes the instant appeal. Finding no merit in appellant's arguments, we affirm.

The facts underlying this matter are not disputed. Pursuant to Amendment 49 to the Arkansas Constitution, Act 9 of 1960, and following voter approval, the City of Little Rock issued industrial development revenue bonds and used the proceeds to acquire and improve properties upon which Jacuzzi and Smith operate industrial plants, (and where Merico operated an industrial plant until December 31, 1995). Jacuzzi manufactures water pumps and other water systems equipment at its facility and employs approximately 200 people in its operations. Smith manufactures fiberglass pipe and related products and employs approximately 340 people.

In 1961 Jacuzzi was successfully recruited, as part of Arkansas's industrial development program, to locate its manufacturing facility in Little Rock. Jacuzzi's recruitment package included a financing plan to be achieved by the City's issuance of its industrial development revenue bonds for the purpose of acquiring and improving certain real property for Jacuzzi's use in its industrial operations, the execution of a lease by the City and Jacuzzi relating to that property, and the payment by Jacuzzi to the City of annual lease payments and specified payments in lieu of taxes, (PILOTs). The Jacuzzi lease provided for an initial twenty-year term, with five consecutive extension renewal options, each for a period of ten years. Jacuzzi exercised its renewal options under the lease, and since placed into service in 1961, the Jacuzzi facility has been continuously operated as an industrial plant. The lease also recites that the property is exempt from *ad valorem* taxes under the Arkansas Constitution. Since 1961 the property has remained exempt from *ad valorem* taxes, and Jacuzzi has made all required PILOTs to the City. The Act 9 bonds relating to the Jacuzzi facility matured and were fully paid on December 1, 1981.

Similarly, Smith was successfully recruited to locate in Arkansas in 1963. Smith's recruitment package included low interest financing to be achieved through the issuance of Act 9 tax-exempt industrial development revenue bonds, the execution by the City and Smith of a lease of certain real property to Smith for Smith's use in its industrial operations, and the payment by Smith to the City of PILOTs. Smith executed its lease in 1963 for an initial twenty-year term, with twenty consecutive extension options, each for a period of one year. Smith has continuously

operated an industrial facility on the property, and, since 1963, the property has been exempt from *ad valorem* taxes, and Smith has made all required PILOTs to the City. The Act 9 bonds relating to the Smith facility matured and were fully paid on May 1, 1983.

Likewise, Arkansas's industrial development program secured Merico's industrial operations in the City of Little Rock. Merico opted to cease operation of its facility when its lease with the City expired on December 31, 1995. For purposes of this appeal, however, until December 31, 1995, the Merico facility presented a situation substantially identical to that of Jacuzzi and Smith.

It is well-settled that our standard of review in tax cases requires the taxpayer to establish an entitlement to an exemption from taxation beyond a reasonable doubt. *Pledger v. C.B. Form Co.*, 316 Ark. 22, 25, 871 S.W.2d 333 (1994) (citing *Pledger v. Baldor Int'l*, 309 Ark. 30, 827 S.W.2d 646 (1992)). Moreover, a strong presumption operates in favor of the taxing power. *C.B. Form*, 316 Ark. at 25 (citing *Ragland v. General Tire & Rubber Co.*, 297 Ark. 394, 763 S.W.2d 70 (1989)). Tax exemptions are strictly construed against the exemption, and this Court has held that "to doubt is to deny the exemption." *C.B. Form*, 316 Ark. at 25 (citing *Baldor*, 309 Ark. at 33).

Article 16, Section 5(b), of the Arkansas Constitution provides that "public property used exclusively for public purposes" shall be exempt from taxation. Although Amendment 49 to the Arkansas Constitution is now repealed, it once provided the constitutional authority for industrial development bonds. Conceptually, Amendment 65 to the Arkansas Constitution has replaced Amendment 49 with respect to the issuance and purposes of revenue bonds. Amendment 65 also permits governmental units, like the City of Little Rock, to issue revenue bonds to finance all or a portion of the costs of facilities for the securing and developing of industry.

Act 9 of 1960, codified at Ark. Code Ann. §§ 14-164-201 to -224 (1987 & Supp. 1997), is known as the Municipalities and Counties Industrial Development Revenue Bond Law. These statutes are intended to "supplement all constitutional provisions and other legislation designed to secure and develop industry."

Ark. Code Ann. § 14-164-202. The statutes may also permit a municipality to issue bonds to accomplish that purpose. Ark. Code Ann. § 14-164-206. The Revenue Bond Law empowers municipalities and counties to develop industry by owning, acquiring, constructing, equipping, and even leasing facilities that can be used in securing or developing industry within or near the municipality or county. Ark. Code Ann. § 14-164-205.

Ark. Code Ann. § 14-164-701 (1987) declares and confirms that securing and developing industry is vital to the economic welfare of the State of Arkansas and its people. Significantly, that statute urges that "maximum flexibility" should be given to governmental entities in their efforts to "retain and expand existing, and locate new, industrial facilities." Moreover, the statute explicitly applies to financings initiated under the Arkansas Constitution, Amendment 49, and provisions of the Revenue Bond Law. The statute embraces the exemption from *ad valorem* taxes of all industrial facilities which were exempt under Article 16, Section 5, of the Arkansas Constitution, as interpreted by this Court in *Wayland v. Snapp*, 232 Ark. 57, 334 S.W.2d 633 (1960). Further, section 14-164-701 contemplates that governmental entities and industrial concerns will negotiate and contractually agree to PILOTs.

Given the framework of Amendment 49 to the Arkansas Constitution and Act 9 of 1960, this Court first considered the issue of whether property was being used exclusively for a public purpose, in the context of a proposed Act 9 financing, in *Wayland v. Snapp*, 232 Ark. 57 (1960). According to our decision in *Wayland*, Section 1 of Amendment 49 clearly made the act of "securing or developing industry" a public purpose. *Snapp*, 232 Ark. at 65. This Court also noted that it has been liberal in its construction of constitutional amendments in order to carry out the obvious purpose of the people in adopting the amendments and that there is an "implied authority to employ reasonable means to carry out the purpose of the amendment." *Id.*

The appellant in *Snapp* challenged a proposed bond issue under Amendment 49. The appellant reasoned that the county would not reap the benefits of the proposed project

because the county issuing the bonds would not hold title to the building to be erected. In considering the purpose of Amendment 49, the *Snapp* Court recalled its determination in an earlier case that while others may benefit from a project, "the fact that benefits cannot be isolated, is no reason to preclude such benefits for those who properly come within the scope of the amendment." *Snapp*, 232 Ark. at 65 (citing *Myhand v. Erwin*, 231 Ark. 444, 330 S.W.2d 68 (1950)). Further, the *Snapp* Court acknowledged that the prime objective of the people in that county in implementing the entire undertaking was not simply to erect a building but to alleviate unemployment. *Id.* The *Snapp* Court concluded that the county and the City of Batesville, where the industry was to be located, would reap the benefits of the project. The property in *Snapp* was used exclusively for a public purpose and, therefore, exempt from taxes under Article 16, Section 5(b), of the Arkansas Constitution.

The *Snapp* Court also held that the whole purpose for the adoption of Amendment 49, the passage of Act 9 of 1960, and the efforts of municipalities and counties in implementing those authorities was for the public welfare, which is "obviously and undoubtedly a 'public purpose.'" *Snapp*, 232 Ark. at 72. The entire program was not meant for any other purpose, particularly not for the benefit of a private business. Any benefit a private business received from the entire undertaking was "entirely incidental." *Id.* The analysis in *Snapp* addressed the entirety of a unique program — carved out by the people of this State by their adoption of Amendment 49 and created by our legislature by the passage of Act 9 of 1960 — designed for the purpose of developing and securing industry. The use of City-owned property in furtherance of this State's industrial development program has been deemed a public purpose.

Like *Snapp*, the instant properties were all publicly owned at the times relevant to this appeal, and the City of Little Rock, like the City of Batesville, sought to secure and develop new industries to relieve unemployment. In that endeavor, the City of Little Rock initiated its industrial development program with respect to Jacuzzi, Smith, and Merico. The distinguishing fact in the instant case is that the bonds financing those projects have matured and

been paid. The appellant contends that the City's public purpose then ended.

However, even after the bonds financing the Jacuzzi, Smith, and Merico projects have matured and been paid, the City of Little Rock's public purpose continues. The emergency clause of section 14-164-701 provides that the industrial development program of the State and her counties is "necessary for the achievement of the public benefits flowing from the retention or expansion of existing employment and the obtaining of additional employment and payrolls." *See* Ark. Code Ann. § 14-164-701 (1987). Likewise, the City seeks to retain the existing industrial facilities, jobs, and payrolls that continue to be generated by Jacuzzi and Smith, (and by Merico until the end of 1995).

Certainly, the City of Little Rock was authorized to issue bonds in furtherance of its industrial development program. However, the issuance of bonds was but one component of the City's program. Additionally, the City was empowered to execute leases and to enter into contracts, including PILOT agreements, to achieve its purpose of securing, developing, and retaining industry. Therefore, in the context of an Act 9 industrial development program, maturity and payment of bonds does not independently trigger the end of the public purpose and the end of the exemption from *ad valorem* taxes.

The appellant relies heavily on decisions of this Court involving the application and interpretation of Article 16, Section 5(b), of the Arkansas Constitution, where we have held that private use of public property was not for an exclusively public purpose. *See Crittenden Hosp. Assoc. v. Board of Equalization*, 330 Ark. 767, 958 S.W.2d 512 (1997); *City of Little Rock v. McIntosh*, 319 Ark. 423, 892 S.W.2d 462 (1995); *B.D.T. v. Moore*, 260 Ark. 581, 543 S.W.2d 220 (1976); *Hilger v. Harding College*, 231 Ark. 686, 331 S.W.2d 851 (1960); and *School District of Ft. Smith v. Howe*, 62 Ark. 481, 37 S.W. 717 (1896). As the appellees correctly contend, these decisions are inapplicable in the instant case. None of these cases involved a municipality or county acting in furtherance of Amendment 49 or Act 9 of 1960 for the public purpose of securing and developing industry. These cases were decided

outside the unique framework of authority underlying Act 9 industrial development programs and financings.

Our decision in *City of Fayetteville v. Phillips*, 306 Ark. 87, 811 S.W.2d 308 (1991), makes this distinction clear. The appellants in *Phillips* relied on the authority of *Snapp* to support their argument that a public entity's construction of an arts center, to be used for a public purpose, was an exclusive public use under Article 16, Section 5(b). Rejecting that argument, we noted that *Snapp* concerned an industrial development project facilitated by Amendment 49 and Act 9 of 1960. We also stated that both the amendment and the act were intended to facilitate the procurement of industry, and that "the amendment specifically describe[d] such an activity as a public purpose." *Phillips*, 306 Ark. at 93. We further distinguished *Phillips* from *Snapp* by observing that, in *Phillips*, there was no comparable constitutional or statutory authority indicating that the proposed use would constitute an exclusive public purpose activity. *Id.*

We find that appellees have proved their entitlement to the exemption beyond a reasonable doubt and that the circuit court correctly held that the subject properties are entitled to an exemption from *ad valorem* taxes pursuant to Article 16, Section 5(b), of the Arkansas Constitution and consistent with our decision in *Wayland v. Snapp*. Accordingly, we affirm.

NEWBERN and IMBER, JJ., dissent.

Special Justice PAUL LINDSEY, concurs.

ANNABELLE CLINTON IMBER, Justice, dissenting. I must dis agree with the majority's conclusion that property acquired under Act 9 of 1960 keeps its tax exempt status after the retirement of Act 9 bonds used to finance the acquisition of the property. The majority relies solely upon our language in *Wayland v. Snapp*, 232 Ark. 57, 334 S.W.2d 633 (1960), concerning the tax exempt status of Act 9 property. I am not persuaded, however, that *Wayland* supports the majority's conclusions.

The majority correctly acknowledges the numerous decisions in which we have held that public property is not used exclusively for a public purpose under Article 16, § 5(b) of the Arkansas Con-

stitution when that property has been used for a private purpose. *See Crittenden Hosp. Assoc. v. Board of Equalization*, 330 Ark. 767, 958 S.W.2d 512 (1997); *City of Little Rock v. McIntosh*, 319 Ark. 423, 892 S.W.2d 462 (1995); *City of Fayetteville v. Phillips*, 306 Ark. 87, 811 S.W.2d 308 (1991); *Holiday Island Suburban Improvement Dist. #1 v. Williams*, 295 Ark. 442, 749 S.W.2d 314 (1988); *B.D.T. v. Moore*, 260 Ark. 581, 543 S.W.2d 220 (1976); *Hilger v. Harding College*, 231 Ark. 686, 331 S.W.2d 851 (1960); *School Dist. of Ft. Smith v. Howe*, 62 Ark. 481, 37 S.W. 717 (1896). The majority is also correct when it notes that the particular property in this case is tax exempt solely because of its unique status as property financed under Act 9. This court, in *Wayland*, carved out a specialized exception to our traditional Article 16, § 5(b) tax exemption analysis when we stated that "only where the title of property is acquired and the property itself is used by a city or county (or by both) *pursuant to Act No. 9 and/or Amendment No. 49*" is the property used exclusively for a public purpose. *See Wayland, supra* (emphasis added). It is the property's unique characterization as Act 9 property that allows it to remain off the county tax rolls. The majority now seeks to expand the exemption perpetually. I cannot subscribe to such an outcome.

We noted in *City of Fayetteville v. Phillips, supra*, that Act 9 was intended to facilitate procurement of industry, and that Amendment 49 made the act of "securing or developing industry" a public purpose. In *Wayland*, we indicated that, together, Act 9 and Amendment 49 were designed for the purpose of developing and securing industry. Both of these goals have been accomplished. The bonds were issued, the land procured and leased out to private enterprises, and industry was secured. The bonds have now been retired. The property is no longer being "used by a city or county (or by both) *pursuant to Act No. 9 and/or Amendment No. 49*." *See Wayland, supra* (emphasis added). Therefore, the property loses its tax exempt status under the limited exception carved out in *Wayland* for property financed under Act 9.

The property in this case has been leased to private industrial enterprises. The mere fact that the use of the property still alleviates unemployment, alone, is insufficient to grant tax exempt status. *See Crittenden Hosp. Assn. v. Board of Equalization, supra*;

Holiday Island Suburban Improvement Dist. # 1 v. Williams, supra. In the *Holiday Island* case, concerning recreational property only open to property owners within an improvement district, we explained:

> 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 . . . . [O]ur decision here deals only with a public purpose within the context of article 16 § 5(b).
>
> Just as it is clear that ad valorem taxes could not be lawfully imposed upon the general public to maintain the cost of construction or maintenance of facilities used for private purposes, we can conceive of no valid reason why facilities restricted to private use should be exempted from payment of taxes assessed against other properties of a similar character.

I see no reason why property leased by Jacuzzi Bros., Smith Fiberglass, and Merico Inc. should be exempted perpetually from payment of ad valorem taxes. Once the benefit of Act 9 financing has been realized and the bonds have been fully retired, the property has ceased to be used by the City of Little Rock pursuant to Act 9 and Amendment 49. The property in question is now no different than any public property leased to a private enterprise that has not been financed under Act 9. Under these circumstances, we should follow our traditional analysis in determining the property's tax exempt status and hold that the property is not exempt from taxation.

For the above reasons, I respectfully dissent.

NEWBERN, J., joins in this dissent.

Jack GARRISON et al. *v.* CITY OF NORTH LITTLE ROCK

97-642 964 S.W.2d 185

Supreme Court of Arkansas
Opinion delivered March 5, 1998

David P. Henry, for appellants.

Timoth Davis Fox, for appellee.

TOM GLAZE, Justice. The appellants are North Little Rock property owners whose lots back up to and adjoin the northern boundary of a commercial development, Lakewood Village Subdivision. A platted forty-foot buffer zone divided the commercial property and the residential lots. Apparently the commercial development owner applied to the North Little Rock Planning Commission for a waiver of the buffer zone, and the request was granted.[1] Immediately afterwards, the developer removed the

[1] The abstract contains only the portion of the minutes of the September 20, 1994 meeting of the North Little Rock Planning Commission that shows the commercial development owner's request for a waiver was approved. The application itself was not abstracted.

trees and other greenery from the buffer zone, and built a retaining wall in place of the greenery.

Appellants filed suit in circuit court against the City of North Little Rock, alleging a wrongful taking of property. They asserted that the City's action in granting the commercial developer a waiver was done without giving them notice and a hearing. This failure of notice and hearing, appellants alleged, violated city ordinances and represented a loss of a property right without due process and just compensation. The City answered, denying the appellants' complaint, and subsequently moved for summary judgment. The City attached ten exhibits in support of its motion. After appellants filed their response, the circuit court granted the City's motion, holding the appellants had no protected property interest in the platted buffer zone, so no due process rights were violated. Appellants brought this appeal, disagreeing with the trial court's decision.

On appeal, the City initially argues the appellants have failed to comply with this court's abstracting requirements and submits this deficiency requires affirmance. We must agree. The transcript in this case is 395 pages, but 373 pages are omitted from the abstract. None of the ten exhibits to the City's Motion for Summary Judgment were abstracted, which omissions include a "screening or buffering" ordinance exhibit and a planning commission regulation excerpt exhibit that dealt with buffer-zone strips located between commercial and residential properties. Nor have appellants provided us with the ordinance(s) that they claim give them a right to notice and a hearing before any waiver of buffer zones can be granted by the planning commission or City. And while the appellants claimed below that the planning commission's regulations and the City's "screening ordinance" gave them a property interest in the disputed forty-foot buffer zone, those regulations or ordinances are not a part of the abstract of record.

Appellants state in their reply brief that they did not abstract the ordinance establishing their entitlement to notice because such ordinance was not in the record. Such a concession, however, only suggests that the failure-of-notice issue they argue on appeal

was not properly preserved at the hearing below. Also, while appellants attempt to justify the ordinance abstract omission by saying, "the City has not suggested appellants were not entitled to a notice or hearing," their statement ignores the point that it is their burden to establish their due process argument and to demonstrate error.

In conclusion, the trial court below and the City on appeal point out that the appellants failed to cite any supporting legal authority for the proposition that the City's action had deprived them of a constitutionally protected property interest in a buffer zone situated on adjoining real property. On this point, appellants mention only Ark. Const. Art. 2, § 13, which generally provides that every person is entitled to a remedy for all injuries or wrongs he may receive to his person, property, or character. They do cite *Richardson v. City of Little Rock Planning Comm'n*, 295 Ark. 189, 747 S.W.2d 116 (1988), but the *Richardson* decision does not involve the due process issue appellants attempt to raise here. Though appellants offer considerable factual discussion and argument bearing on this point for reversal, their supporting legal authority is severely lacking and requires further research.

Because appellants' record, abridgement of record, and citation of supporting legal authority are so deficient that we cannot fully consider and decide their arguments on appeal, we must affirm. *See* Ark. Sup. Ct. R. 4-2(a)(6) and (b)(1) and (2) (1997); *Stroud Corp., Inc. v. Hagler*, 317 Ark. 139, 875 S.W.2d 851 (1994); *Anthony v. Kaplan*, 324 Ark. 52, 918 S.W.2d 174 (1996).

John E. MEDLOCK *v.* STATE of Arkansas

CR 97-865 964 S.W.2d 196

Supreme Court of Arkansas
Opinion delivered March 5, 1998
[Petition for rehearing denied April 16, 1998.]

Michael Medlock, for appellant.

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

TOM GLAZE, Justice. Appellant John E. Medlock brings this appeal following an earlier one decided in *Medlock v. State*, 328 Ark. 229, 942 S.W.2d 861 (1997). Both appeals involve his November 25, 1995 arrest for suspicion of driving while intoxicated (DWI) and refusal to submit to a chemical test. On June 25, 1996, he was tried on both charges; the trial judge found him guilty of the refusal-to-submit offense, but the jury trying Medlock on the DWI charge ended in a mistrial. Medlock appealed his refusal-to-submit conviction, and contended the trial court had erred in denying him a jury. We agreed, and on April 28, 1997, we reversed and remanded in *Medlock I*. However, before *Medlock I* was decided, the trial court retried Medlock's DWI charge on January 24, 1997, and, this time, a jury found him guilty. Medlock now brings this second appeal, arguing three points for reversal.

In Medlock's first argument, he submits the trial court erred in refusing his motion in limine in which Medlock sought to prevent the State from introducing evidence bearing on his

having refused to take a breathalyzer test. Medlock argues such evidence violates Rules 609(a) and 404(b) of the Arkansas Rules of Evidence. We disagree. Regarding Medlock's Rule 609 contention, we need say nothing more than that the State never mentioned at trial Medlock's earlier refusal-to-submit conviction. Thus, because Rule 609 addresses impeachment by evidence of conviction of a witness offering testimony, the Rule simply is not an issue.

Medlock's argument bearing on Rule 404(b), however, is a properly raised issue, but we conclude the trial court acted correctly when it ruled Medlock's refusal to submit to a chemical test was admissible under the Rule. The State urged below, and the trial court agreed, that Medlock's refusal to take the test was some evidence indicating guilt, and if such evidence had been excluded, the State would have been prejudiced, since the State would have been unable to show any blood-alcohol test results; nor could it have shown why such tests had not been taken.

Medlock's response was somewhat confusing in places. Initially, he argued that his refusal charge should not have been admitted as evidence because that charge had been appealed, and was still pending. He suggested further that any prejudice that the State would have faced in the retrial of Medlock's DWI offense could have been avoided by combining both charges (DWI and refusal to submit) in one trial after his appeal was decided.[1]

Medlock's point has been answered in the State's favor by the court of appeals' decision in *Spicer v. State*, 32 Ark. App. 209, 799 S.W.2d 562 (1990). There, Spicer was charged with DWI, speeding, and driving left of center. Prior to trial, he moved in limine to prohibit the State from offering any evidence of his refusal to submit to a breathalyzer test. The trial court denied Spicer's motion, and the appellate court affirmed on appeal. In doing so, the *Spicer* court stated that it appears a majority of courts in states without statutory authority have concluded

[1] Medlock's position assumed that he would prevail in his appeal on the refusal charge, that his speedy-trial rights would not be violated as a result of the State's delay in proceeding on the DWI charge, and that he was not entitled to request a severance of the two charges on retrial. Of course, the trial court was not bound to make its ruling based on these contingent matters.

that evidence of the refusal to take a chemical test is probative on the issue of intoxication, as a showing of guilt. In adopting this rule, our court of appeals looked to the Alabama Supreme Court case of *Hill v. State*, 366 So.2d 318 (Ala. 1979), which relied upon and quoted from the Ohio decision of *City of Westerville v. Cunningham*, 15 Ohio St.2d 121, 239 N.E.2d 40 (1968), as follows:

> Where a defendant is being accused of intoxication and is not intoxicated, the taking of a reasonably reliable chemical test for intoxication should establish that he is not intoxicated. On the other hand, if he is intoxicated, the taking of such a test will probably establish that he is intoxicated. Thus, if he is not intoxicated, such a test will provide evidence for him; but, if he is intoxicated, the test will provide evidence against him. Thus, it is reasonable to infer that a refusal to take such a test indicates the defendant's fear of the results of the test and his consciousness of guilt, especially where he is asked his reason for such refusal and he gives no reason which would indicate that his refusal had no relation to such consciousness of guilt.

While not directly in issue, our court cited the *Spicer* rule with approval in *Massengale v. State*, 319 Ark. 743, 894 S.W.2d 594 (1995). Now, since that rule is in issue and bears on the circumstances before us, we adopt the rule as a sound one and find it dispositive of Medlock's argument. Accordingly, we hold that evidence of Medlock's refusal to submit to a chemical test can be properly admitted as circumstantial evidence showing a knowledge or consciousness of guilt, and that such evidence possesses independent relevance bearing on the issue of intoxication and was not being offered merely to show Medlock was a bad person. *See Price v. State*, 268 Ark. 535, 597 S.W.2d 598 (1980); *see also* Ark. Stat. Ann. § 5-65-206(b) (1987) (the provisions providing for chemical tests for determining the amount of alcohol in a defendant's blood shall not be construed as limiting the introduction of any other relevant evidence bearing on the question whether or not the defendant was intoxicated).

Medlock's second point for reversal is that the trial court erred in refusing to join his DWI and refusal-to-submit charges.[2] Although he cites no authority for the proposition,

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[2] Though not argued as a continuance motion, Medlock's motion for joinder could only occur after *Medlock I* was decided and reversed for a new trial. We note as a passing

Medlock urges that he had an absolute right to have the two charges joined. Medlock simply has failed to preserve this argument, since the record reveals no motion showing he requested a joinder of the two offenses. The rule is settled that joinder is *not required* of a prosecutor, *Lockhart v. State*, 314 Ark. 394, 862 S.W.2d 265 (1993), nevertheless, it is the duty of a party seeking relief to apprise the trial court of the proper basis upon which he relies in order to preserve an issue for appeal. *Baker v. State*, 310 Ark. 485, 837 S.W.2d 471 (1992). Because the trial judge did not have a fair opportunity to rule on this severance issue, we will not consider it on appeal. *Id.* at 490.

Finally, we address Medlock's third point wherein he assigns error to the trial court for allowing Officer Ron Keeling to testify as an expert in the area of hypoglycemic reactions. We first note that Medlock never objected to Officer Keeling's credentials as an expert. The abstract reflects only that Medlock objected to Keeling's testimony, without giving his reason. In any event, Keeling testified that he had received training with regard to DWI detection in connection with his law-enforcement training, and in addition served in the U.S. Army for twenty-three years, with eleven years as a special-forces medic. As part of his specialized training, Keeling testified that he was trained to detect signs or symptoms of diabetes, specifically hypoglycemic reactions. Keeling further testified as to the differences between intoxication and a hypoglycemic reaction, and stated that, at the time of Medlock's arrest for DWI, Medlock did not exhibit the symptoms of an individual suffering from a hypoglycemic reaction.

Here, Keeling was qualified to testify as to the symptoms of a hypoglycemic reaction. Although Medlock contends Keeling's testimony should have been excluded because he is not a doctor or a nurse, the rule is well settled that expert witnesses may be qualified by experience, knowledge, or training, and need not be licensed professionals. *John H. Parker Constr. Co. v. Aldridge*, 312 Ark. 69, 847 S.W.2d 687 (1993). Because the trial court did not abuse its discretion in allowing Keeling to testify as an expert, we affirm.

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reference Medlock's inconsistency in argument to point one where he was seeking to keep the refusal-to-submit charge from the jury when trying the DWI offense.

David WILSON *v.* Arthur FULLERTON and Bradley Motor Company, Incorporated

397-358 964 S.W.2d 208

Supreme Court of Arkansas
Opinion delivered March 5, 1998

Bill G. Wells and *Thomas D. Deen*, for appellant.

Epley, Epley, & Parker, Ltd., by: *Tim S. Parker*, for appellees.

TOM GLAZE, Justice. Appellant David Wilson is a used car dealer who purchased three used trucks from appellees Bradley Motor Company, Inc., and its president, Arthur Fullerton. At the time of purchase, First State Bank of Warren held title to two of the trucks that had been repossessed from a Mr. Thomas and Mr. Lephiew. Chrysler Credit Corporation possessed the title to the third truck, which is not at issue in this litigation. This appeal ensues from Wilson's suit against Bradley Motor and Fullerton wherein Wilson alleged the tort of deceit, claiming they willfully and wantonly refused to give him the titles to the Thomas and Lephiew trucks. Fullerton and Bradley Motor subsequently filed a third-party complaint against First State Bank, and asserted that the Bank was solely responsible for failing to convey the two titles to Wilson. Wilson then brought suit directly against the Bank for the tort of conversion, alleging the Bank converted his titles after having been paid for them.

The parties' dispute was tried to a jury which awarded Wilson a verdict against Fullerton for compensatory damages in the amount of $50,000.00 and $100,000.00 in punitive damages; against Bradley Motor for $25,000.00 in compensatory damages and $25,000 in punitive damages; and against First State Bank for $4,710.00 in compensatory damages. Afterwards on posttrial motions, the trial court found the verdicts inconsistent because the

same jury instruction on compensatory damages was given against Fullerton and Bradley Motor, yet the jury returned different awards. Also, the court found that, because of the different theories of tort liability pursued against the Bank and Fullerton and Bradley Motor, Wilson had a potential for receiving a double recovery for the same economic loss.

The trial court, after reviewing the evidence, concluded that Wilson's compensatory damages against both Fullerton and Bradley Motor amounted to $5,118.45. Because these same expenses incurred by Wilson involved the same economic loss attributed to First State Bank, the trial court ordered that Wilson could recover $4,710.00 on only one of the judgments against Fullerton, Bradley Motor, or the Bank, and not all three.[1] In addition, the trial court reduced Fullerton's punitive damages to $25,000.00 (the same amount awarded against Bradley Motor), finding the jury's larger amount resulted from passion and prejudice, likely due to Fullerton having failed to appear and defend his case. The trial court's judgment was filed on August 30, 1996.

Unhappy with the trial court's order reducing the jury verdict amounts for compensatory and punitive damages, Wilson filed this appeal on September 27, 1996, arguing that the trial court's remittiturs were made in error. Since First State Bank satisfied its judgment on September 23, 1996, and filed it of record on October 7, 1996, in the full amount of $4,710.00, Wilson did not appeal from that judgment. However, Fullerton and Bradley Motor filed a timely cross-appeal, on October 2, 1996, asserting, as they did in their posttrial motions, that the evidence did not support the compensatory damages awarded. They further argue that, because compensatory and punitive damages are interwoven, any error made with respect to one award of damages requires a retrial of the whole case. Fullerton and Bradley Motor further argue that Wilson's verdicts against them for deceit and against the Bank for conversion are mutually exclusive and amount to contradictory verdicts as well as double recovery.

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[1] The difference between the $5,118.45 amount imposed against Fullerton and Bradley Motor and the $4,710.00 amount against the Bank appears to be attributable to the value of the Lephiew truck (without a title), which Wilson has possession of.

After the parties filed their respective appeals and the Bank satisfied its judgment, Wilson, on May 21, 1997, caused a writ of execution to be issued against real and personal properties owned by Fullerton and Bradley Motor. Fullerton and Bradley Motor responded on May 22, 1997, by filing a corporate supersedeas bond in the amount of $25,749.84, and on May 23, 1997, the court stayed all executions, levies, and garnishments pending this appeal. Following Wilson's action to execute on his August 30, 1996 judgment, Fullerton and Bradley Motor filed a motion to dismiss Wilson's appeal. They first claim Wilson cannot appeal a judgment on the one hand and attempt to satisfy it on the other. Additionally, Fullerton and Bradley Motor submit that, under the election-of-remedies doctrine, Wilson's acceptance of First State Bank's satisfaction of Wilson's conversion claim against the Bank requires the setting aside of his deceit claim against Fullerton and Bradley Motor. Because we agree with Fullerton's and Bradley Motor's first claim, we need not fully address their election-of-remedies argument at this stage. Instead, we will defer discussing that point when dealing with Fullerton's and Bradley Motor's cross-appeal.

In considering Fullerton's and Bradley Motor's dismissal argument, the rule is well established that the acceptance of benefits of a decree or judgment which are inconsistent with the relief sought on appeal, and detrimental to the rights of others, bars the appeal and requires its dismissal. *See Shepherd v. State Auto Property & Casualty Ins. Co.*, 312 Ark. 502, 850 S.W.2d 324 (1993); *Anderson v. Anderson*, 223 Ark. 571, 267 S.W.2d 316 (1954); *Jones v. Rogers*, 222 Ark. 523, 261 S.W.2d 649 (1953). Arkansas law is also well settled that the acceptance of an amount less than appellant contends is due him is an estoppel against his appeal only when, by seeking to gain more by the appeal, he risks a smaller recovery on reversal. *Coston v. Lee Wilson & Co.*, 109 Ark. 548, 160 S.W. 857 (1913); *see also Gate City Bldg. & Ass'n v. Frisby*, 177 Ark. 252, 6 S.W.2d 537 (1928); *Jones v. Hall*, 136 Ark. 348, 206 S.W. 671 (1918).

Wilson argues that, if we affirm the trial court's remittiturs, he will be entitled to no less than the reduced judgment. He is in error. In the present case, Wilson, by prosecuting his appeal,

incurs the hazard of recovering less than was awarded him by the judgment appealed from. From the outset of this litigation, Fullerton and Bradley Motor have denied they owed Wilson any damages, including compensatory ones. Nonetheless, the jury awarded Wilson $25,000.00 compensatory damages and the trial court awarded such damages in the reduced amount of $5,118.45. Still, both Fullerton and Bradley Motor have continued their challenge to any compensatory damages by cross-appealing from the $5,118.45 judgment, as well as the punitive-damage judgment awarded against them. Clearly, when Wilson accepts the $5,118.45 judgment in compensatory damages against Fullerton and Bradley Motor, but seeks to gain more by his appeal, Wilson indisputably risks a smaller recovery.

Specifically, if Fullerton and Bradley Motor prevail in their appeal and obtain a new trial on the reversal and remand of this case, a jury on retrial could well determine no compensatory damages should be awarded. As a consequence, Wilson would not only risk the loss of the $5,118.45 judgment against Fullerton and Bradley Motor, but in this circumstance, he could also lose his reduced award of $25,000.00 in punitive damages. *See Bell v. McManus*, 294 Ark. 275, 742 S.W.2d 559 (1988) (court held punitive damages are not recoverable unless compensatory damages are also awarded). At the very least, Wilson, on appeal, stands the possibility of having his $5,118.45 award against Fullerton and Bradley Motor reduced by the $4,710.00 payment made by the Bank, since Wilson accepted that payment during his appeal.

We add that, by filing a writ of execution in satisfaction of the remitted punitive damages, Wilson has also taken action that was detrimental to the rights of Fullerton and Bradley Motor. As a result of Wilson's attempt at execution, Fullerton was forced to post a supersedeas bond and obtain a stay of execution. Had Fullerton not done so, Wilson could have successfully executed the writ, and thereby possibly accept and benefit from the full amount of the remitted judgment. Such action is entirely inconsistent with the claim of right Wilson seeks to establish on appeal.

In sum, when Wilson voluntarily accepted partial satisfaction of the judgment, and later issued a writ of execution in an

effort to satisfy the entire judgment against Fullerton and Bradley Motor, he knew there was a dispute as to whether he would be entitled to the remitted judgments he had obtained. He knew both Fullerton and Bradley Motor had challenged all amounts of damages owed, and was well aware that they intended to continue that challenge, since they had filed a cross-appeal. Wilson, has, therefore, waived his right of appeal by virtue of his execution efforts and the satisfaction of judgment against First State Bank. Consequently, his appeal must be dismissed.

We now turn to Fullerton's and Bradley Motor's cross-appeal. In doing so, we consider the two points they offer for reversal, dismissal, or for a new trial or directive as to the effect of the Bank's satisfaction of Wilson's $5,118.45 judgment against Fullerton and Bradley Motor. In their first point, they argue the evidence adduced at trial was insufficient to support compensatory damages, and because compensatory and punitive damages are interrelated, the entire damage award required reversal and a retrial. As previously mentioned, the jury returned a verdict against Fullerton and Bradley Motor for compensatory and punitive damages. However, Fullerton and Bradley Motor asked not only that the damage verdicts be set aside because of insufficient evidence, but also made the alternative request that the trial court reduce the amount of any judgment to the amount consistent with the proof presented. As discussed earlier herein, the trial court granted a reduction in damages, and Fullerton and Bradley Motor never objected. Because Fullerton and Bradley Motor asked for and received a reduction in the compensatory and punitive damages awarded against them, they cannot on appeal complain of a ruling in their favor. *See Carton v. Missouri Pac. R.R.,* 315 Ark. 5, 865 S.W.2d 635 (1993).

Fullerton's and Bradley Motor's second point for appeal is not as easily answered. Actually, this point encompasses several arguments. They initially argue that the trial court erred by permitting Wilson to pursue two mutually exclusive remedies. In sum, Fullerton and Bradley Motor urge that Wilson should not have been allowed to say they had committed the tort of deceit by fraudulently selling vehicles and willfully refusing to deliver the titles as promised, but at the same time, claim First State Bank had

converted the titles after Fullerton and Bradley Motor paid the Bank to release the titles. Fullerton and Bradley Motor argue that, while a jury could have found against either Fullerton and Bradley Motor or the Bank, Wilson could not recover against all of them. Of course, the trial court recognized this inconsistency, and as we discussed previously, the trial court entered a judgment which avoided double recovery, ordering that Wilson could only recover $4,710.00 from one of the defendants, Fullerton, Bradley Motor, or the Bank, not all of them. Again, Fullerton and Bradley Motor never challenged that part of the trial court's order below, and they may not do so now. *See Anthony v. Kaplan*, 324 Ark. 52, 918 S.W.2d 174 (1996).

■ ■ However, Fullerton and Bradley Motor are quite right that they had no opportunity to raise their election-of-remedies doctrine at trial, because the Bank's satisfaction of the trial court's award of $4,710.00 in compensatory damages was not filed until after Wilson filed his notice of appeal. The election-of-remedies doctrine bars more than one recovery on inconsistent remedies. *Cates v. Cates*, 311 Ark. 627, 846 S.W.2d 173 (1993); *see also Jones v. Ray*, 54 Ark. App. 336, 925 S.W.2d 805 (1996). Here, the trial court recognized the double recovery possibility and eliminated that problem, ordering that Wilson could not collect the $4,710.00 judgment more than once. When Wilson accepted payment of this amount from the Bank, he precluded further recovery of that amount from Fullerton and Bradley Motor. Accordingly, we hold Fullerton and Bradley Motor are entitled to have the $5,118.45 judgment against them reflect its satisfaction in the amount of $4,710.00, leaving a balance owed in the smaller amount of $500.00.

For the foregoing reasons, Fullerton's and Bradley Motor's cross-appeal is affirmed in part and reversed and remanded in part, with instructions consistent with this opinion.

NEWBERN, BROWN, and IMBER, JJ., concur in part and dissent in part.

ANNABELLE CLINTON IMBER, Justice, concurring in part and dissenting in part.

I.

I would deny Fullerton and Bradley Motor's motion to dismiss appeal. Wilson's attempt to execute on the reduced judgment while Fullerton and Bradley Motor had failed to obtain a supersedeas bond is consistent with the relief he seeks on appeal. Wilson's sole argument on appeal is that the trial court erred in reducing the verdicts that the jury originally awarded. The only remedy that he requests from this court is that we reinstate the amount of the original verdicts. Thus, there is no risk that Wilson will receive a smaller recovery should we affirm or reverse on direct appeal.

Of course, the majority is absolutely correct in stating that if we accept the arguments put forth by Fullerton and Bradley Motor on cross-appeal, one possible outcome is the grant of a new trial, which obviously carries with it the chance that Wilson will receive nothing once the case is retried. However, I am not persuaded that we should delve into Fullerton's and Bradley Motor's cross-appeal to hold that Wilson has somehow run the risk of recovering less on appeal, or that he has accepted the benefits of a judgment inconsistent with the relief he seeks on appeal. In none of the cases relied on by the majority was a possible outcome on cross-appeal dispositive in dismissing a direct appellant's appeal. *See Anderson v. Anderson*, 223 Ark. 571, 267 S.W.2d 316 (1954) (affirming dismissal of petition to set aside divorce decree following petitioner's acceptance of $60,000 under decree); *Jones v. Rogers*, 222 Ark. 523, 261 S.W.2d 649 (1953) (dismissing appeal challenging trial court's refusal to confirm commissioner's sale after appellants "enjoyed the possession and use of the $5,000.00" that came to them by virtue of the order denying confirmation); *Gate City Bldg. & Loan Assn. v. Frisby*, 177 Ark. 252, 6 S.W.2d 537 (1928) ("overruling" motion to dismiss appeal where appellant claimed a right to contract rate of interest rather than statutory rate following foreclosure sale — "appellant incurred no hazard whatever of recovering a less amount on appeal."); *Jones v. Hall*, 136 Ark. 348, 206 S.W. 671 (1918) (dismissing appeal that involved a review of the entire record to determine amount appellant was entitled to); *Coston v. Lee Wilson & Co.*, 109 Ark. 548, 160 S.W. 857 (1913) (same). To the extent that there is language

in our cases suggesting otherwise, *see Delaughter v. Britt*, 243 Ark. 40, 418 S.W.2d 638 (1967) ("There was no cross-appeal as to the amount of these damages.") (Fogleman, J., dissenting) *and McIlroy v. McIlroy*, 191 Ark. 45, 83 S.W.2d 550 (1935) ("In the case at bar there is no cross-appeal challenging the amount of alimony to be paid each month."), it is merely *dictum*. I think that the better course of action would be to look solely to the relief sought on direct appeal to determine whether an appellant has accepted the benefit of a judgment inconsistent with his appeal.

In *Shepherd v. State Auto Property & Casualty Ins. Co.*, 312 Ark. 502, 850 S.W.2d 324 (1993), the appellants argued, among other things, that the trial court erred in allowing an underinsurance carrier to offset from its policy-limits liability proceeds already paid by the tortfeasor's carrier. The underinsurance carrier, which had voluntarily paid the judgment prior to the appeal, moved to dismiss the appellants' appeal on the theory that the appellants had accepted the benefits of the judgment that they appealed from, rendering their appeal inconsistent with acceptance of the judgment. Relying on the governing law set down in *Bolen v. Cumby*, 53 Ark. 514 (1890) ("[H]e waives his right to an appeal by accepting a benefit which is inconsistent with the claim of right he seeks to establish by the appeal."), this court denied the motion to dismiss because the judgment that the appellants accepted belonged to them "*in any event*," and "their claims on appeal expressly [went] to *additional* awards." *Shepherd, supra* (emphasis in original). This was true despite the fact that the carrier had filed a cross-appeal, ultimately dismissed as moot, in which it argued that it was entitled to the offset and that the trial court erred in not offsetting the judgment further with workers' compensation benefits paid.

The *Shepherd* case is in line with cases from other jurisdictions which hold that an appellant, who has already accepted some benefit from a judgment, and who requests only a larger amount on appeal, has not sought relief inconsistent with the judgment appealed from, and that such an "inconsistency" cannot be garnered from a possible result on cross-appeal. *Heacock v. Ivorette-*

Texas, Inc., 26 Cal. Rptr.2d 257 (Cal. Ct. App. 1993) ("In deciding whether the plaintiff's appeal is inconsistent with having accepted the benefits of the judgment, we focus solely on the relief sought by the plaintiff, not on arguments made by a cross-appealing defendant."); *Stevens Const. Corp. v. Draper Hall, Inc.*, 242 N.W.2d 893 (Wis. 1976) ("As long as the party accepting the money has not put his right to that money in jeopardy in his own appeal, there is no waiver, even though his right to the money may be endangered by his opponent's cross-appeal or notice of review."); *Schleicht v. Bliss*, 532 P.2d 1 (Or. 1975), *disavowed on other grounds*, 688 P.2d 379 (Or. 1984) ("If a cross-appeal could prevent the original appellant from pursuing a valid appeal on the grounds the cross-appeal allows the appellate court to possibly reduce the award given the original appellant, the cross-appeal could be used as a vehicle to dismiss the original appeal."); *see also 1st Nat'l Bank v. Energy Equities Inc.*, 569 P.2d 421 (N.M. Ct. App. 1977) (reaching merits of cross-appeal that went only to additional awards despite direct appeal challenging the cross-appellant's right to amounts already collected under the judgment). Because Wilson's claim on appeal goes only to additional awards, I would reach the merits.

II.

I concur in the result reached by the majority on Fullerton's and Bradley Motor's cross-appeal. As to their argument that the relationship between the compensatory and punitive award is so disparate as to require a new trial, this argument was made below in their "Motion for Reconsideration" filed before the entry of judgment. In cross-appellants' brief, and during oral argument, counsel for cross-appellants maintained that this "Motion for Reconsideration" was in fact a Rule 59 motion for new trial. Accepting the cross-appellants' characterization of their own motion, I would hold that we are precluded from reaching the merits because their argument was raised in an ineffective Rule 59 motion for new trial. In cases discussing the timeliness of notices of appeal this court has routinely stated that under Ark. R. Civ. P. 59(b), which provides "[a] motion for new trial shall be filed not

later than 10 days after the entry of judgment," a motion for new trial must be filed after entry of judgment in order to be effective. *See Benedict v. National Bank of Commerce*, 329 Ark. 590, 951 S.W.2d 562 (1997) ("[Appellant] failed to file her motion within the ten-day period provided in ARCP Rule 59(b), so it was ineffective."); *Breckenridge v. Ashley*, 55 Ark. App. 242, 934 S.W.2d 536 (1996) ("Because [the motion for new trial] was filed before the decree was entered, we are convinced that it was not timely."). The Reporter's Note to Rule 59 explains that "Section (b) marks a significant departure from prior Arkansas practice. Under this section, a motion for new trial must be filed within ten days after entry or filing of the judgment."

III.

Finally, I agree with the majority that we are precluded from reaching the merits of the cross-appellants' election-of-remedies argument relating to the allegedly inconsistent jury verdicts because they failed to make such an objection below. However, I deem it unnecessary to reduce the compensatory award against Fullerton and Bradley Motor to reflect the payment by FSB, considering that the trial court specifically found that Wilson was entitled to "only recover the sum of $4,710.00 on one of the judgments, not against all of the party defendants." This would appear to eliminate any double-recovery problem.

NEWBERN and BROWN, JJ., join as to Part I.

Jarrell E. SOUTHALL and Barbara J. Southall *v.* LITTLE ROCK NEWSPAPERS, INC., and Bobbi Ridlehoover

97-400 964 S.W.2d 187

Supreme Court of Arkansas
Opinion delivered March 5, 1998
[Petition for rehearing denied April 16, 1998.*]

* BROWN and IMBER, JJ., not participating.

R. David Lewis, for appellants.

Williams & Anderson, by: *Leon Holmes*, for appellee Little Rock Newspapers, Inc.

Kaplan, Brewer & Maxey, P.A., by: *Philip E. Kaplan*, for appellee Bobbi Ridlehoover.

DONALD L. CORBIN, Justice. Appellants Jarrell E. and Bar bara J. Southall filed an action for defamation against Appellees Little Rock Newspapers, Inc. (the Newspaper), and Bobbi Ridlehoover[1] in the Pulaski County Circuit Court. The trial court granted summary judgment to both Appellees. Appellants raise three points for reversal, which necessarily involve questions on the law of torts. As such, our jurisdiction is pursuant to Ark. Sup. Ct. R. 1-2(a)(15). We find no error and affirm.

Facts

Appellant Jarrell Southall was the executive director of the Arkansas Department of Pollution Control and Ecology (PC&E) from 1977 through January 28, 1983, though he had actually worked for PC&E as a chemist beginning in 1965. In 1983, Southall opened his own consulting service, during which time Ensco, Inc., was one of his main clients. In 1986, Southall went to work directly for Ensco until 1993. According to his deposition, Southall took the lead in trying to draft this state's hazardous-waste legislation and in getting the issue into the public debate. He indicated that there was a lot of controversy surrounding the subject of hazardous waste. He stated that it was part of his responsibility as both a member and executive director of PC&E to attend legislative committee meetings and give testimony on these issues. He stated further that he had conducted interviews with the media, had talked to reporters on radio and television, had served as a registered lobbyist with the Arkansas General Assembly, and had been fairly prominent in the debate over the regulation of hazardous waste.

On December 16, 1990, the Newspaper ran several articles about Ensco, one of which Appellants argue defamed Jarrell Southall. The article, written by Appellee Ridlehoover, consisted of eighty-four paragraphs and was entitled "The watchers now watched in El Dorado." The relevant portions are as follows:

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[1] Appellants' complaint also named Walter E. Hussman Jr. as a defendant; however, the notices of appeal filed in this case indicate that Appellants do not appeal the grant of summary judgment in favor of Hussman.

> [Jack] Forrest and other Ensco employees were able to name seven former state and federal regulators who now work for the company. Another former PC&E employee was at one time under contract with the company.
>
> The list includes former PC&E director Jarrell E. Southall, who went to work for the company as a consultant in 1983. At the time, Southall said he approached Ensco for the job.
>
> Southall has denied that he negotiated with Ensco for the job while he was the state's top pollution control regulator.
>
> Southall has since become a full-time Ensco employee. He is the contract administrator for the company's proposal to build a hazardous waste incinerator facility in Arizona.
>
> The *Arkansas Democrat* reported in 1983 that Southall had official dealings with Ensco less than a month before he went to work for the company.
>
> In addition, Melvyn Bell, Ensco's former president and now board chairman, provided Southall a private plane ride to Ensco on January 13, 1983 when hazardous material spilled at the plant. State Health Department officials trying to investigate the spill were not allowed past a locked gate.
>
> Southall acknowledged that he flew down with Bell on his plane, and he blamed a "mix-up" in communication for Health Department officials Don Wise and Martin Tull not being admitted inside the gate.
>
> The Health Department shares responsibility with PC&E for investigating such spills, but the PC&E official who should have notified the Health Department failed to do so.

The second article which Appellants argue is defamatory to Jarrell Southall was published in the Newspaper on July 13, 1992, and was entitled "Environmentalists see liquid-waste regulations as best bet." The story consisted of twenty-eight paragraphs and described the work of Clyde Temple of Warren, Arkansas, in the area of environmental issues. The relevant portions of the article are as follows:

> Temple, 62, has worked on environmental issues for more than a decade. He is past president and vice president of the Arkansas Wildlife Federation and has been chairman of the group's water committee for 11 years.
>
> He won one of his earliest battles — which Arkansas environmentalists know is no small feat.

> It was over water quality. The group he formed, the Committee for a Clean Saline, won a successful citizens' suit in federal court in July 1981 against Jarrell Southall, then director of the state Department of Pollution Control and Ecology, and the City of Warren. The suit forced the cleanup of pollution in the lower Saline River.

On appeal, Appellants argue that the trial court erred in granting Appellees' motion for summary judgment and in making the following findings: (1) that Jarrell Southall was a public official as well as a limited-purpose public figure with regard to environmental issues; (2) that the December 16, 1990 article contained no false or defamatory statement of fact of and concerning Jarrell Southall, and that there was not sufficient evidence showing that Appellees had acted with actual malice; and (3) that, as to the July 13, 1992 article, there was not sufficient evidence that Appellees had acted with actual malice.

We note that Appellants have failed to abstract the articles in their entirety, as is required for this court's review of whether the articles are libelous. *See Little Rock Newspapers, Inc. v. Fitzhugh*, 330 Ark. 561, 954 S.W.2d 914 (1997); *Pigg v. Ashley County Newspaper, Inc.*, 253 Ark. 756, 489 S.W.2d 17 (1973). Appellees have, however, supplied us with sufficient portions of those articles in their supplemental abstract. As such, we will address the merits of the arguments on appeal.

Public Figure/Public Official

For their first point on appeal, Appellants argue that Jarrell Southall was neither a public official nor a public figure at the time of the articles' publication. We disagree.

Whether a person is a public official or a public figure is a mixed question of fact and law to be determined by the trial court. *Fitzhugh*, 330 Ark. 561, 954 S.W.2d 914 (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) and *Cornett v. Prather*, 293 Ark. 108, 737 S.W.2d 159 (1987)). We recently discussed the issue of when an individual is considered to be a public figure:

> 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.*

Fitzhugh, 330 Ark. 561, 579-80, 954 S.W.2d 914, 924 (emphasis added) (quoting *Gertz*, 418 U.S. at 351-52). Since the Court's decision in *Gertz*, courts have construed the term "public figure" narrowly, with an emphasis on the plaintiff's status in relation to the subject of the defamatory article. *Id.*

This court has held that neither a former United States Attorney nor a private attorney were public figures, (*see Fitzhugh*, 330 Ark. 561, 954 S.W.2d 914; *Dodrill v. Arkansas Democrat Co.*, 265 Ark. 628, 590 S.W.2d 840 (1979), *cert. denied*, 444 U.S. 1076 (1980)). This court has, however, held that an assistant law school dean was a public figure (*see Gallman v. Carnes*, 254 Ark. 987, 497 S.W.2d 47 (1973)), as were a sheriff, a deputy sheriff, a city police officer, (*see Pritchard v. Times Southwest Broadcasting, Inc.*, 277 Ark. 458, 642 S.W.2d 877 (1982); *Hollowell v. Arkansas Democrat Newspaper*, 293 Ark. 329, 737 S.W.2d 646 (1987); *Lancaster v. Daily Banner-News Publishing Co., Inc.*, 274 Ark. 145, 622 S.W.2d 671 (1981)), and a chairman of the board of governors of a county memorial hospital (*see Drew v. KATV Television, Inc.*, 293 Ark. 555, 739 S.W.2d 680 (1987)).

In *Fitzhugh*, 330 Ark. 561, 954 S.W.2d 914, the plaintiff's photograph appeared in an article about the Whitewater investigation in which it was reported that another man named Fitzhugh was indicted by a federal grand jury. We determined that the plaintiff, a former United States Attorney for eight years, was neither a public official nor a public figure, because the substance of the defamatory article bore no relation to his position as a federal prosecutor. We held that, as to the category of limited-purpose public figure, there was no evidence that Fitzhugh 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." *Id.* at 582, 954 S.W.2d at 926. We held further that Fitzhugh had not, "by virtue of his having been a federal prosecutor for eight years, occup[ied] 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." *Id.* at 582-83, 954 S.W.2d at 926. We concluded that Fitzhugh had not achieved such general fame or notoriety throughout the area where the article was published that would render him a public personality for all purposes.

Here, in contrast to the factual situation presented in *Fitzhugh*, we conclude that, in the present context, Jarrell Southall was a limited-purpose public figure on the subject of environmental issues. The evidence demonstrated that he enjoyed a promi-

nent role in the creation and enforcement of environmental legislation in this state. Southall himself stated in his deposition that he had conducted interviews with the media, had talked to radio and television reporters, had been a lobbyist at the state legislature, and had been fairly prominent in the public debate over the regulation of hazardous waste. By his own statements, Southall has demonstrated that he had thrust himself into the vortex of the public controversy surrounding the subject of hazardous waste. Accordingly, we conclude the trial court's assessment of Southall as a public figure for the limited purpose of environmental issues was not erroneous. It is thus not necessary that we reach the issue of whether Southall is considered to be a public official for the purpose of construing the two articles in question.

Actual Malice

For their remaining two points for reversal, Appellants argue that the trial court erred in finding that the December 16, 1990 article was not defamatory and that there was not sufficient evidence that Appellees had published either article with actual malice. Appellees do not concede that the articles contained false information or that they were defamatory toward Jarrell Southall. Appellees do contend, however, that even if the articles were factually incorrect and were defamatory, Appellants' claims must nonetheless fail because there was no evidence presented below showing that Appellees published the articles with actual malice.

An action for defamation turns on whether the communication or publication tends or is reasonably calculated to cause harm to another's reputation. *Fitzhugh*, 330 Ark. 561, 954 S.W.2d 914; *Thomson Newspaper Publishing, Inc. v. Coody*, 320 Ark. 455, 896 S.W.2d 897, *cert. denied*, 116 S. Ct. 563 (1995). 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. *Fitzhugh*, 330 Ark. 561, 954 S.W.2d 914; *Minor v. Failla*, 329 Ark. 274, 946 S.W.2d 954 (1997). Because Jarrell Southall was a limited-purpose public figure on environmental

issues, Appellants have the additional burden of proving that such false statements were made by Appellees with actual malice. *Coody*, 320 Ark. 455, 896 S.W.2d 897.

In discussing the standard for actual malice, this court has observed:

> [T]he plaintiff in such an action must prove that the defamatory publication "was made with 'actual malice' — that is, with knowledge that it was false or with reckless disregard of whether it was false or not."
>
> . . . .
>
> *These cases are clear that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.* Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.
>
> . . . .
>
> The defendant in a defamation action brought by a public official cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith.

Fuller v. Russell, 311 Ark. 108, 112, 842 S.W.2d 12, 14-15 (1992) (footnote omitted) (emphasis added) (quoting *St. Amant v. Thompson*, 390 U.S. 727, 728, 731, 732 (1968)).

Where a motion for summary judgment is made in a defamation case involving the "actual malice" standard, the trial court must determine whether the evidence presented could support a reasonable jury's finding that actual malice was shown by clear and convincing evidence. *KATV Television, Inc.*, 293 Ark. 555, 739 S.W.2d 680 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986)). Where the First Amendment is involved, we are "obligated to make an independent examination of the whole record to make sure the judgment does not constitute a forbidden intrusion on the field of free expression." *Fuller*, 311 Ark. at 112, 842 S.W.2d at 14 (citing *Bose Corp. v. Consumer's Union of United States, Inc.*, 466 U.S. 485 (1984)). The question of whether the evidence in the record is sufficient to support a finding of actual

malice is a question of law. *Id.* (citing *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989)). Accordingly, because Appellees' First Amendment right to free expression is at stake in this case, we apply the heightened standard of review. This heightened standard only applies to a review of the issue of actual malice, not to the determination of libel. *Coody*, 320 Ark. 455, 896 S.W.2d 897 (citing *Bose*, 466 U.S. 485).

We consider first the December 16, 1990 article reporting Jarrell Southall's connection with Ensco and his having received a plane ride to Ensco's El Dorado location from the company's president. Appellants do not contend that the story was factually false; rather, they assert that the implication from the story was defamatory. The portion of the article that Appellants find defamatory is as follows:

> The *Arkansas Democrat* reported in 1983 that Southall had official dealings with Ensco less than a month before he went to work for the company.
>
> In addition, Melvyn Bell, Ensco's former president and now board chairman, provided Southall a private plane ride to Ensco on January 13, 1983 when hazardous material spilled at the plant. State Health Department officials trying to investigate the spill were not allowed past a locked gate.

Specifically, Appellants assert that the article is defamatory in that it implied that Southall, who was then director of PC&E, was at Ensco's plant when health department officials trying to investigate the spill were not allowed past the locked gate, and that he had something to do with those officials being denied entrance to the plant.

Considering that Southall admitted the truth of the statements contained in the article, namely that he had accepted a plane ride from Melvyn Bell and that the health department officials were not allowed past the gate because of a "mix-up" in communication, we fail to see how such true statements amount to defamatory statements of fact concerning Southall. Nor do we view the article as having a defamatory implication. Instead, we agree with the trial court that the article implies nothing more than that Southall went to the plant on a private plane when the spill occurred and that the health department officials attempting

to investigate the spill were not allowed past the locked gate; it does not imply that Southall was standing at the gate preventing the officials from entering or that he had conspired with Ensco to keep them out of the plant.

Furthermore, even assuming that those statements possessed a defamatory implication, Appellants have offered no clear and convincing evidence that Appellees published the article with actual malice. Appellants merely contend that Ridlehoover knew the implication of the article was false because she had reported in 1983 that Southall had said that he was no longer at the Ensco plant at the time that the health department officials had arrived. Appellants argue that the reason Ridlehoover only made this implication, rather than stating outright that Southall was at the plant at the time the officials were prohibited entrance, was to avoid a libel suit, which demonstrates actual malice. We are not persuaded by this argument. The fact that the statements were true and Southall was given the opportunity to state his view of the events that occurred at the Ensco plant refute the allegation that Appellees published the article with actual malice.

Appellants further argue that the words "in addition" contained in the December 16, 1990 article referred to more than one "official dealing" that Southall had with Ensco prior to his departure from PC&E. Appellants offer no convincing argument as to how the fact that Southall may or may not have had more than one "official dealing" with Ensco prior to his departure from PC&E is necessarily defamatory to him. Appellees contend, on the other hand, that even if there were some defamatory implication from those words, there was no evidence presented by Appellants that would show by clear and convincing evidence that they published the article with actual malice. In support of this contention, Appellees point to an article published in the Newspaper in 1983 reporting that Southall had some communication with Ensco president Melvyn Bell, either directly or indirectly through PC&E staff. The article, published on April 19, 1983, reflected:

> Records on file at the department show ENSCO has had extensive dealings with the agency almost up to the time when Southall stepped down in January, and some of these dealings involve Southall personally.

> For example, in December ENSCO sought permission to run a test burn of the hazardous waste in a mobile incinerator at the company's El Dorado plant. The company had no permit, however, and the request was denied.
>
> Sandra Perry, hazardous waste coordinator at the Pollution Control and Ecology Department, sent a memo on the ENSCO request to Southall and two other officials. Dated Dec. 13, the memo concludes:
>
> "Mr. Bell can, however, burn natural gas or fuel oil . . . in his new incinerator without a permit for a period of four hours in December. If his goal is to secure the tax break for pollution control equipment that expires in December, perhaps this would meet his needs."
>
> Beside this paragraph a handwritten note appears, which states: "Melvin (sic) said this was fine & would suit him OK. I told him to notify JES (Southall) before he began as per JES's (request.)" The note wasn't signed, but apparently was written by Ms. Perry.
>
> A spokesman for the Pollution Control and Ecology Department said the agency wasn't giving free tax advice to Ensco and never sent this memo to the company. "It was strictly an internal document," the spokesman said.
>
> When asked about the memo in a recent interview, Southall said he couldn't recall the circumstances.

Appellants respond that this memo does not qualify as an "official dealing" between Southall and Ensco, and that the article is thus false and defamatory. Such contention does not advance Appellants' position on appeal, because the fact that Appellees relied on this prior article in support of the December 16, 1990 article contravenes the argument that the article was published with actual malice. In short, there is no evidence that would permit the conclusion that Appellees in fact entertained serious doubts as to the truth of the December 16, 1990 article or that they published the article with a reckless disregard for the truth.

As to the July 13, 1992 article, Appellants assert that the statement that Clyde Temple won a suit against Jarrell Southall, then director of PC&E, was false and defamatory. Appellants assert that Southall had been dismissed as a party to the suit prior to the time that it was settled by the City of Warren. Appellants

argue that actual malice is apparent from Ridlehoover's failure to read the official court file prior to publishing the article in order to verify whether Southall was a party at the time of the suit's disposition.

Appellees argue that even if the statement that Clyde Temple won a suit against Southall and the City of Warren is not substantially true, there is nothing defamatory about a statement that the director of a state agency was sued in his capacity as director of that agency. They argue further that Appellants' argument regarding malice amounts to no more than an allegation of a failure to investigate, which does not meet the definition of actual malice. We agree with this argument.

The foregoing case law demonstrates that the failure to investigate information later published is not, without more, evidence of actual malice. There must be clear and convincing evidence to permit the conclusion that Ridlehoover and the Newspaper in fact entertained serious doubts as to the truth of the story. There was no such evidence presented below. In fact, Ridlehoover stated that her source for the information was the Newspaper's "clip file." Appellants do not rebut this assertion with any proof to the contrary.[2] As such, the evidence does not rise to the level of demonstrating that Ridlehoover entertained serious doubts about the truth of the statements when she published the July 13, 1992 article. Accordingly, we affirm the ruling of the trial court.

HOLLY LODGE MEYER, Sp. J., joins in this opinion.

THORNTON, J., and KEITH N. WOOD, Sp. J., concur.

BROWN and IMBER, JJ., not participating.

RAY THORNTON, Justice, concurring. I concur in the decision to affirm, but, in my opinion, it is only necessary to decide

[2] We note Appellants' argument that malice is shown by the fact that, when asked about the existence of this "clip file," the Newspaper responded that there was no such file. We do not address this argument, however, as such alleged response on behalf of the Newspaper is not contained in the abstract, nor is it apparent that Appellants ever raised this issue below prior to the time the trial court made its ruling. The abstract reflects that this argument was first raised in Appellants' motion for new trial.

whether the trial court erred in determining that Jarrell Southall was a limited-purpose public figure who failed to show that appellees published the allegedly inaccurate news stories about him with actual malice. Southall's charges, if proven, would not reach the threshold of actual malice required by the landmark case of *New York Times v. Sullivan*, 376 U.S. 254 (1964). I agree with the majority that the trial court did not err in granting summary judgment and that the case should be affirmed.

Special Justice KEITH N. WOOD joins in this concurrence.

Kathy STEWART *v.* STATE of Arkansas

CR 97-1276 964 S.W.2d 793

Supreme Court of Arkansas
Opinion delivered March 5, 1998
[Petition for rehearing denied April 16, 1998.]

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

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

ANNABELLE CLINTON IMBER, Justice. At the conclusion of a bench trial, the appellant, Kathy Stewart, was convicted of possession of a controlled substance in violation of Ark. Code Ann. § 5-64-401 (Repl. 1997). On appeal, Stewart challenges the trial court's denial of her motion to suppress the evidence that was seized from her coat pocket. We reverse and remand.

On December 4, 1995, at approximately 1:45 a.m., Officer Spangler was patrolling an area of Little Rock that was known to him to have "high drug traffic." As Officer Spangler approached the intersection of 27th Street and Broadway, he noticed Kathy Stewart standing on the corner outside of her home. Based upon the time of day, where she was standing, and the fact that he had previously made several arrests in that area, Officer Spangler believed that Stewart might be engaged in drug trafficking.

Officer Spangler pulled up to where Stewart was standing and asked her what she was doing. Stewart answered that she was about to go for a walk. Officer Spangler asked Stewart to remove her hands from her coat pocket and to walk towards his patrol car. As Stewart approached Officer Spangler's vehicle, she placed her right hand inside of her right coat pocket two or three times despite Officer Spangler's repeated requests to keep both of her hands out of her jacket. Stewart's behavior caused Officer Spangler to believe that she might have a weapon in her coat pocket.

When Stewart reached the police car, Officer Spangler asked her to place both hands on the car, and he proceeded to perform a pat down search for weapons. After feeling a large bulge in Stewart's right coat pocket, Officer Spangler reached into Stewart's pocket and retrieved thirty-five one dollar bills, a one hundred dollar bill, and a matchbox. Officer Spangler then opened the matchbox and discovered two rocks of crack cocaine. Stewart was subsequently arrested and charged with possession of a controlled substance.

Prior to trial, Stewart filed a motion to suppress the drugs seized from her pocket because the warrantless stop was made without "a reasonable and articulable suspicion that [she] was armed and dangerous nor with probable cause to believe that [she] had committed a felony." At the beginning of the bench trial, Stewart reminded the court of her pending motion to suppress, and asked the court to "take the matter up" at the same time that it considered whether she was guilty of possession of a controlled substance. The trial judge granted Stewart's request.

The State proceeded to present its case-in-chief against Stewart. When the State offered the drugs into evidence, Stewart objected on the basis that the State had failed to establish a proper chain of custody, but she did not renew her constitutional challenges to the stop and subsequent search. After the State established a proper chain of custody, the drugs were admitted into evidence. The State presented no further evidence and rested its case. Stewart immediately followed with her argument that the drugs should have been suppressed due to the unconstitutional stop and search. The same argument was renewed by Stewart at the conclusion of the trial. The court denied Stewart's motion to suppress and found her guilty of possession of a controlled substance.

In *Stewart v. State*, 59 Ark. App. 77, 953 S.W.2d 599 (1997), the Arkansas Court of Appeals reversed Stewart's conviction and remanded for a new trial because it concluded that the police officer exceeded the permissible scope of a pat-down search under *Terry v. Ohio*, 392 U.S. 1 (1968), when he removed the matchbox from Stewart's pocket and examined the contents. We granted the State's petition to review, and decide the case as if the appeal was originally filed in this court. *McElhanon v. State*, 329 Ark. 261, 948 S.W.2d 89 (1997); *Brunson v. State*, 327 Ark. 567, 940 S.W.2d 440 (1997).

I. Contemporaneous Objection

On appeal, the issue is whether the trial court erred when it denied Stewart's motion to suppress the drugs seized from her coat pocket. Before reaching the merits of Stewart's argument, we must first decide whether she has properly preserved this issue for

appeal. The State contends that she has not because she failed to make a contemporaneous objection when the drugs were offered into evidence. Hence, we are asked for the first time to decide whether a contemporaneous objection is required during a bench trial when the previously filed motion to suppress has been renewed at the beginning of the trial.

It is well settled that in order to preserve an issue for appeal the appellant must make an objection contemporaneously with the alleged error. *Smith v. State*, 330 Ark. 50, 953 S.W.2d 870 (1997). In *State v. Brummett*, 318 Ark. 220, 885 S.W.2d 8 (1994), we explained that the reason for the contemporaneous-objection rule is to give the trial court an opportunity to fully understand the reason for the disagreement with its proposed action before it renders a ruling. If, however, the motion to suppress is orally renewed at the beginning of a bench trial, and the trial court agrees to consider the motion to suppress at the same time it considers the evidence, there is no risk that the court will be unfamiliar with the nature of the objection. Under these circumstances, we hold that a contemporaneous objection is not required in order to preserve the issue for appeal.

In reaching this conclusion, we are not unmindful of two recent cases where we held that a contemporaneous objection is required in order to preserve for appeal issues that were raised in a motion in limine. *Slocum v. State*, 325 Ark. 38, 924 S.W.2d 237 (1996); *Massengale v. State*, 319 Ark. 743, 894 S.W.2d 594 (1995). We, however, find these cases distinguishable because they involved jury trials, instead of a bench trial as in this case. If a contemporaneous objection is not made at the time the evidence is offered during a jury trial, the proverbial bell will have been rung and the jury prejudiced. However, when the contested evidence is mentioned during a bench trial, there is no risk of prejudice because a trial judge is able to consider evidence only for its proper purpose. Similarly, in *Strickland v. State*, 322 Ark. 312, 909 S.W.2d 318 (1995), we held that litigants are not required to make a motion challenging the sufficiency of the evidence during cases tried before the court instead of a jury.

For these reasons, we hold that during a bench trial it is not necessary to make a contemporaneous objection when the contested evidence is offered if the appellant has renewed the previously filed motion to suppress at the beginning of the trial, and the court agrees to consider the motion simultaneously with the evidence on the merits. Accordingly, we hold that Stewart has properly preserved her constitutional argument for appeal.

II. Constitutionality of the Initial Encounter

As to the merits, Stewart contends that the trial court erred when it denied Stewart's motion to suppress the drugs seized from her coat pocket. When reviewing a trial court's ruling on a motion to suppress, we make an independent determination based on the totality of the circumstances and reverse only if the trial court's ruling is clearly against the preponderance of the evidence. In making this determination, we view the evidence in the light most favorable to the State. *Burris v. State*, 330 Ark. 66, 954 S.W.2d 209 (1997); *Mullinax v. State*, 327 Ark. 41, 938 S.W.2d 801 (1997), *cert. denied*, 117 S. Ct. 2411 (1997).

In order to resolve this issue, we must first decide whether the police action in the initial encounter between Officer Spangler and Stewart was permissible under the Constitution and our Rules of Criminal Procedure. In *Frette v. City of Springdale*, 331 Ark. 103, 959 S.W.2d 734 (1998), we recently explained that there are three types of encounters between the police and private citizens:

> The first and least intrusive category is when an officer merely approaches an individual on a street and asks if he is willing to answer some questions. Because the encounter is in a public place and is consensual, it does not constitute a "seizure" within the meaning of the fourth amendment. The second police encounter is when the officer may justifiably restrain an individual for a short period of time if they have an "articulable suspicion" that the person has committed or is about to commit a crime. The initially consensual encounter is transformed into a seizure when, considering all the circumstances, a reasonable person would believe that he is not free to leave. The final category is the full-scale arrest, which must be based on probable cause.

(citing *Thompson v. State*, 303 Ark. 407, 797 S.W.2d 450 (1990); *U.S. v. Hernandez*, 854 F.2d 295 (8th Cir. 1988)).

The State first contends that the initial encounter between Officer Spangler and Stewart was a permissible "stop" or "seizure" under Ark. R. Crim. P. 3.1, which provides that:

> A law enforcement officer lawfully present in any place may, in the performance of his duties, stop and detain any person who he reasonably suspects is committing, has committed, or is about to commit (1) a felony, or (2) a misdemeanor involving danger of forcible injury to persons or of appropriation of or damage to property, if such action is reasonably necessary either to obtain or verify the identification of the person or to determine the lawfulness of his conduct.

In this context, we have defined a "reasonable suspicion" 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); Ark. R. Crim. P. 2.1. In making this determination, the trial court may consider several factors which are listed in Ark. Code Ann. § 16-81-203 (1987). The factors most relevant to this case are:

> 1) the demeanor of the suspect;
> 2) the gait and manner of the suspect;
> 6) the time of the day or night the suspect is observed;
> . . .
> 8) the particular streets and areas involved;
> . . .
> 12) incidence of crime in the immediate neighborhood;
> 13) the suspect's apparent effort to conceal an article;

As mentioned previously, Officer Spangler testified that he asked Stewart to approach his patrol car because she was standing on a street corner in a known drug area at around 1:45 a.m. Officer Spangler also testified that Stewart returned her hand to her coat pocket two or three times, thus possibly indicating that she was concealing a weapon. However, Stewart did not do this until *after* Spangler asked her to approach the car, and thus it cannot be used as a justification for the stop. In addition, there was

nothing about Stewart's actions or demeanor that indicated that she was involved in any illegal activity. Thus, Officer Spangler's only justification for stopping Stewart was simply that she was standing in the wrong place at the wrong time. Under such limited circumstances, we have no hesitancy in saying that the trial court's finding that Officer Spangler had a reasonable suspicion to stop Stewart under Ark. R. Crim. P. 3.2, was clearly against the preponderance of the evidence.

This, however, does not end our inquiry because the State claims that, in the alternative, Officer Spangler's initial contact with Stewart was permissible under Ark. R. Crim. P. 2.2, which provides that:

> A law enforcement officer may request any person to furnish information or otherwise cooperate in the investigation or prevention of crime. The officer may request the person to respond to questions, to appear at a police station, or to comply with any other reasonable request.
>
> (b) . . . Compliance with the request for information or other cooperation hereunder shall not be regarded as involuntary or coerced solely on the ground that such a request was made by a law enforcement officer.

On several occasions, we have clarified that an encounter under Ark. R. Crim. P. 2.2, is permissible only if the information or cooperation sought is in aid of an investigation or the prevention of a particular crime. *Hammons v. State*, 327 Ark. 520, 940 S.W.2d 424 (1997); *State v. McFadden*, 327 Ark. 16, 938 S.W.2d 797 (1997); *Thompson v. State*, 303 Ark. 407, 797 S.W.2d 450 (1990); *Baxter v. State*, 274 Ark. 539, 626 S.W.2d 935 (1982); *Meadows v. State*, 296 Ark. 380, 602 S.W.2d 636 (1980).

For example, in *Hammons v. State*, *supra*, we held that it was permissible under Rule 2.2 for an officer to approach the driver of a parked car in the course of investigating a tip from a confidential informant that the driver of a black corvette was selling drugs behind the Old Town Tavern. Likewise, in *Baxter v. State*, *supra*, we held that an officer had not violated Rule 2.2 when he asked a driver about a theft from a nearby jewelry store that occurred only ten minutes earlier. In both of these cases, the initial encounter, which was not a seizure under the Fourth Amendment, was per-

missible under Ark. R. Crim. P. 2.2 because the officer was seeking assistance in the investigation of a particular crime.

In contrast, in *Meadows v. State, supra,* we held that an officer violated Rule 2.2 when he questioned two passengers who were exiting a plane simply because they repeatedly looked back at the officer and quickened their pace when they realized that he was following them. There was nothing in the officer's testimony that suggested that he asked Meadows for identification in the course of an investigation. *Id.* In *State v. McFadden, supra,* an officer received a report that a juvenile girl was missing from her home, and that she might be with McFadden, her boyfriend. Because no criminal activity was suspected at the time of the encounter, we held that the officer violated Rule 2.2 when he pulled over McFadden and questioned him about the juvenile's disappearance. *Id.*

In this case, Officer Spangler pulled over to the curb where Stewart was standing and asked her to approach his patrol car simply because she was standing on the corner in a high crime area late in the evening. Unlike *Hammons* and *Baxter,* Officer Spangler was not investigating a nearby crime or a tip from an informant at the time of the encounter. Under these circumstances, we cannot say that the encounter was permissible under Rule 2.2.

Because the initial encounter was impermissible under Ark. R. Crim. P. 2.2 and 3.1, we reverse the trial court's denial of the motion to suppress as it was clearly against the preponderance of the evidence. In light of this holding, there there is no need for us to consider Stewart's final argument that the extent of the search was unconstitutional under *Minnesota v. Dickerson,* 508 U.S. 366 (1993). Moreover, we note that this particular constitutional challenge is procedurally barred because Stewart did not raise it below. *See Moore v. State,* 323 Ark. 529, 915 S.W.2d 284 (1996); *Rhoades v. State,* 319 Ark. 45, 888 S.W.2d 654 (1994); *Chism v. State,* 312 Ark. 559, 853 S.W.2d 255 (1993).

For these reasons, we reverse and remand.

Jimmie L. WILSON *v.* James A. NEAL

96-1524 964 S.W.2d 199

Supreme Court of Arkansas
Opinion delivered March 5, 1998

George E. Hairston, E. Dion Wilson, Victor Hill, Roy C. Lewellen, and *Sam Whitfield, Jr.*, for appellant.

Daggett, Van Dover, Donovan & Perry, PLLC, by: *Robert J. Donovan*, for appellee.

ANNABELLE CLINTON IMBER, Justice. Attorney Jimmie L. Wilson appeals the trial court's order of summary judgment which disbarred him from the practice of law in Arkansas. We reverse and remand for a hearing to determine the appropriate sanction for Wilson's violation of Model Rule of Professional Conduct 8.4(b).

In the words of Chief Judge Waters of the United States District Court, the procedural background of this case is "long and tortured," *Neal v. Wilson*, 920 F. Supp. 976 (E.D. Ark. 1996), and it has been discussed in detail in three other opinions. *See Neal v. Wilson*, 112 F.3d 351 (8th Cir. 1997); *Neal v. Wilson*, 321 Ark. 70, 900 S.W.2d 117 (1995); *Neal v. Wilson*, 316 Ark. 588, 873

S.W.2d 552 (1994). The facts relevant to the issues presented in this appeal are as follows.

In 1981 and 1982, Jimmie L. Wilson borrowed approximately $775,230 from the Farmers Home Administration (FmHA) for farm operating expenses. The loan was secured by an FmHA lien on Wilson's crops. On August 22, 1990, Wilson pled guilty in the United Stated District Court, Eastern District, to three counts of violating 18 U.S.C. § 658[1] by "knowingly" disposing of soybeans and rice that were mortgaged and pledged to the FmHA, and two counts of violating 18 U.S.C. § 641[2] by "knowingly" taking money from a Department of Agriculture bank account and using it for unapproved purposes. For these crimes, Wilson was sentenced to four and one-half months in prison and three years of probation. The United States District Court also suspended Wilson's license to practice law in the federal courts until final disposition of the disciplinary actions taken against him.

On March 29, 1991, the Arkansas Committee on Professional Conduct ("Committee") notified Wilson that a complaint had been filed against him alleging that his misdemeanor convictions in the federal court constituted a violation of the Model Rules of Professional Conduct. Wilson failed to respond either personally or in writing to the merits of the allegations contained in the complaint. On July 22, 1991, the Committee determined by a unanimous vote that Wilson had violated the Model Rules, and on October 9, 1991, the Committee filed a disbarment action against Wilson in the Phillips County Circuit Court.

---

[1] This statute says in relevant part that:

Whoever, with intent to defraud, knowingly conceals, removes, disposes of, or converts to his own use or to that of another, any property mortgaged or pledged to, or held by, . . . the Secretary of Agriculture acting through the Farmers Home Administration . . . shall be fined under this title or imprisoned . . . or both . . . .

[2] This statute says in relevant part that:

Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or any department or agency thereof, . . . shall be fined under this title or imprisoned . . . or both . . . .

Over the next five years, numerous pleadings and interlocutory appeals were filed in this case. *See Neal v. Wilson*, 112 F.3d 351 (8th Cir. 1997); *Neal v. Wilson*, 920 F. Supp. 976 (E.D. Ark. 1996); *Neal v. Wilson*, 321 Ark. 70, 900 S.W.2d 117 (1995); *Neal v. Wilson*, 316 Ark. 588, 873 S.W.2d 552 (1994). Finally, on August 30, 1996, the Phillips County Circuit Court entered summary judgment in favor of the Committee. In its order, the court: 1) rejected Wilson's argument that the Committee had denied him due process of law by denying his requests for extensions to respond to the initial complaint; 2) denied Wilson's request for additional discovery; 3) found that Wilson had violated Model Rule 8.4; and 4) held that disbarment was the appropriate sanction. From this order, Wilson filed a timely notice of appeal.

On appeal, Wilson contends that there were numerous errors and violations of his constitutional rights throughout the disbarment process before the Committee and the trial court. We will address these issues in the order in which they arose.

I. Double Jeopardy and Collateral Estoppel

As previously mentioned, this is the third state appeal in this matter. For his first argument on appeal, Wilson contends that the doctrines of collateral estoppel and double jeopardy should have prevented the Committee from continuing the disbarment action against him. Wilson is procedurally barred from raising these arguments on appeal because they were not raised below or ruled upon by the trial court. *Wilson v. Rebsamen Ins. Inc.*, 330 Ark. 687, 957 S.W.2d 678 (1997); *McGhee v. State*, 330 Ark. 38, 954 S.W.2d 206 (1997). It is well settled that to preserve arguments for appeal, even constitutional ones, the appellant must obtain a ruling below. *Akins v. State*, 330 Ark. 228, 955 S.W.2d 483 (1997). Accordingly, we reject this argument without reaching the merits.

II. Requests for Extensions

Next, Wilson contends that the Committee violated his right to procedural due process when it denied his requests for an extension to prepare a response to the initial complaint filed before the Committee. Citing *McCullough v. Neal*, 314 Ark. 372, 862

S.W.2d 279 (1993), the Committee contends that this issue is procedurally barred because Wilson failed to exhaust his administrative remedies. According to Sections 5(E)(3) and (F)(1) of the Procedures of the Arkansas Supreme Court Regulating Professional Conduct of Attorneys at Law, an attorney who has been cautioned, reprimanded, or suspended has a right to a *de novo* hearing before the Committee. In *McCullough*, we held that an attorney who failed to exercise this administrative remedy was procedurally barred from contesting the Committee's decision on direct appeal. *Id.* This case, however, is distinguishable from *McCullough*, because if the vote is to initiate disbarment proceedings, Section 5(E)(5) declares that the Committee shall file a disbarment action in circuit court and "there shall be no hearing before the committee." Because Wilson did not have any further administrative remedies before the Committee, as did the attorney in *McCullough*, we conclude that the issue is not procedurally barred.

Turning to the merits, we have previously explained that the power to regulate and define the practice of law is a prerogative of the judicial department as one of the divisions of government. *Neal v. Wilson*, 316 Ark. 588, 873 S.W.2d 552 (1994); *Weems v. Supreme Court Comm. on Prof'l Conduct*, 257 Ark. 673, 523 S.W.2d 900 (1975). Moreover, Amendment 28 to the Arkansas Constitution declares that, "[t]he Supreme Court shall make rules regulating the practice of law and the professional conduct of attorneys at law." Accordingly, we have promulgated the Procedures of the Arkansas Supreme Court Regulating Professional Conduct of Attorneys of Law, which state in relevant part that:

> (1) Upon receiving information of such complaint, the attorney shall have twenty (20) days in which to file a written response consisting of an original and eight (8) copies with the Executive Director . . . .
>
> (2) The Executive Director is authorized to grant, at the request of an attorney, an extension of reasonable length for the filing of a response. Subsequent requests for extensions must be in written form and will be ruled on by the Chairman of the Committee.

Section 5(C).

On March 29, 1991, the Committee sent Wilson a letter announcing that a complaint had been filed against him. According to Section 5(C)(1), Wilson had twenty days to respond to the complaint. Instead of filing a response, Wilson's attorney sent a letter to the Committee on April 15, 1991, asking for an extension until August 30, 1991. The Executive Director of the Committee granted Wilson an extension until May 20, 1991. On appeal, Wilson argues that the Committee violated his rights because it granted him an extension for only one month instead of for the three and one-half months that he requested. According to Section 5(C)(2), the Executive Director has the authority to grant the first extension for a "reasonable length" of time. We hold that one month was a reasonable length of time because Wilson already had twenty days to respond, and he was represented by competent counsel who could have helped him prepare his response.

On May 20, 1991, Wilson tendered a second request for an extension which was denied by the Committee Chairman. At this point, the Committee had already given Wilson one extension, thereby allowing him almost two months instead of the usual twenty days to file his response. Accordingly, we also hold that the Committee did not violate Wilson's rights when it denied his second request for an extension.

III. Constitutionality of the Procedures Regulating Professional Conduct

After denying Wilson's two requests for extensions, the Committee determined by a unanimous vote that Wilson's misdemeanor convictions in the federal court constituted a violation of the Model Rules. The Committee then filed a disbarment action against Wilson in the Phillips County Circuit Court pursuant to Section 6(B), which states in relevant part that:

> When a complaint against an attorney is based on a conviction of a felony or a crime which also violates Rule 8.4(b) of the Model Rules of Professional Conduct, the Committee *shall* institute an action of disbarment.

(Emphasis added.)

On appeal, Wilson argues that this rule is unconstitutional because it grants the Committee unfettered discretion to determine what crimes constitute a violation of Model Rule 8.4(b), and to arbitrarily choose when they will pursue disbarment. We find no merit to either of these arguments because the rule unambiguously proclaims that the Committee "shall" institute a disbarment action when it determines that a crime constitutes a violation of Model Rule 8.4(b). The Committee simply has no discretion on whether or not to file a disbarment action. Moreover, it is the trial court, not the Committee, that ultimately determines whether there has been a violation of the Model Rules, and whether disbarment is the appropriate sanction. Section 5(G)(2). Accordingly, we also find no merit to Wilson's third point on appeal.

IV. Discovery

After the disbarment action was filed, Wilson propounded interrogatories to the Committee which included a detailed request for information regarding any complaint the Committee had ever received against an attorney who had been convicted of a criminal offense. Wilson contended that he needed this information to develop his disparate-treatment argument. When the information was not forthcoming, Wilson filed a motion to compel, which was denied by the trial court. Wilson claims that the trial court committed reversible error when it rendered this ruling. We disagree.

It is well settled that a trial court has wide discretion in matters pertaining to discovery, and thus we will reverse a trial court's ruling only when there has been an abuse of discretion. *Parker v. Southern Farm Bureau Cas. Ins. Co.*, 326 Ark. 1073, 935 S.W.2d 556 (1996); *Stein v. Lukas*, 308 Ark. 74, 823 S.W.2d 832 (1992). Moreover, a discovery motion must be considered in light of the particular circumstances which give rise to the request and the need of the movant for the information requested. *Parker, supra*; *Marrow v. State Farm Ins. Co.*, 264 Ark. 227, 570 S.W.2d 607 (1978).

We hold that the trial court did not abuse its discretion when it denied Wilson's motion to compel for several reasons. First, the majority of the information that Wilson requested was a matter of public record which he could have easily obtained from the Arkansas Supreme Court Clerk pursuant to Section 4(C), which declares that:

> When a letter of caution, reprimand, or suspension becomes final under these Procedures, or when the Committee decides to initiate disbarment proceedings, a copy of such shall be forwarded to the Clerk and shall be maintained as a public record by the Clerk.

Second, during the hearing on Wilson's motion to compel, the Executive Director of the Committee voluntarily took the stand and answered many of Wilson's questions about other attorneys who had been convicted of criminal offenses. The Committee also presented its files, which were reviewed *in camera* by the trial court. After reviewing the materials, the court determined that the Committee had adequately complied with Wilson's request.

Finally, the court found that Wilson had been given ample opportunity over the five years that this case was pending to engage in meaningful discovery, but that he had been "less than diligent." Based on these circumstances, we cannot say that the trial court abused its discretion when it denied Wilson's motion to compel. Accordingly, we also affirm on this point.

V. Violation of Model Rule 8.4(b)

The first issue the trial court had to resolve in the disbarment action was whether Wilson's misdemeanor convictions constituted a violation of Model Rule 8.4(b). Model Rule 8.4(b) provides that it is professional misconduct for a lawyer to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." In his defense, Wilson argued that his misdemeanor convictions did not constitute a violation of this rule because he did not commit the crimes with a culpable *mens rea.* We hold that the trial court properly rejected this argument for two reasons.

First, both crimes to which Wilson pled guilty required knowing conduct. *See* 18 U.S.C. §§ 641 and 658. Wilson pled guilty to three charges that he *knowingly* disposed or converted to his own use crops pledged to the FmHA, and to two charges that he *knowingly* took money from a controlled Department of Agriculture bank account and used the money for unapproved purposes. Second, Section 6(B) declares that a certified copy of the judgment of conviction "shall be conclusive evidence of the attorney's guilt" of the underlying crime, and that the attorney may not "offer evidence inconsistent with the essential elements of the crime for which he was convicted." Thus, once Wilson was convicted in federal court, he was precluded from relitigating the elements of the crimes during the disbarment proceeding.

After considering the arguments by both sides, the trial court entered summary judgment in favor of the Committee. As we have said on numerous occasions, a trial court may grant summary judgment pursuant to Ark. R. Civ. P. 56 if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Wilson v. Rebsamen Ins. Inc.*, 330 Ark. 687, 957 S.W.2d 678 (1997); *Sanders v. Bradley County Human Serv. Pub. Facilities Bd.*, 330 Ark. 675, 956 S.W.2d 187 (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. *Wilson, supra*; *Sanders, supra.* In this case, the trial court concluded that the "law of the case" and the "undisputed facts" required a determination that Wilson's misdemeanor convictions constituted a violation of Model Rule 8.4(b). These rulings will be considered separately.

We hold that the trial court erred when it concluded that the law-of-the-case doctrine prevented it from deciding whether Wilson violated Model Rule 8.4(b). The law-of-the-case doctrine precludes a trial court from reconsidering questions that were "explicitly or implicitly" determined on appeal. *Foreman v. State*, 328 Ark. 583, 945 S.W.2d 926 (1997). In *Neal v. Wilson*, 316 Ark. 588, 873 S.W.2d 552 (1994), Wilson's first appeal in this case, one of the issues on appeal was whether the

Model Rules were applicable because they were adopted after Wilson committed the federal crimes, but before he was convicted. We held that the Model Rules applied because the relevant date was the day Wilson was convicted and not the days on which the crimes were committed. *Id.* In making this determination we said:

> Rule 8.4(b), which defines "professional misconduct" in part as the commission of "a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects," and which comprehends the misdemeanor charges to which Mr. Wilson pled guilty, was effective as part of the Model Rules of Professional Conduct on January 1, 1986, having been adopted by per curiam order on December 16, 1985.

Id. With this language, we were merely clarifying our holding that the Model Rules applied to Wilson's federal convictions. We were not, however, either "explicitly or implicitly" making a factual conclusion that Wilson's conduct constituted a violation of Model Rule 8.4. In fact, later in the opinion we specifically denied the Committee's request to pronounce judgment on this issue because the trial court had not ruled on the matter. *Id.* Accordingly, we conclude that the trial court erred when it found that the law of the case mandated summary judgment in favor of the Committee.

This, however, does not end our inquiry because the trial court also found that "the undisputed facts" established that Wilson's federal convictions constituted a violation of Model Rule 8.4(b). We agree. According to Model Rule 8.4(b), it is professional misconduct for a lawyer to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." The Comments to Rule 8.4 further explain that:

> Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return . . . . Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving

> violence, dishonesty, or breach of trust, or serious interference with the administration of justice are in that category.

(Emphasis added.)

In this case, Wilson was convicted of five counts of "knowingly" converting money and property that belonged to the federal government in violation of 18 U.S.C. §§ 641 and 658. Although all five crimes were misdemeanors, we agree with the trial court that these convictions involved dishonesty and a breach of trust, and seriously undermined "the confidence of the public in our legal profession." *See In re Lee*, 305 Ark. 196, 806 S.W.2d 382 (1991). Because we have no hesitation in holding that Wilson's convictions reflected adversely on Wilson's fitness to practice law, we affirm the trial court's finding that Wilson violated Model Rule 8.4(b).

VI. Right to A Full Trial

Next, Wilson argues that by entering summary judgment on this issue, the trial court denied him a right to an "action" and a "trial" under Section 5(G)(1), which states that:

> An action for disbarment shall be filed with the Clerk of the Circuit Court of the county in which the attorney resides, or in which the alleged violation was committed. In disbarment suits, the action shall proceed as an action between the Executive Director and the respondent. Proceedings in the Circuit Court shall be held in compliance with the Arkansas Rules of Civil Procedure and trial shall be had before the Circuit Judge without a jury.

Wilson somehow construes this section to give him an absolute right to a full trial and thus precludes the entry of summary judgment. We disagree. According to Section 5(G)(1), the Rules of Civil Procedure, including Ark. R. Civ. P. 56 on summary judgments, apply once the Committee files a disbarment action in the circuit court. Because summary judgment was appropriate in this case for the reasons explained above, we hold that the trial court was not required to hold a full trial.

VII. Appropriate Sanction

Once the trial court concluded that Wilson's federal convictions constituted a violation of Model Rule 8.4(b), the next step was to determine the appropriate sanction. It is in this final stage of the disbarment proceeding that we find reversible error.

In its order of summary judgment, the trial court incorrectly found that Wilson "must be disbarred as a matter of law" according to Section 6(B), which provides that:

> When a complaint against an attorney is based on a conviction of a felony or a crime which also violates Rule 8.4(b) of the Model Rules of Professional Conduct, the Committee *shall institute an action of disbarment.*

(Emphasis added.) We disagree with the trial court's reasoning because this section declares what type of action the Committee must file and does not limit the sanctions the court may impose. Instead, we hold that the correct provision is Section 5(G)(2), which provides in relevant part that:

> If the Circuit Judge finds that the attorney has violated the Model Rules, he shall *caution, reprimand, suspend, or disbar such attorney as the evidence may warrant.*

(Emphasis added). It is clear from this provision that the trial court was not required to disbar Wilson, but was entitled to select any one of the four listed sanctions. Accordingly, we hold that the trial court erred when it concluded that disbarment was required as a matter of law.

Again, this does not end our analysis because the trial court also declared in its order of summary judgment that "even if this conclusion were not reached as a matter of law, this Court's conclusion would be the same, based upon the undisputed facts." We cannot agree because the trial court reached this conclusion without all the information necessary to make a decision on the appropriate sanction.

During the hearing on the Committee's motion for summary judgment, the trial court assured Wilson that if it concluded that he had violated Rule 8.4, it would hold a second hearing to

determine the appropriate sanction. The trial court, however, never held the second hearing as promised, and instead ordered disbarment before Wilson was ever provided an opportunity to present evidence in mitigation. Clearly, at this point in the disbarment proceeding, Wilson should not have been allowed to relitigate the elements of the underlying crimes, or whether his convictions constituted a violation of Model Rule 8.4(b). Both parties, however, should have been able to present some evidence and arguments as to which of the four sanctions was appropriate in this case.

The American Bar Association Joint Committee on Professional Standards has developed the following list of aggravating and mitigating factors that we think are useful in a court's determination of an appropriate sanction:

Aggravating Factors:

(a) prior disciplinary offenses;
(b) dishonest or selfish motive;
(c) a pattern of misconduct;
(d) multiple offenses;
(e) bad faith obstruction of the disciplinary proceedings by intentionally failing to comply with [the] rules or orders of the disciplinary agency;
(f) submission of false evidence, false statements, or other deceptive practices during the disciplinary process;
(g) refusal to acknowledge [the] wrongful nature of [the] conduct;
(h) vulnerability of [the] victim;
(i) substantial experience in the practice of law;
(j) indifference to making restitution;
(k) illegal conduct, including that involving the use of controlled substances.

Mitigating Factors:

(a) absence of a prior disciplinary record;
(b) absence of a dishonest or selfish motive;
(c) personal or emotional problems;
(d) timely good faith effort to make restitution or to rectify [the] consequences of [the] misconduct;
(e) full and free disclosure to [the] disciplinary board or cooperative attitude towards [the] proceedings;

(f) inexperience in the practice of law;
(g) character or reputation;
(h) physical disability;
(i) mental disability or chemical dependency including alcoholism or drug abuse when;
  (1) there is medical evidence that the respondent is affected by a chemical dependency or mental disability;
  (2) the chemical dependency or mental disability caused the misconduct;
  (3) the respondent's recovery from the chemical dependency or mental disability is demonstrated by a meaningful and sustained period of successful rehabilitation; and
  (4) the recovery arrested the misconduct and recurrence of that misconduct is unlikely.
(j) delay in [the] disciplinary proceedings;
(k) impositions of other penalties or sanctions;
(l) remorse;
(m) remoteness of prior offenses.

MODEL STANDARDS FOR IMPOSING LAWYER SANCTIONS §§ 9.22 and 9.32 (1992).

For these reasons, we affirm the trial court on the first six issues and reverse only on the final issue of sanctions. We remand for a sanction hearing during which each side may present evidence and arguments regarding the above-listed aggravating and mitigating factors. The parties, however, must limit their arguments to these matters, and for the reasons explained above, are precluded from relitigating the elements of underlying federal crimes, or whether those convictions constituted a violation of the Model Rules.

Affirmed in part and reversed and remanded in part for proceedings consistent with this opinion.

Special Justices GENE E. MCKISSIC, CHARLES D. BARNETTE, and JACK T. LASSITER join in this opinion.

NEWBERN, GLAZE, and CORBIN, JJ., not participating.

Alvie NELSON *v.* TIMBERLINE INTERNATIONAL, INC.;
Crum & Forster, Carrier;
and Second Injury Fund

97-439 964 S.W.2d 357

Supreme Court of Arkansas
Opinion delivered March 5, 1998

Barber, McCaskill, Jones & Hale, P.A., by: *Tim A. Cheatham*, for appellees-petitioners Timberline International, Inc., and Crum & Forster Commercial Insurance.

Judy W. Rudd, for appellee-respondent Second Injury Fund.

RAY THORNTON, Justice. Timberline International, Inc., and Crum & Forster Commercial Insurance, its workers' compensation carrier, appeal the decision of the Arkansas Workers' Compensation Commission holding that the Second Injury Trust Fund is not liable for the permanent disability benefits awarded to Alvie Nelson, a former employee of Timberline, because his present condition resulted from the cumulative effect of successive injuries he received while in the same employment. The Arkansas Court of Appeals affirmed the Commission's decision based on the authority of *McCarver v. Second Injury Fund*, 289 Ark. 509, 715 S.W.2d 429 (1986), and *Riceland Foods, Inc. v. Second Injury Fund*, 289 Ark. 528, 715 S.W.2d 432 (1986). *Nelson v. Timberline Int'l, Inc.*, 57 Ark. App. 34, 942 S.W.2d 260 (1997). We granted

review of the decision of the court of appeals pursuant to Ark. Sup. Ct. R. 1-2(f).

The primary issue is whether we should overrule *McCarver* and *Riceland Foods*, in which we affirmed decisions of the court of appeals interpreting Ark. Stat. Ann. § 81-1313(i) (Supp. 1985), now codified at Ark. Code Ann. § 11-9-525 (Repl. 1996), to mean that the Second Injury Trust Fund is not liable for wage-loss disability benefits resulting from the cumulative effect of successive injuries when the claimant sustains the injuries in the same employment. We are persuaded by a careful review of the *McCarver* and *Riceland Foods* decisions that they should be overruled.

The facts of this case are not disputed. In 1988, Alvie Nelson suffered a lower-back injury while working as a diesel mechanic for Timberline. He eventually underwent back surgery resulting in a permanent impairment rating of fifteen percent to the body as a whole. When he recovered, Nelson returned to work at Timberline where he performed lighter work as a mechanic for about six months before being placed in the parts department where he worked for a year or so. Nelson then returned to his job as a diesel mechanic, and, in March 1992, he suffered another lower-back injury, for which he underwent two surgeries. Nelson has not returned to work or attempted to return to work since the second back injury. A neurosurgeon assessed his permanent impairment from the 1992 injury to be an additional fifteen percent to the body as a whole.

Timberline accepted full responsibility for the payment of benefits for the permanent physical impairment resulting from Nelson's second injury. A hearing was held before an administrative law judge to determine the extent of Nelson's permanent disability and the liability for any wage-loss disability benefits in excess of Nelson's permanent physical impairment ratings. The judge found that Nelson was not permanently and totally disabled due to the March 1992 injury but that he had sustained wage-loss disability benefits of sixty percent. The judge also ruled that the Second Injury Trust Fund had no liability for these benefits.

Nelson appealed the administrative law judge's decision to the Workers' Compensation Commission, and Timberline cross-appealed, asserting that the Second Injury Trust Fund was liable for the wage-loss benefits over and above Nelson's permanent physical impairment rating. The Commission rejected Nelson's claim of permanent and total disability, but reversed in part, finding that Nelson had sustained a thirty percent impairment to his earning capacity in excess of his physical impairment rating. Furthermore, the Commission, citing our decisions in *McCarver* and *Riceland Foods*, affirmed the determination that the Second Injury Trust Fund had no liability for Nelson's wage-loss disability benefits because he sustained the second disabling injury while working for the same employer for whom he had worked when he suffered his first compensable injury.

Both parties appealed the Commission's decision to the court of appeals, which affirmed on both points. In its opinion, the court of appeals urged that the "same employer" defense, created by the court in *McCarver* and *Riceland Foods*, deserves our reconsideration. *Nelson*, 57 Ark. App. at 36, 942 S.W.2d at 261. Nelson did not file a petition asking us to review the court of appeals' determination that there was sufficient evidence to support the Commission's finding that he was not permanently and totally disabled; therefore, we do not address that determination. On May 5, 1997, we granted Timberline's and Crum & Forster's petition for review solely to determine whether we correctly interpreted Ark. Stat. Ann. § 81-1313(i), now codified at Ark. Code Ann. § 11-9-525, in *McCarver* and *Riceland Foods* to provide that the Second Injury Trust Fund is not liable for permanent disability benefits which exceed those directly related to a second injury in the same employment. 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. *Stucco Plus, Inc. v. Rose*, 327 Ark. 314, 938 S.W.2d 556 (1997).

At the outset, we consider appellee's, the Second Injury Trust Fund, argument that principles of *stare decisis* militate against revisiting our prior decisions interpreting the liability of the Fund under the statute. We are mindful that under the doctrine of *stare decisis* we follow the previous decisions of this court

construing a statute. *Scarbough v. Cherokee Enterprises*, 306 Ark. 641, 816 S.W.2d 876 (1991); *Southwest Ark. Communications, Inc. v. Arrington*, 296 Ark. 141, 753 S.W.2d 267 (1988). In *Southwest Arkansas Communications, Inc.*, we considered the principle of *stare decisis* in the context of interpreting a constitutional provision and stated:

> A cardinal rule in dealing with constitutional provisions is that they should receive a consistent and uniform interpretation so that they shall not be taken to mean one thing at one time, and a different thing at another time. Certainly, when a constitutional provision or a statute has been construed, and that construction consistently followed for many years, such construction should not be changed.

Id. at 145, 753 S.W.2d at 269 (citing *O'Daniel v. Brunswick Balke Collender Co.*, 195 Ark. 669, 674, 113 S.W.2d 717, 719 (1938)). Nevertheless, as the United States Supreme Court has recognized, *stare decisis* has never been applied mechanically to prohibit overruling prior decisions that have determined the meaning of statutes. *Monell v. New York City Dept. of Social Serv.*, 436 U.S. 658, (1978). Indeed, this court has, on occasion, departed from a prior statutory interpretation. *See Fountain v. Chicago, R.I. & P. Ry.*, 243 Ark. 947, 422 S.W.2d 878 (1968). We believe the ultimate inquiry is whether there are compelling reasons for abandoning our prior judicial interpretation of the statute. As discussed below, upon review of the *McCarver* and *Riceland Foods* decisions, we conclude that compelling reasons exist to overturn them.

We also note that Ark. Code Ann. § 11-9-1001 (Repl. 1996) does not affect our ability to decide the issue before us. That statute provides:

> When, and if, the workers' compensation statutes of this state need to be changed, the General Assembly acknowledges its responsibility to do so . . . . In the future, if such things as the statute of limitations, the standard of review by the Workers' Compensation Commission or courts, *the extent to which any physical condition, injury, or disease should be excluded from or added to coverage by the law, or the scope of the workers' compensation statutes need to be liberalized, broadened, or narrowed*, those things shall be addressed by the General Assembly and should not be done by

> administrative law judges, the Workers' Compensation Commission, or the courts.

(Emphasis added.)

This language does not preclude our review in this matter because we are not "liberalizing, broadening, or narrowing" the scope of the Workers' Compensation Act. In addressing the liability of the Second Injury Trust Fund for permanent disability benefits under the statute, the issue relates only to the allocation of responsibility for payment of those benefits. The claimant receives the same compensation regardless of who bears the liability. We are not changing the scope of the Workers' Compensation Act; rather, we are merely interpreting a statutory provision allocating responsibility for benefits, which is clearly a function of this court.

Prior to 1979, employers who employed previously impaired workers were obligated under Ark. Stat. Ann. § 81-1313(f)(1) (Repl. 1976) to pay benefits for permanent total disability in the event a new injury had the cumulative effect of causing such a permanent disability. That statute provided:

> If an employee receives a permanent injury after having previously sustained another permanent injury in the employ of the same employer, for which he is receiving compensation, compensation for the subsequent injury shall be paid for the healing period and permanent disability by extending the period and not by increasing the weekly amount. When the previous and subsequent injuries received result in permanent total disability, compensation shall be payable for permanent total disability as provided in Section 10(a) 81-1310 of this Act.

Ark. Stat. Ann. § 81-1313(f)(1). In order to clarify the provisions of the Arkansas workers' compensation law and to provide improved benefits for persons qualifying under the Act, the Arkansas General Assembly passed Act 290 of 1981, which significantly changed the laws relating to second injuries and repealed all laws in conflict with its provisions. Section 4 of Act 290 provides in pertinent part:

> Commencing January 1, 1981, all cases of permanent disabilities or impairment where there has been previous disabilities or

> impairments shall be compensated as herein provided. . . . If any employee who has a permanent partial disability or impairment, whether from compensable injury or otherwise, receives a subsequent compensable injury resulting in additional permanent partial disability or impairment so that the degree or percentage or disability or impairment caused by the combined disabilities or impairment is greater than that which would have resulted from the last injury, considered alone and of itself, and if the employee is entitled to receive compensation on the basis of combined disabilities or impairments, *the employer at the time of the last injury shall be liable only for the degree or percentage of disability or impairment which would have resulted from the last injury had there been no preexisting disability or impairment. After the compensation liability of the employer for the last injury, considered alone,* . . . has been determined . . . the degree or percentage of employee's disability that is attributable to all injuries or conditions existing at the time of the last injury was sustained shall then be determined . . . and the degree or percentage of disability or impairment which existed prior to the last injury plus the disability of impairment resulting from the combined disability shall be determined and compensation for that balance, if any, shall be paid out of a special fund known as a Second Injury Fund provided for in Section 47 (Ark. Stats. 81-1348).

(Emphasis added.)

This language appears to reflect a clear legislative intent that any employer who employs a handicapped or disabled worker is responsible only for such actual anatomical impairment as may result from the last injury, and the Second Injury Trust Fund is obligated to provide compensation for any greater disability that may result from a combination of injuries.

In 1986, the court of appeals decided *Second Injury Fund v. Riceland*, 17 Ark. App. 104, 704 S.W.2d 635 (1986) and *Second Injury Fund v. McCarver*, 17 Ark. App. 101, 704 S.W.2d 639 (1986), in which the court of appeals interpreted Section 4 of Act 290 of 1981, now codified at Ark. Code Ann. § 11-9-525. We begin our analysis by reviewing those opinions to determine the basis upon which the court of appeals declined to apply the above quoted language to cover circumstances where the claimant sustained successive injuries during the same employment.

In those companion cases, the court of appeals reviewed and reversed decisions of the Workers' Compensation Commission finding that the Fund *was liable* for the permanent disability benefits of the individual claimants even though all the injuries occurred while in the same employment. We consider the rationale employed by the court of appeals in each case separately.

In *Riceland,* the court of appeals reviewed a decision in which the administrative law judge and the Commission had determined that the Second Injury Trust Fund was liable for the permanent disability benefits based on the following language contained in paragraph three of Act 290, now codified at Ark. Code Ann. § 11-9-525(b)(5):

> If the previous disability or impairment or disabilities or impairments whether from compensable injury or otherwise, and the last injury together result in permanent total disability, the employer at the time of the last injury shall be liable only for the actual anatomical impairment resulting from the last injury considered alone and of itself; . . . .

Riceland, 17 Ark. App. at 106, 704 S.W.2d at 636. On review, the court of appeals found the statute was ambiguous and stated that "although it is possible to make the interpretation made by the law judge and the Commission, we do not think 'previous disability or impairment' refers to a condition which occurred while in the employment of the second-injury employer." *Id.* at 107, 704 S.W.2d at 636. Instead, the court of appeals focused on general language contained in Ark. Stat. § 81-1313(i), now codified at Ark. Code Ann. 11-9-525(a)(1):

> The Second Injury Fund established herein is a special fund designed to insure that an employer employing a handicapped worker will not, in the event such worker suffers an injury on the job, be held liable for a greater disability or impairment than actually occurred *while the worker was in his employment.*

Id. at 106, 704 S.W.2d at 636 (emphasis in original). Based on this language, the court of appeals reasoned:

> [I]f . . . the employer employing a handicapped worker is to be liable *only* for the disability or impairment that occurs when the worker sustains an injury during that employment, then it must

> follow that such employer will be liable for *all* the disability or impairment that occurs when the worker is injured while in that employment.

Id. at 107, 704 S.W.2d at 636 (emphasis in original).

The reasoning employed by the court of appeals in *Riceland* was both logically and legally flawed. It does not follow from the premise that the employer "is to be liable *only* for [injuries during an employment]," that the employer "will be liable for *all* [injuries during an employment.]" The establishment of the Second Injury Trust Fund was for the stated public purpose of encouraging employment of disabled or handicapped workers by assigning liabilities for some wage-loss consequences of a second injury to that Fund.

In *McCarver*, the court of appeals further reasoned that the Fund should not be liable for same employment injuries:

> The legislature expressly stated that the purpose of the statute is to insure that an employer employing a handicapped worker will not be required to pay for a greater amount of the disability or impairment than that which the worker sustains while in the employment of that employer. Stretching the statute to require the Second Injury Fund to assume liability for part of the disability or impairment sustained by a handicapped worker while in an employer's employment relieves that employer of part of his statutory liability and grants him a windfall or subsidy. It was not, in our opinion, the legislature's intent to give employers that type of encouragement to hire or retain handicapped or injured workers.

McCarver, 17 Ark. App. at 103-04, 704 S.W.2d at 641. Contrary to the court of appeals' conclusion, if we interpret the Fund law to mean that an employer's liability is limited to the actual anatomical impairment resulting from the last injury, there is clearly no windfall to employers because it is the employers themselves who contribute to the Fund.

The court of appeals also inferred that the Fund could become insolvent if the statute was interpreted to allow employers to seek recovery from the Fund in instances where the employee sustained both injuries while employed by the same employer; therefore, the court of appeals reasoned that the solvency of the

Fund required the application of what has become known as the "same employer" defense. *Riceland*, 17 Ark. App. at 107, 704 S.W.2d at 637; *McCarver*, 17 Ark. App. at 103, 704 S.W.2d at 641.

Our recent holding in *Stucco Plus v. Rose*, 327 Ark. 314, 938 S.W.2d 556 (1997) points out the faulty reasoning in *McCarver* and *Riceland Foods*. In *Stucco Plus*, we rejected an argument of the Workers' Compensation Commission concerning the solvency of the Second Injury Trust Fund. In holding that the Commission's reliance on protecting the solvency of the Fund was misplaced, we stated:

> [I]n *Mid-State Constr. Co.* this court cited with approval Justice Newbern's dissent in *McCarver v. Second Injury Fund*, 289 Ark. 509, 715 S.W.2d 429 (1986), which pointed out that the court of appeals' reference to language from *Arkansas Workmen's Compensation Comm'n v. Sandy*, 217 Ark. 821, 233 S.W.2d 382 (1950) on consideration of the Fund's solvency came from the Commission and not from this court. Secondly, we note that the funding mechanisms provided for the Fund in 1950 by Ark. Stat. Ann. § 81-1313(f)(2)(iii) (Supp. 1949) were remarkably different from the current funding mechanisms provided in Ark. Code Ann. §§ 11-9-301 to -307 (Repl. 1996). This difference in funding sources underscores that any considerations of the Fund's solvency in this case is inappropriate. Finally, we note that, in the event the Fund becomes insolvent, the General Assembly has expressed an intent to provide claimants with arrearage once the Fund regains its solvency, without any possibility of reverter of responsibility for benefits to employers. Section 11-9-301(f).

Stucco Plus, 327 Ark. at 321, 938 S.W.2d at 559-60.

In 1986, we reviewed the decisions rendered by the court of appeals in *McCarver* and *Riceland Foods*. In our review, we affirmed the decisions of the court of appeals without fully addressing the rationale employed by that court in reaching its decisions, and we concluded:

> If successive injuries in the same employment cause total and permanent disability the employer or his insurance carrier is responsible to the employee for all benefits. If the previous disa-

> bility or impairment did not arise out of the employment by the same employer, the Second Injury Fund must pay the benefits.

Riceland Foods, 289 Ark. at 531, 715 S.W.2d at 435.

The question before us now is whether this determination of the Second Injury Trust Fund's limited liability under the *Riceland* and *McCarver* decisions was correct. We begin our reconsideration by noting that the statutory language at issue is ambiguous; we must therefore interpret it using the tools of statutory construction. In considering the meaning of a statute, we construe it just as it reads, giving the words their ordinary and usually accepted meaning. *Vanderpool v. Fidelity & Cas. Inc. Co.*, 327 Ark. 407, 939 S.W.2d 280 (1997). The basic rule of statutory construction, to which all other interpretative guides must yield, is to give effect to the intent of the legislature. *Graham v. Forrest City Housing Auth.*, 304 Ark. 632, 803 S.W.2d 923 (1991). In attempting to ascertain legislative intent, we look to the language of the statute, the subject matter, the object to be accomplished, the purpose to be served, legislative history, and other appropriate matters that shed light on the matter. *Board of Trustees v. Stodola*, 328 Ark. 194, 942 S.W.2d 255 (1997).

We recently explained the legislative intent in the establishment of the Second Injury Trust Fund law as follows:

> It is clearly expressed in section 11-9-525 that the purpose of the Fund is to fully compensate an employee for his total injuries while simultaneously protecting employers from having to pay for injuries that did not occur while the employee was working for that employer . . . . Moreover, the statute clearly and unambiguously provides for the Second Injury Trust Fund to make up the balance of the employees total benefits and the employer's share when it states that the "fund pays the worker the difference between the employer's liability and the balance of his disability or impairment which results from all disabilities or impairments combined."

Stucco Plus, 327 Ark. at 322, 938 S.W.2d at 560.

In light of the legislative intent, we examine again the judicial analysis used to reach the results of *McCarver* and *Riceland*. Based upon the flawed logic and incorrect assumptions regarding

the solvency of the fund and a potential windfall to employers, which buttressed those opinions, we conclude that *McCarver* and *Riceland Foods* were wrongly decided. It remains for us to exercise our authority and responsibility to overrule those cases if a compelling reason exists for doing so. Such a compelling reason was recently articulated in *Mid-State Construction Co. v. Second Injury Fund*, 295 Ark. 1, 746 S.W.2d 539 (1988). In *Mid-State Construction*, we reviewed an unpublished decision by the court of appeals that determined the Second Injury Trust Fund had no liability for the wage-loss benefits that resulted from the combination of a prior nonwork related impairment and a compensable injury. The court of appeals held that the employer and its carrier were liable for the full disability. In reversing that decision, we wrote the following regarding the result reached by the court of appeals:

> That result impermissibly distinguishes between two types of handicapped persons, contravenes the statutory scheme which makes employers liable only for the "degree of percentage of disability or impairment which would have resulted from the [recent compensable] injury had there been no preexisting disability or impairment," and defeats the purpose of the Fund to encourage the hiring of the handicapped.

Mid-State Constr. Co., 295 Ark. at 8, 746 S.W.2d at 543.

We also note that the legislative intent to make available employment opportunities for injured workers is a more significant public policy consideration than the determination of which of two privately funded providers of compensation benefits shall be responsible for payment of wage-loss disability benefits. Our reinterpretation of ambiguous statutory language to give effect to the legislative intent merely reallocates responsibility for payment of claims by requiring that the cost of additional wage-loss benefits, beyond the actual anatomical impairment resulting from the second injury, is to be borne by the Second Injury Trust Fund.

The requirement that the risk of employing an injured worker should be spread over the entire pool of employers is so fair and reasonable that it is apparently followed in every other jurisdiction that has a second injury fund law. *See, e.g., Second Injury Fund v. Hodgins*, 461 N.W.2d 454 (Iowa 1990); *Denton v.*

Sunflower Elec. Coop., 740 P.2d 98 (Kan. App. 2d 1987); *Estep v. State Workmen's Compensation Comm'n*, 298 S.E.2d 142 (W.Va. 1982). We are unaware of any cases to the contrary.

As a result of our determination that Act 290 of 1981 must be reinterpreted to give effect to legislative intent, we also consider whether an earlier statute, Ark. Stat. Ann. § 81-1313(f)(1) (Repl. 1976), remains effective. In *Riceland*, we noted that while Act 290 contained a clause repealing all provisions of law contrary to Act 290, Ark. Stat. Ann. § 81-1313(f)(1) was not inconsistent with Act 290 and need not be considered repealed by implication. *Riceland*, 289 Ark. at 532, 715 S.W.2d at 434. With the interpretation of Act 290 we adopt today, it is clear that Ark. Stat. Ann. § 81-1313(f)(1) is in conflict with Act 290, and accordingly is deemed repealed by implication by Act 290 from the time of this decision.

We conclude that our interpretation of Act 290 in *McCarver* and *Riceland Foods* was wrong and that it defeats the purpose of encouraging employers to retain employees with disabilities or impairments resulting from a prior injury in the same employment, in contravention of legislative intent. This is a compelling reason for overruling those decisions.

For the reasons stated, we reverse the Commission's decision and remand for further proceedings consistent with this opinion.

GLAZE, J., concurs.

CORBIN and IMBER, JJ., dissent.

TOM GLAZE, Justice, concurring. The dissenting opinion correctly sets out this court's sound principles bearing on *stare decisis*, and I certainly do not take issue with them. This court has and continues to follow those rules, but it should not do so blindly. As the majority opinion says, *stare decisis* has never been applied mechanically to prohibit overruling prior decisions that have determined the meaning of statutes.

Only recently, this court dealt with the Second Injury Fund in the case of *Stucco Plus, Inc. v. Rose*, 327 Ark. 314, 938 S.W.2d 556 (1997), where we held the Worker's Compensation Commis-

sion erred in relying on the Commission's public policy to protect the solvency of the Fund. In so holding, the *Stucco Plus* case stood at odds with this court's earlier cases of *Riceland Foods, Inc. v. Second Injury Fund*, 289 Ark. 528, 715 S.W.2d 432 (1986), and *McCarver v. Second Injury Fund*, 289 Ark. 509, 715 S.W.2d 428 (1986).

The *Riceland Foods* and *McCarver* cases were reviews of court of appeals' decisions which were infected with the court of appeals' belief that the solvency of the Second Injury Fund required the Fund law provisions to be strictly complied with. *See Second Injury Fund v. McCarver*, 17 Ark. App. 101, 704 S.W.2d 639 (1986); *Second Injury Fund v. Riceland Foods, Inc.*, 17 Ark. App. 104, 704 S.W.2d 635 (1986). In short, the court of appeals inferred that the Fund might become insolvent, if the court adopted an interpretation of the Fund law that permitted employers to seek Fund relief in instances where the injured or handicapped workers sustain both the first and second injuries while with the same employer. *See,* Glaze, J., dissenting, *Riceland Foods, Inc.*, 17 Ark. App. at 100. Unfortunately, this court in its review of *Riceland Foods* expressly and favorably recognized the court of appeals' solvency reference to the Fund as the state of the law. 289 Ark. at 532.

As already noted, our court, after deciding *Stucco Plus* as it did, had cases going opposite directions as to how Arkansas's Fund law should be interpreted and what, if any, effect insolvency of the Fund should play in awarding benefits. As I see it, this court was either correct in its holding in *Riceland Foods* and *McCarver*, or it was correct in *Stucco Plus*, and it is this court's province and duty to decide which case(s) should prevail. *Stare decisis* is simply not the issue; the issue, instead, is whether the rationale in *Riceland Foods* and *McCarver* prevails or whether the reasoning in *Stucco Plus* should stand.

Because I believe solvency of the Fund has no relevance when construing Fund provisions, I join with the majority court in overruling *Riceland Foods* and *McCarver.*

ANNABELLE CLINTON IMBER, Justice., dissenting. There are two fundamental principles of statutory construction that prevent

me from joining the majority. The first, as the majority acknowledges, is that statutes and constitutions:

> should receive a consistent and uniform interpretation so that they shall not be taken to mean one thing at one time, and a different thing at another time. Certainly, when a constitutional provision or a statute has been construed, and that construction consistently followed for many years, such construction should not be changed.

Morris v. McLemore, 313 Ark. 53, 852 S.W.2d 135 (1993); *Southwest Ark. Communications, Inc. v. Arrington*, 296 Ark. 141, 753 S.W.2d 267 (1988); *O'Daniel v. Brunswick Balke Collender Co.*, 195 Ark. 669, 113 S.W.2d 717 (1938); *Tindall v. Searan*, 192 Ark. 173, 90 S.W.2d 476 (1936). The second principle is that once we have construed a statute, our interpretation becomes part of the act just as if it had been so written by the legislature. *See, e.g., Burns v. Burns*, 312 Ark. 61, 847 S.W.2d 23 (1993); *Gibson v. Gibson*, 264 S.W.2d 418, 572 S.W.2d 146 (1978); *E.C. Barton v. Neal*, 263 Ark. 40, 562 S.W.2d 294 (1978); *Merchant's Transfer & Warehouse Co. v. Gates*, 180 Ark. 96, 21 S.W.2d 406 (1929).

Adhering to these two principles, we have, on many occasions, refused to abandon our interpretation of a statute or constitutional provision in the absence of legislative action. *See, e.g., Sawyer v. State*, 327 Ark. 421, 938 S.W.2d 843 (1997) (thirty-six-year interpretation of the habeas corpus act, Ark. Code Ann. § 16-112-103); *Morris v. McLemore, supra* (one hundred-year interpretation of the statute of limitations for legal malpractice actions, Ark. Code Ann. § 16-56-105); *Burns v. Burns, supra*, (seven-year interpretation of the marital property act, Ark. Code Ann. § 9-12-315); *Scarbrough v. Cherokee Enters.*, 306 Ark. 461, 816 S.W.2d 164 (1991) (fifty-year construction of the standard of review in workers' compensation cases, Ark. Code Ann. § 11-9-711); *Southwest Ark. Communications, Inc. v. Arrington, supra* (five-year interpretation of the usury law contained in Ark. Const., amend. 60); *E.C. Lumber Co. v. Neal & Jones, supra* (seventy-year construction of the mechanic's lien statute, Ark. Stat. Ann. § 51-601); *Gibson v. Gibson, supra* (sixteen-year interpretation of the partition statute, Ark. Stat. Ann. § 34-1801).

Eleven years ago, we held in *Riceland Foods, Inc. v. Second Injury Fund*, 289 Ark. 528, 715 S.W.2d 432 (1986), and *McCarver v. Second Injury Fund*, 289 Ark. 509, 715 S.W.2d 429 (1986), that pursuant to Ark. Code Ann. § 11-9-525, the Second Injury Fund is not liable when an employee sustains successive injuries while working for the same employer. As mentioned previously, once we reached this conclusion, our interpretation became part of the Workers' Compensation Act. Since that time, the General Assembly has convened on eight separate occasions,[1] but no changes were made to Section 11-9-525 in response to our holdings in *Riceland* and *McCarver*. In fact, in 1993, the General Assembly made comprehensive revisions to the Workers Compensation Act, some of which were in response to particular cases decided by this court. 1993 Ark. Acts 796, §§ 6[2] and 31.[3] Yet, Section 11-9-525, and our interpretation thereof, remained unchanged.

Even though the legislature has, by implication, approved of our holdings in *Riceland* and *McCarver*, the majority is willing to abandon our well-established precedent in favor of the policy considerations articulated by Timberline. Although these policy considerations appear persuasive, the identical arguments were considered and rejected by this court eleven years ago in *Riceland* and *McCarver*. In particular, the majority appears to have been persuaded by Timberline's contention that our construction of Section 11-9-525 discourages employers from retaining impaired or injured workers. However, the record before us is devoid of any evidence indicating that this concern has been realized over the last eleven years. In the absence of such evidence, I am hesitant to abandon our well-established interpretation of Section 11-9-525.

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[1] Regular Sessions in 1987, 1989, 1991, 1993, 1995 and Extraordinary Sessions in 1988, 1989, 1992.

[2] Specifically rejecting our interpretations of the exclusive remedy provision, Ark. Code Ann. § 11-9-107, in *Wal-Mart Stores, Inc. v. Baysinger*, 306 Ark. 239, 812 S.W.2d 463 (1991); *Mapco, Inc. v. Payne*, 306 Ark. 198, 812 S.W.2d 483 (1991); and *Thomas v. Valmac Indus., Inc.*, 306 Ark. 228, 812 S.W.2d 673 (1991).

[3] Specifically rejecting our construction of the provision regarding the modification of workers' compensation awards, Ark. Code Ann. § 11-9-713, in *International Paper Co. v. Tuberville*, 302 Ark. 22, 786 S.W.2d 830 (1990).

Finally, as we said in *Gibson v. Gibson*, "even though we might feel that decision was wrong in retrospect, the construction of the statute . . . established a rule of [law], and we are not at liberty to overturn it." Once we considered the relevant policy considerations and interpreted the ambiguous language contained in Ark. Code Ann. § 11-9-525, our construction became part of the statute itself, and it was up to the legislature to amend the act if it disagreed with our interpretation. The General Assembly has simply refused to do so, and we should not act in their stead.

For these reasons, I respectfully dissent.

CORBIN, J., joins in this dissent.

Jerry Chris JOHNSON *v.* STATE of Arkansas

CR 97-1306 964 S.W.2d 199

Supreme Court of Arkansas
Opinion delivered March 5, 1998

James Wyatt, for appellant.

No response.

PER CURIAM. Appellant Jerry Chris Johnson has filed an appeal from an order of the trial court denying his Rule 37 petition. His brief was filed on December 29, 1997, and the State, as appellee, filed its brief on January 26, 1998. Johnson, prior to filing his reply brief, has filed this motion to supplement the record and for an extension of time to file his reply brief.

According to his motion, Johnson requests that this court allow him to supplement the record on this appeal "with the abstract of his previous appeal." We construe his request to be for permission to supplement the record in the instant case with the record of the underlying trial.

The motion is moot in that it is not necessary for an appellant in a postconviction appeal to request that the record be supplemented with the trial transcript. The transcript of a trial which has been lodged in the appellate court on direct appeal of the judgment is a public record. As such, it need not be incorporated into the record in a postconviction appeal which stems from the same judgment of conviction. *Drymon v. State*, 327 Ark. 375, 938 S.W.2d 825 (1997). As it will be necessary for Johnson's counsel to abstract the record of the previous appeal, however, rebriefing should occur so that Johnson can file his original brief with an abstract which includes an abstract of the trial record.

Motion moot.

Anthony PACEE *v.* STATE of Arkansas

CR 90-285 962 S.W.2d 808

Supreme Court of Arkansas
Opinion delivered March 5, 1998

Petitioner, pro se.

Winston Bryant, Att'y Gen., by: *Brad Newman,* Asst. Att'y Gen., for respondent.

PER CURIAM. In 1990, Anthony Pacee was found guilty of four counts of violating the Arkansas Uniform Controlled Substances Act and the offense of being a felon in possession of a firearm. He was sentenced as a habitual offender to terms of imprisonment of twenty years, twelve years, twelve years, and life. We affirmed. *Pacee v. State*, 306 Ark. 563, 816 S.W.2d 856 (1991). Pacee subsequently filed in the trial court a petition for postconviction relief which was denied.

On December 16, 1997, Pacee filed a petition here entitled "Petition for an Extraordinary Remedy from a Judgment in Columbia County, Arkansas," which invokes "the ancient writ of error coram nobis." We treat the petition as a petition to reinvest the trial court with jurisdiction to consider a petition for writ of error coram nobis and deny it. Once a judgment has been affirmed on appeal, a petition for leave to proceed in the trial court with a coram nobis action 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).

Petitioner asserts that jurisdiction should be reinvested in the trial court to consider an error coram nobis petition on the following grounds: (1) he was not informed of his right to coun-

sel under Criminal Procedure Rule 36.4; (2) he was not present during an *ex parte* communication with the jury; and (3) he was denied effective assistance of counsel because a "fee cap" was in place which undermined his defense. We do not find that petitioner Pacee has demonstrated that there was a fundamental error extrinsic to the record which would have resulted in a different verdict had the fact been known at trial. As a result, there is no cause to reinvest the trial court with jurisdiction to consider a petition for writ of error coram nobis.

Petition denied.

Calvin PORTER *v.* STATE of Arkansas

CR 96-1477 964 S.W.2d 184

Supreme Court of Arkansas
Opinion delivered March 5, 1998

Curtis L. Bowman, for appellant.

Winston Bryant, Att'y Gen., by: *O. Milton Fine, II*, Asst. Att'y Gen., for appellee.

PER CURIAM. The appellant, Calvin Porter, was convicted of capital murder and sentenced to die by lethal injection. We affirmed the conviction and sentence in *Porter v. State*, 321 Ark. 555, 905 S.W.2d 835 (1995). Porter subsequently sought a stay of the mandate while he petitioned the Supreme Court for a writ of certiorari. We granted the stay on October 23, 1995.

The Supreme Court denied certiorari in *Porter v. Arkansas*, 116 S.Ct. 1329 (1996), on March 25,1996. Consequently, this court issued the mandate from the direct appeal on April 1, 1996.

Porter sought postconviction relief pursuant to Arkansas Criminal Procedure Rule 37. He filed his petition in the Jefferson County Circuit Court on June 17, 1996. The State responded with a motion to dismiss in which it argued that the Circuit Court did not have the jurisdiction to grant relief because Porter's petition was filed more than sixty days after the issuance of the mandate. The Circuit Court dismissed Porter's petition as untimely. Porter now appeals that order. We remand the case for a hearing in order to determine whether Porter had an attorney at the time the Clerk issued the mandate, and if not, whether he mistakenly relied on that fact.

In this appeal, Porter contends that his petition should not be considered untimely because he did not receive "actual notice" from the Clerk of the Supreme Court or from the Jefferson County Circuit Clerk that the appellate mandate was issued on April 1, 1996. He argues that due process requires this Court to change its practice in order to insure that the appellant receives actual notice of the issuance of the mandate. We decline to change the practice of issuing the mandate directly from this Court to the Clerk of the Circuit court that entered the judgment of conviction. We have previously noted that it is incumbent on a convicted defendant to determine when the judgment is entered

before filing a notice of appeal. *Doyle v. State*, 319 Ark. 175, 890 S.W.2d 256 (1994).

The aspect of this case that concerns us, however, is the absence of facts that indicate how Porter became aware of the issuance of the mandate, and if the delay in his awareness of the issuance was in any way related to the unique circumstances surrounding the status of his legal representation at that time. Specifically, Porter's brief indicates that the Director of the Arkansas Capital Resource Center, Al Schay, represented Porter before the Supreme Court. While Porter's petition for a writ of certiorari was pending, however, funding for the Arkansas Capital Resource Center was terminated. Under these circumstances, it may well be that Mr. Schay's representation of Porter ended when the funding for the Resource Center ceased, and that Porter did not have an attorney at the time the mandate was issued. More importantly, it may well be the case that the delay in filing Porter's petition was caused by his belief that Mr. Schay, as his attorney, would notify him of the disposition of his certiorari petition and the issuance of the mandate and would file the necessary Rule 37 petition.

The importance of determining the status of Porter's legal representation at the time the mandate was issued is highlighted by our new Rule 37.5 relating to death sentences. *See In Re: Adoption of Rule 37.5 of the Rules of Criminal Procedure*, 329 Ark. 641 (1997). Had Rule 37.5 been in effect, Porter would have been called before the Circuit Court within 21 days of the mandate's issuance and the availability of counsel for Rule 37 purposes would have been assessed by the Circuit Court.

Rule 37.5 evolved from Act 925 of 1997, now codified at Ark. Code Ann. §§ 16-91-201 to -206 (Supp. 1997) (Arkansas Effective Death Penalty Act of 1997), where the General Assembly expressly noted that the purpose of the Act was to comply with federal law by instituting a comprehensive state court review. Ark. Code Ann. § 16-91-204 (Supp. 1997). The purpose of a meaningful state review is to eliminate the need for multiple federal habeas corpus proceedings in death cases. Therefore, in death cases where a Rule 37 petition is denied on procedural grounds,

great care should be exercised to assure that the denial rests on solid footing.

Accordingly, we remand this case for a hearing in order to develop facts surrounding the status of Porter's legal representation on April 1, 1996, and his understanding regarding the status of that representation.

Remanded.

Jacqueline WALLACE *v.* Frank BROYLES

97-170 961 S.W.2d 712

Supreme Court of Arkansas
Opinion delivered March 5, 1998

Joey McCutcheon, Gary L. Richardson and *Chad R. Richardson*, for appellants.

Jeffrey A. Bell and *Woody Bassett, III*, for appellee J. Frank Broyles.

Jeffrey A. Bell, for appellee Dean Webber.

Davis, Cox & Wright, P.L.C. , by: *Walter Cox, Jeffrey A. Bell* and *Woody Bassett, III*, and *Winston Bryant*, Att'y Gen., by: *Angela S. Jegley*, Asst. Att'y Gen., for appellees James Woody Woodell and Harp's Food Stores, Inc.

Davis, Cox & Wright, P.L.C. , by: *Walter Cox* and *Constance G. Clark*, for appellees, Dr. John P. Park, Dr. Tom Philip Coker, Dr. Tom Patrick Coker, Dr. Walter "Duke" Harris, and Ozark Orthopaedic Sports Medicine Clinic, Ltd.

PER CURIAM. Frank Broyles, Dean Weber, James "Woody" Woodell, Harp's Food Stores, Inc., Dr. John P. Park, Dr. Tom Philip Coker, Dr. Tom Patrick Coker, Dr. Walter "Duke" Harris, and Ozark Orthopaedic Sports Medicine Clinic, Ltd., petition for rehearing. They contend that we erred in our statement that the wrong standard was applied by the trial court in granting their

motion for summary judgment. We disagree and deny the petition.

The argument is that we have, in prior summary-judgment appeals, used the very terminology used by the trial court here, *i.e.,* whether "reasonable minds" could differ as to a factual conclusion to be reached. The petitioners set forth the following five of our earlier decisions in support of their point.

In *Thomas v. Sessions,* 307 Ark. 203, 818 S.W.2d 940 (1991), we reversed a summary judgment in a wrongful-death case after pointing out that the potential evidence shown by discovery responses was in conflict. Although we spoke of "weighing" the proof, we wrote:

> Some courts apply the "scintilla of evidence" rule which requires a court considering summary judgment to admit the truthfulness of *all evidence* favorable to the nonmovant, thereby removing all issues of credibility from the case, and determine if there are any facts from which a jury could reasonably infer ultimate facts upon which a claim depends; if so, the case must be decided by the factfinder. *Schoen v. Gulledge,* 481 So.2d 1094 (S.Ct.Ala. 1985). Our own rule is similar:
>
>> The object of summary judgment proceedings is not to try the issues, but to determine if there are any issues to be tried, and if there is any doubt whatsoever, the motion should be denied.
>
> *Rowland v. Gastroenterology Assoc., P.A.,* 280 Ark. 278, 657 S.W.2d 536 (1983).

In a subsequent paragraph we stated, "We have said that summary judgment is not proper where evidence, although in no material dispute as to actuality, reveals aspects from which inconsistent hypotheses might reasonably be drawn and reasonable minds might differ." Although we thus used the term "reasonable minds," the context makes it clear that we were concerned with that part of Ark. R. Civ. P. 56(c) which entitles a moving party to a summary judgment if "there is no genuine issue as to any material fact and that the moving party is *entitled to a judgment as a matter of law.*" Although facts may not be in dispute, they may result in differing conclusions as to whether the moving party is

entitled to judgment as a matter of law. We say again that, in such an instance, summary judgment is inappropriate.

Cox v. McLaughlin, 315 Ark. 338, 867 S.W.2d 460 (1993), is another case in which we reversed a summary judgment. We wrote:

> The standard of review in these cases is well settled. Summary judgment should be granted only when it is clear that there are no genuine issues of material fact to be resolved. If there is any doubt as to whether there are issues to be tried, the motion should be denied. In this case the defendants, as the moving parties, bore the burden of showing that there were no genuine issues of material fact. Plaintiff is entitled to have all doubts and inferences resolved in his favor, and summary judgment is not proper if reasonable minds could reach different conclusions when given the facts. *Tullock v. Eck,* 311 Ark. 564, 785 S.W.2d 31 (1993)."

Again, we used the "reasonable minds" language but it was in combination with our concern with whether, although there might be no dispute as to underlying facts, different conclusions could be reached. Summary judgment was inappropriate.

Tyson Foods, Inc. v. Adams, 326 Ark. 300, 930 S.W.2d 374 (1996), was a legal malpractice action in which a summary judgment was granted in favor of the defendant-attorney. The summary judgment was premised on the fact that, although the attorney had been negligent, the damages claimed by the plaintiff resulted from events which were not proximately caused by the defendant's negligence. In other words, the plaintiff had failed to produce evidence on an element of its claim. We wrote:

> Tyson [the plaintiff] questions the determination of proximate [cause] by means of summary judgment. Summary judgment is to be granted by a trial court when it is clear that there is no genuine issue of material fact to be litigated, and, on appellate review, the appellate court determines if the granting of summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of the motion leave a material question of fact unanswered. *Knowlton v. Ward,* 318 Ark. 867, 889 S.W.2d 721 (1994). 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. *Skinner v. R.J. Griffin & Co.,* 313 Ark. 430, 855 S.W.2d 913 (1993). The granting of summary judgment can be appropriate in a legal malpractice suit. [Citation omitted.] Here, there was no question of material fact to be determined, and the evidence was such that reasonable minds could not differ about proximate cause. Thus, the trial court correctly granted summary judgment.

Obviously we did not mean, by the reference to "reasonable minds," that the evidence was in a state to be weighed and we were doing so. Rather, we held the plaintiff's case was lacking in the element of proximate causation. There was no possibility of varying conclusions and no remaining issue of fact because of the lack of evidence of proximate causation. In *Cragar v. Jones,* 280 Ark. 549, 660 S.W.2d 168 (1983), a divided court reached a similar result on the ground that the plaintiff had presented no evidence of proximate causation.

The final Arkansas case cited by the petitioners is *Union Pac. R.R. Co. v. Sharp,* 330 Ark. 174, 952 S.W.2d 658 (1997). That was a case in which the issue was whether a verdict should have been directed in favor of the defendant after the evidence had been produced at the trial. It was not a summary-judgment case. We wrote, correctly, that "proximate causation becomes a question of law only if reasonable minds could not differ." In the directed-verdict context we are, as is the trial court, in a position to make that call even though there may be some conflicting evidence.

Also cited by the petitioners is *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242 (1986), in which the Supreme Court stated that the summary-judgment standard "mirrors the standard for a directed verdict." That statement was repeated by the Supreme Court, although it was not the basis of the holding, in *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986), a case we have cited often for other language concerning summary-judgment law but not for the "mirror" concept.

If it has not been clear heretofore, we hope this opinion clarifies that, although we follow federal courts' interpretation of

the parallel rule, F.R.C.P. 56(c) when possible for the sake of uniformity, we have never gone so far as to say, much less hold, that we will make a "sufficiency of the evidence" determination when a summary-judgment motion is at issue. We regard that directed-verdict standard, used in ruling on motions made pursuant to Ark. R. Civ. P. 50, as being somewhat different from the summary-judgment standard.

We have ceased referring to summary judgment as "drastic" remedy. We now regard it simply as one of the tools in a trial court's efficiency arsenal; however, we only approve the granting of the motion when the state of the evidence as portrayed by the pleadings, affidavits, discovery responses, and admissions on file is such that the nonmoving party is not entitled to a day in court, *i.e.*, when there is not any genuine remaining issue of material fact and the moving party is entitled to judgment as a matter of law.

Petition denied.

Shawn WATKINS *v.* STATE of Arkansas

CR 98-160 959 S.W.2d 404

Supreme Court of Arkansas
Opinion delivered March 5, 1998

Andre K. Valley, for appellant.

No response.

PER CURIAM. Shawn Watkins, by his attorney, has filed a motion for rule on the clerk.

His attorney, Andre K. Valley, admits in his motion that the record was tendered late due to a mistake on his part.

We find 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.

Charles Laverne SINGLETON *v.* Larry NORRIS, Director, Arkansas Department of Correction

CR 98-218 964 S.W.2d 366

Supreme Court of Arkansas
Opinion delivered March 9, 1998
[Petition for rehearing denied April 23, 1998.*]

* ARNOLD, C.J., and GLAZE and CORBIN, JJ., dissent. *See* 332 Ark. 668, 964 S.W.2d 366 (1998).

Jeff Rosenzweig, for appellant.

Winston Bryant, Att'y Gen., by: *Kelly K. Hill*, Deputy Att'y Gen., *Todd L. Newton*, Asst. Att'y Gen., and *Jonathan D. Perez*, Asst. Att'y Gen., for appellee.

PER CURIAM. Petitioner Charles Laverne Singleton has petitioned this court for a stay of his execution, which is scheduled for March 11, 1998. The basis for his petition is the fact that he currently has pending before the Jefferson County Circuit Court a petition for declaratory judgment and for the issuance of all writs and orders necessary to enforce that declaratory judgment. According to Singleton's petition for stay before this court, the essential question presented in the circuit court petition is "whether the State may forcibly medicate a death-sentenced inmate in order to make him competent to be executed." His reason for requesting a stay of execution from this court is his acknowledgment that there is some question as to whether the circuit court has the power to grant such a stay.

The circuit court petition was filed by Singleton on February 17, 1998, and the State has not responded. At the time this petition in circuit court was filed, his execution date had been set by the Governor. According to the State, Singleton is attempting to halt his execution on a variety of fronts. He currently has pending, in addition to the petition in this court and Jefferson County Circuit Court, an application for stay of execution in the United States Court of Appeals for the Eighth Circuit, a request to the same Eighth Circuit Court of Appeals to file his third federal habeas corpus action in federal district court, and a request to the Governor for executive clemency.

The standard under our law for determining competency for purposes of execution is whether a condemned person understands "the nature of and reason for the punishment." Ark. Code Ann. § 16-90-506(d)(1)(A) (Supp. 1997). Though the issue of Singleton's general competency due to voluntary medication was delved into by the district court in *Singleton v. Norris*, PB-C-93-425 (E.D. Ark. July 25, 1995) (*Norris*), that court also observed that competency in connection with forced medication and his execution was not ripe for review and added:

> Likewise, if petitioner later seeks to challenge any forced administration of his competency-inducing medication in connection with his execution, he will also have to first raise any such challenge in an Arkansas forum.

Id., slip op. at 5 (citations omitted). *See also Id.*, slip op. at 5, n.4.

Prior to the district court's decision in *Norris, supra*, this court had decided an appeal regarding whether Singleton was entitled to a hearing as provided in *Ford v. Wainwright*, 477 U.S. 399 (1986), on whether he was insane and thus could not be executed. *Singleton v. Endell*, 316 Ark. 133, 870 S.W.2d 742 (1994) (*Singleton I*), *cert. denied*, 513 U.S. 960 (1994). The trial court denied the relief requested by Singleton, and we affirmed. In doing so, we considered only Singleton's challenge that § 16-90-506(d)(1) was procedurally insufficient to comply with the requirements of *Ford v. Wainwright, supra*. We held that our procedures were not insufficient. But we specifically declined to review the issue of the administration of antipsychotic medication to Singleton without his objection because, as we stated then, it was apparent to us that Singleton preferred to present the medication issue exclusively in federal court. We concluded that our statutory procedure for deciding the competency issue passed constitutional muster.

Three things are clear to us from the district court's decision in *Norris* and our own opinion in *Singleton I*: (1) the precise issue pending before the Jefferson County Circuit Court was not ripe until the State determined to medicate Singleton involuntarily in 1997, and the Governor set his execution date, (2) we did not reach this issue in *Singleton I* because it was not presented to us,

and (3) the federal district court in *Norris* contemplated that the issue now pending in Jefferson County Circuit Court should first be raised in "an Arkansas forum."

■ We turn then to the question of whether the Jefferson County Circuit Court or this court has jurisdiction to stay an execution. We have recently held that a circuit court does not have jurisdiction to stay an execution. *Rector v. Clinton*, 308 Ark. 104, 823 S.W.2d 829 (1992) (per curiam), *citing Howell v. Kincannon*, 181 Ark. 58, 24 S.W.2d 953 (1930). Our caselaw on this point is explicit and unmistakable.

■ As to whether this court may stay an execution, the apposite state statute provides that a "condemned felon" may be granted a reprieve by the Governor or by "writ of error from the Supreme Court" or by stay "by any competent judicial proceeding." Ark. Code Ann. § 16-90-506(a)(1) (Supp. 1997). Further on in that same statute, it provides that the only officers that may suspend an execution are the Governor, the Director of the Department of Correction in cases of insanity or pregnancy, and "[i]n cases of appeals, the Clerk of the Supreme Court, as prescribed by law." Ark. Code Ann. § 16-90-506(c)(3) (Supp. 1997). Thus, on the one hand § 16-90-506 appears to contemplate stays of executions by this court only in "cases of appeals" and on the other, stays by this court pursuant to a writ of error issued by this court or "by any competent judicial proceeding."

■ There is no question but that this court has previously considered § 16-90-506(c)(3), and opined that our jurisdiction is limited to appeals. *See, e.g., Howell v. Kincannon, supra.* The *Howell* case, however, did not consider § 16-90-506(a)(1) and what is meant by a stay "by any competent judicial proceeding." In a later case, this court revoked the stay of execution issued by one justice, but in doing so included this footnote in the opinion:

> It is argued in the briefs for appellee that under § 43-2621 Ark. Stats. and the concluding part of § 43-2623 Ark. Stats. (both sections from the Criminal Code of 1869), neither this Court, nor any Judge thereof, has power to suspend the execution after the date has been set by the Governor. But such argument overlooks some of the provisions of Act No. 55 of 1913 — as now

> found in § 43-2617 Ark. Stats. — which provision uses this language: " . . . a writ of error from the Supreme Court, or should the execution of the sentence be stayed by any competent judicial proceeding, notice of . . . such writ of error or stay of execution shall be served upon the superintendent of the penitentiary . . . and the said superintendent shall yield obedience to the same . . . ." The said Act of 1913 constituted legislative recognition of the inherent judicial power, so the § 43-2621 and § 43-2623 Ark. Stats. cannot have the strict meaning argued for them.

Leggett v. State, 231 Ark. 13, 16 n.4, 328 S.W.2d 252, 255 n.4 (1959). Save for this footnote, what is meant by stay of execution "by any competent judicial proceeding" has not been discussed by this court. And the State does not address it in its response to Singleton's petition.

This petition for a stay presents this court with unique circumstances. A petition for declaratory judgment and necessary writs is currently before the Jefferson County Circuit Court which has no authority to stay an execution. A petition to stay is likewise percolating in the Eighth Circuit Court of Appeals, but the status of that petition is unknown. The petition pending in Jefferson County Circuit Court, arguably, did not become ripe for decision until Singleton was medicated involuntarily, beginning in August of 1997, and the execution date was fixed. The petition raises an issue that has not been decided by the United States Supreme Court and, as best we can determine, by any other court in this land. Indeed, the Eighth Circuit Court of Appeals expressly did not reach the issue in *Singleton v. Norris*, 108 F.3d 872 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 118 (1997), and Judge Heaney in a concurring opinion referred to this precise issue as "problematic and unresolved." *Id.*, at 874 (Heaney, J., concurring). Though Singleton frames the issue broadly, we discern the issue to be whether the State can mandatorily medicate him with antipsychotic drugs in order to keep him from being a danger to himself and others when a collateral effect of that medication is to render him competent to understand the nature and reason for his execution.

Contrary to Singleton's contention in his reply to the State's response to the petition before this court, the Louisiana Supreme

Court in *State v. Perry*, 610 So.2d 746 (La. 1992), did not address this exact issue. In *Perry*, the Louisiana Supreme Court held that the State could not medicate a prisoner against his will to make him fit for execution when there was no determination that forcible medical treatment was for the purpose of safeguarding Perry and others in prison under *Washington v. Harper*, 494 U.S. 210 (1990). In the instant case, a *Harper* decision was made by a three-person Medication Review Panel on August 18, 1997, that the State did have a legitimate reason to medicate Singleton without his consent, and that decision was not appealed by him to circuit court. It was that decision to medicate Singleton forcibly and the setting of the execution date that rendered this matter ready for determination.

Because the issue pending in Jefferson County Circuit Court is clearly ripe for decision but no response has been made by the State, and, thus, no decision has been rendered, and, secondly, in light of the fact that the issue before that court is a constitutional issue of first impression, we deem the proceeding to be a "competent judicial proceeding" under § 16-90-506(a)(1). Ordinarily, we would hear the issue on appeal but due to the fact that the execution is two days away, the likelihood of a decision by the circuit court and a meaningful appeal to this court occurring before execution appear to be exceedingly remote. It would be an anomaly in our law with the direst of consequences if a bona fide constitutional claim made ripe by the Medication Review Panel's action in August of last year and by the fixing of an execution date could not be decided prior to execution. We, therefore, grant the stay of execution for the limited purpose of resolving this singular issue of public significance.

In doing so, we stress once more the uniqueness of our decision today. We have been zealous in stating that once an execution date is set, the issue of a reprieve rests with the Governor. *See, e.g., Rector v. Clinton, supra.* Yet, in *Rector* the issue at hand was Rector's mental condition and, there, both the federal district court and the state trial court had found him competent for execution under the *Ford v. Wainwright* test. In the case before us today the issue that has not been resolved involves two competing policies: medicating an inmate against his will to protect him

from himself and others, which, of course, is legitimate under *Washington v. Harper, supra*, and medicating an inmate in order that he may appreciate the nature and reasons for his execution, which may not be. When all is said and done, we are convinced that this issue must be resolved before Singleton can be executed.

The fact that this issue is brought to us at the eleventh hour after such a long delay is of significant concern to us. Were it not for the fact that the ripeness of the issue occurred after the Medication Review Panel issued its opinion for mandatory medication on August 18, 1997, and the Governor set the date for execution, we would deny the petition for lack of jurisdiction. That, though, is what distinguishes this case from *Rector v. Clinton, supra*. We underscore, however, what we said in *Rector v. Clinton, supra*, that we will not entertain recurring last-minute appeals on the issue of current sanity which could prevent an execution indefinitely with no good reason. Here, though, as explained in this opinion, the circumstances are different.

We grant the stay in order to give the Jefferson County Circuit Court an opportunity to consider Singleton's petition.

ARNOLD, C.J., and GLAZE and CORBIN, JJ., dissent.

TOM GLAZE, Justice, dissenting. In 1979, Charles Laverne Singleton stabbed Mary Lou York to death, and upon overwhelming evidence presented at trial, Singleton was found guilty and sentenced to death. Now after nearly twenty years of state and federal court trials and appeals, Singleton is still in the courts defending himself against the death penalty. As this court said in *Rector v. Clinton*, 308 Ark. 104, 823 S.W.2d 829 (1992), "[E]ven death cases must come to an end."

Although this court's *Rector* case clearly requires a denial of Singleton's motion to stay his execution, the majority opinion, using some rather bewildering logic, attempts to distinguish *Rector*. I first set out what this court said and held in *Rector*, which is almost totally ignored by the majority.

The *Rector* case involved almost the identical situation as Singleton's, except there, we *denied* Rector's motion to stay his execution eleven years after his conviction for murdering Conway

Police Officer Bob Martin. Like Singleton, Rector filed a petition for declaratory judgment in circuit court, stating he was ineligible for execution because (1) a state cannot execute persons whose mental illness prevents comprehension of the reasons for the penalty, and (2) the Arkansas standard limiting executions of persons with mental deficiencies is more stringent than that required under the Supreme Court's decision in *Ford v. Wainwright*, 477 U.S. 399 (1986), and Arkansas's law should prevent Rector's execution if his current mental impairment prevented him from assisting his counsel in coming up with reasons to stay the execution. *Id.* at 105. In denying Rector's request to stay his execution, this court held that, under Ark. Code Ann. § 16-90-506 (1987), the circuit court lacked jurisdiction to stay execution based upon Rector's claim of current insanity, and that the matter rested with the executive branch of government. This court summarized its holding in *Rector* as follows:

> (1) The circuit court lacked jurisdiction to stay the execution on the basis of the allegation that Mr. Rector is ineligible for execution due to his mental condition; (2) even if that court had such authority, we could not disagree with its finding that there had been no change in Mr. Rector's condition since his evaluation by federal authorities in 1989; and (3) Arkansas law does not pose for execution of a person who may be mentally deficient a standard different from that declared by the United States Supreme Court in *Ford v. Wainwright. The matter of clemency rests with the executive branch.*

(Emphasis added.)

The only essential difference between Rector's situation and Singleton's is that Singleton's counsel advances the legal argument that the State cannot "forcibly" medicate a death-sentenced inmate in order to make him competent to be executed. However, if his argument had any merit, Singleton had every opportunity to have raised it both in federal court and in the state courts on several occasions. *See Singleton v. Norris*, No. PB-C-93-425 (E.D. Ark. June 2, 1995) (where Singleton raised and later abandoned the argument); *Singleton v. Endell*, 316 Ark. 133, 870 S.W.2d 742 (1994) (where Singleton chose not to mention the

issue, and the court surmised that Mr. Singleton apparently preferred to present the issue in federal court).

Confoundedly, the majority court blindly adopts Singleton's argument that our court in *Singleton* in some unspoken way looked to the federal courts to decide Singleton's issue, and the federal district court was looking for Singleton to raise the issue in state courts. With all due respect, these assumptions are balderdash! The simple fact is that Singleton chose not to raise his issue in either the federal or state court. To reiterate, all this court said in *Singleton* was "it is apparent that Mr. Singleton would prefer to present the medication issue exclusively in the federal court."

Singleton also had a third opportunity to raise his issue. The State Medication Review Panel, authorized under Ark. Code Ann. § 16-90-506 to review Singleton's examination, reviewed and concluded that Mr. Singleton should be given a trial on mandatory medication to see if he returned to a higher level of function. Singleton never questioned the Panel's decision, nor did he request its administrative review. Mr. Singleton's counsel claims he could not have obtained a legal resolution to his forcible-medication argument because Singleton previously had chosen to take medication, but now he is being "involuntarily" medicated.

Obviously, if Singleton could simply choose at will when he wants or does not want medication, the constitutional issue he raises now (and earlier raised in the U. S. District Court), might never be decided. This court, in *Endell*, recited one report where Singleton asked to be taken off the medication because he was to see some "federal doctors." And another physician reported that Mr. Singleton wanted to appear "crazy." The judicial system should not be manipulated in such fashion. This court in *Endell* would have undoubtedly reached the issue if Singleton had seriously wanted it decided. The majority court's suggestion to the contrary is wrong.

Fortunately, whether Singleton is being manipulative need not control whether he is entitled to another last-ditch opportunity to have an answer to the question whether the State is medicating him in order to make him competent to be executed.

Instead, although the State has been medicating Singleton, the federal district court has found Singleton was not placed on medication to make him competent, so the State could execute him; rather, the court found he was being medicated to meet his medical needs. *See Singleton*, No. PB-C-93-425 at p. 14; *see also, Washington v. Harper*, 494 U.S. 210 (1990) (where Court held the safeguards provided by Washington law were sufficient and did not preclude the State from medicating the prisoner prior to the prescribed hearing on the issue if he posed a danger to himself or others). The federal court's finding has never been challenged or appealed. In short, Singleton's assertion that he is being forced to take medicine so he can be executed is a last minute red herring. It is untrue and not an issue. Instead, Singleton has been appropriately and lawfully receiving medication for his own medical needs, so he will not be a danger to himself or others.

In the *Singleton v. Endell* decision, we held that Singleton's remedy is under § 16-90-506(d)(1) which the court declared to be constitutional. As I pointed out above, § 16-90-506(a)(1) places Singleton's remedies for evaluation and review with the executive branch.

Lastly, the majority court offers the hollow suggestion that this court somehow has authority to stay an inmate's execution even though § 16-90-506 only gives this court such authority when appeals or writs of error are involved. No such writ or appeal is before us. Nonetheless, the majority points to language in provision (a)(1) of § 16-90-506 which reads, "or should the execution of the sentence be stayed by any competent judicial proceeding," and avails Singleton another judicial hearing. It takes little or no thought to understand that, under § 16-90-506, "a competent judicial proceeding" as far as the Arkansas Supreme Court is concerned is where an appeal or a writ of error is involved. Again, our *Rector* decision upheld the constitutionality of § 16-90-506 placing matters involving insanity with the executive branch, but the majority opinion dismantles the executive branch's role in the reviewing and deciding of such matters.

To summarize, I submit that Arkansas's trial and appellate procedures should be evenly interpreted, applied, and enforced.

Over a twenty-year period, Singleton has had every opportunity to raise his full panoply of defenses, constitutional and otherwise, as to guilt and penalty. We decided as much in *Rector* when this court denied Rector any further stays. Maybe, in the future, Arkansas will decide the death penalty is one the state should abandon. But, until then, the State's procedures under § 16-90-506(d)(1) should be fairly and indiscriminately followed. Mr. Singleton has been afforded due process and his other constitutional guarantees. To follow, now, the procedures established in § 16-90-506(d)(1) will serve only to minimize the enormous delays between when capital-murder convictions are rendered and when a death-penalty sentence is administered.

As was done in *Rector*, I would deny Singleton's stay motion.

ARNOLD, C.J., and CORBIN, J., join this dissent.

STATE of Arkansas *v.* Kenneth Lamont SLOCUM

CR 97-244 964 S.W.2d 388

Supreme Court of Arkansas
Opinion delivered March 12, 1998

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

Al Shay, for appellee.

DAVID NEWBERN, Justice. Kenneth Lamont Slocum was convicted of capital murder and sentenced to life imprisonment without parole. We affirmed the conviction. *Slocum v. State,* 325 Ark. 38, 924 S.W.2d 237 (1996). Mr. Slocum sought post-conviction relief pursuant to Ark. R. Crim. P. 37 on the ground that his counsel was ineffective in that he failed to request an instruction (AMCI 2d 403) to the effect that he could not be convicted solely on the uncorroborated testimony of an accomplice. *See* Ark. Code Ann. § 16-89-111(e)(1) (1987). In response, the Trial Court granted a new trial. The State appeals from that decision, and we reverse it.

At the trial on the capital-murder charge, Vernon Scott testified that Mr. Slocum gave him a rock of cocaine worth forty dollars in return for luring the victim, Willie Simpkins, to the home of a man named Hattison. Mr. Scott testified he did not know why Mr. Slocum wanted it done. Mr. Scott said that, while he and Mr. Simpkins were at Hattison's, Elgin King and Mr. Slocum, who was brandishing a .45 caliber pistol, entered and abducted Mr. Simpkins. Mr. Scott said that, despite the fact that Mr. King and Mr. Slocum were wearing masks, he was able to identify Mr. Slocum whom he had known for most of his life. Mr. Simpkins's body was found with both .45 and .38 caliber bullets in it, and a rubber mask was found nearby.

Mr. King was convicted of first-degree murder. We reversed and remanded that conviction on the ground that the Trial Court refused Mr. King's proffer of AMCI 2d 403 with respect to Mr. Scott's testimony. *King v. State,* 323 Ark. 671, 916 S.W.2d 732 (1996). In Mr. Slocum's direct appeal, however, we declined to reverse on the failure of the Trial Court to give the instruction because it had not been proffered to the Trial Court.

At the hearing on Mr. Slocum's claim that his counsel's failure to proffer AMCI 2d 403 resulted in his counsel being ineffective, the lawyer who represented Mr. Slocum at the trial testified as follows. He and his co-counsel sought to have Mr. Scott declared an accomplice as a matter of law. *See Williams v. State,* 328 Ark. 487, 944 S.W.2d 822 (1997). That request was denied. Counsel then agreed that AMCI 2d 403 would be requested, but, through inadvertence, it was not done. It is clear, however, that counsel's trial strategy was not to depend on evidence that Mr. Scott was an accomplice whose testimony was uncorroborated. Rather, their strategy was to challenge the State's evidence that Mr. Slocum had participated in the crime.

Although Mr. Slocum did not testify, he had consistently denied his guilt in conversations with his counsel. Counsel's testimony on the point at the Rule 37 hearing was as follows:

> And I specifically recall my conversation with [co-counsel] where we decided we would not argue to the jury that Vernon Scott was an accomplice, so even if you believed him, you could not convict because we felt that that was not a beneficial argument to make. But, and during that same discussion, we agreed that it was crucial that we submit that issue to the jury.

At a later point, counsel was questioned about whether it might have been inconsistent to have argued to the jury that Mr. Slocum was not even present at the crime scene and that Mr. Scott's testimony was uncorroborated. Counsel responded that it would not have been inconsistent but that it would not have been a "winning argument."

The only evidence produced that might have been considered corroborative of Mr. Scott's testimony was: (1) a .45 caliber bullet like the ones found in Mr. Simpkins's body that was found

at Mr. Slocum's grandmother's home, which was frequented by Mr. Slocum; and (2) testimony that Mr. Slocum had a motive to kill Mr. Simpkins because Mr. Simpkins was supposed to testify in a trial against one of Mr. Slocum's relatives. Thus, the "corroborating evidence" was hardly substantial, but it is also questionable whether the jury would have found Mr. Scott to be an accomplice, given his protestation that he knew nothing of the plan to abduct and kill the victim.

It is difficult to understand counsel's statement that the giving of AMCI 2d 403 was "crucial" to their client's case in light of their concession that they had no plan to argue the accomplice-testimony issue to the jury but were following the tack of their client's complete innocence. Taking counsel at his word that there was an intention to seek the instruction, we are nonetheless left with the defense strategy, which was to argue to the jury that the State had failed to prove Mr. Slocum's participation and not to rely on the accomplice-corroboration point. That is so because of counsel's clear testimony that there was no plan to argue the accomplice-corroboration point to the jury, even if the instruction had been given.

We are aware of only one other State appeal from the granting of Rule 37 relief. *State v. Manees,* 264 Ark. 190, 569 S.W.2d 665 (1978). Our decision in that case was that the Trial Court lacked jurisdiction to alter a sentence being served and that error occurred because of failure to recite formal findings of fact and conclusions of law. There was no need to state a standard of review for cases such as the one we now consider. In considering the standard of review to be applied, we see no need to vary from the one used when Rule 37 relief has been denied, *i.e.,* that we will not reverse the decision unless it is clearly erroneous. *Catlett v. State,* 331 Ark. 270, 962 S.W.2d 313 (1998) (per curiam), *citing Thomas v. State,* 330 Ark. 442, 954 S.W.2d 255 (1997). The question we must decide is whether the Trial Court clearly erred in holding that counsel's performance was ineffective, applying the standard set in *Strickland v. Washington,* 466 U.S. 668 (1984).

[redacted] We recently discussed the principles relating to ineffective assistance of counsel in *Thomas v. State,* 330 Ark. 442, 447-48, 954 S.W.2d 255, 257-58 (1997):

> 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* [*v. State*], 322 Ark. 670, 911 S.W.2d 259 [(1995)]. 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.

We have written on many occasions that a lawyer's choice of trial strategy that proved ineffective is not a basis for meeting the *Strickland* test. *See, e.g., Vickers v. State,* 320 Ark. 437, 898 S.W.2d 26 (1995); *Monts v. State,* 312 Ark. 547, 851 S.W.2d 432 (1993). If counsel had proffered AMCI 2d 403 and it had been presented to the jury, and if counsel had then testified at the Rule 37 hearing that he declined to argue the accomplice issue to the jury because he did not consider the argument to have been "beneficial" or a "winning argument," we most assuredly would have held that the *Strickland* test had not been met. The distinction here is that the instruction was not requested. Given the strategy choice of not asking the jury to follow that instruction, even if it had been given, we must say it is a distinction without a difference. True, the jury might possibly have seized upon the instruction and acquitted Mr. Slocum; however, we cannot say that the mistake made in this instance resulted in counsel's performance being so deficient as to have denied a fair trial. It is difficult to say there was prejudice to Mr. Slocum in view of counsel's choice, based on Mr. Slocum's statements to him, to defend on what counsel referred to as "general denial."

Counsel testified at the Rule 37 hearing that the failure to request the instruction did not result from a tactical decision on his part. It was, however, clearly a tactical decision not to argue the requirement of accomplice corroboration, for which counsel thought he had requested an instruction, to the jury. Given that tactical decision, it cannot be said that the result of the trial would have been different had the instruction been requested. Given the stringent standards set by the *Strickland* decision, which we have followed consistently, we hold that the Trial Court clearly erred in granting a new trial.

Reversed.

Christine RAGAR *v.* R.J. BROWN and
Crockett and Brown

96-1202 964 S.W.2d 372

Supreme Court of Arkansas
Opinion delivered March 12, 1998

Sloan, Rubens & Peeples, by: *Kent J. Rubens*; and *Timothy O. Dudley*, for appellant.

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

DONALD L. CORBIN, Justice. Appellant Christine Ragar appeals the summary judgment granted in a legal malpractice case she brought against Appellees R.J. Brown, and Crockett and Brown, a law firm in which Brown is a partner. The Pulaski County Circuit Court rendered judgment in favor of Appellees on the basis that the three-year statute of limitations barred the action. Jurisdiction is pursuant to Ark. Sup. Ct. R. 1-2(a)(15) and (17), as this case presents questions on the law of torts and is of significant public interest. Additionally, Appellant argues that this court should overrule precedent dating from 1877.

Appellant raises two points on appeal. First, she argues that the trial court erred by granting summary judgment on her legal malpractice claim. Second, she argues that the trial court erred by ruling that the statute of limitations barred her claim for breach of fiduciary duty. We hold that the trial court correctly ruled that the three-year statute of limitations barred Appellant's claims and affirm the grant of summary judgment for both claims. We further uphold the occurrence rule for determining the date of accrual for legal malpractice claims.

The parties do not dispute the facts and dates of the underlying case or the procedural history of the legal malpractice action. In 1991, Appellees represented Appellant in filing her Chapter Thirteen bankruptcy petition. In the course of the 1991 representation, Appellees advised Appellant to transfer a parcel of real property to them to be held in trust in order to secure payment for their legal fees. Appellant conveyed her property, which consisted of real estate located on Shackleford Road in Little Rock, to Appellees before filing the voluntary petition on June 19, 1991. The bankruptcy court found that the property conveyance created a conflict of interest between Appellant and the Appellees and dis-

qualified Appellees from representation. The bankruptcy court further found that the conveyance was fraudulent, thereby converting Appellant's voluntary Chapter Thirteen petition, into an involuntary Chapter Seven petition which could not be dismissed. Appellees appealed both the disqualification order and the fraudulent-conveyance order to the federal district court. Both orders were affirmed on July 31, 1992.

Appellant filed this legal malpractice action against Appellees in Pulaski County on March 8, 1995. All of the acts alleged in Appellant's complaint occurred on or before June 19, 1991. Her amended complaint alleged that she sustained no damages before July 31, 1992. Her second amended complaint added a claim for breach of fiduciary duty. Appellant did not, however, specifically plead the dates on which the alleged negligent actions occurred in either claim stated, but instead, included only the July 31, 1992 date. Upon motion by Appellees, the trial court reconsidered its earlier rulings, granted summary judgment, and dismissed both claims with prejudice on June 27, 1996. The trial court specifically held that the three-year statute of limitations governed by Ark. Code Ann. § 16-56-105 (1987) barred both claims. The trial court did not rule on Appellant's final motion for reconsideration, in which she argued that the trial court had not considered the claim for breach of fiduciary duty. Appellant filed notice of this appeal on July 17, 1996.

Arkansas Rule of Civil Procedure 56(c) provides for summary judgment when "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In *Calcagno v. Shelter Mut. Ins. Co.*, 330 Ark. 802, 957 S.W.2d 700 (1997), we explained that summary judgment is reserved for cases that have no genuine factual disputes. The moving party bears the burden of sustaining a motion for summary judgment; once the moving party meets this burden, the opposing party must present proof with proof and demonstrate that a material issue of fact survives. *Id.* We view the evidence in a light most favorable to the opposing party and resolve all questions and ambiguities against the moving party. *Id.* This court must review

the evidence presented below to determine whether the trial court ruled correctly. *Wright v. Compton, Prewett, Thomas & Hickey*, 315 Ark. 213, 866 S.W.2d 387 (1993). Summary judgment is proper when the statute of limitations bars the action. *Alexander v. Twin City Bank*, 322 Ark. 478, 910 S.W.2d 196 (1995). We will affirm a summary judgment when the plaintiff admits a dispositive fact. *Sublett v. Hipps*, 330 Ark. 58, 952 S.W.2d 140 (1997).

Appellant first argues that the trial court erred when it granted summary judgment on the basis that the three-year statute of limitations governed by section 16-56-105 barred her suit filed on March 8, 1995. Section 16-56-105 provides for a three-year statute of limitations period in actions based in contract or liability, including unwritten breaches of duty. Since 1877, this court has consistently held that the three-year limitations period applies to legal malpractice actions. *Chapman v. Alexander*, 307 Ark. 87, 817 S.W.2d 425 (1991) (citing *White v. Reagan*, 32 Ark. 281 (1877)).

Next, we must determine when the claim accrued, and whether it is barred by the limitations period. *Goldsby v. Fairley*, 309 Ark. 380, 831 S.W.2d 142 (1992). There are at least three common approaches used to determine when a cause of action accrues: (1) the "occurrence rule," (2) the "damage rule" or "injury rule" and a variation called the "discovery rule," and (3) the "termination-of-employment rule," also named the "continuing-representation rule." *See Chapman*, 307 Ark. 87, 817 S.W.2d 425. *See generally* 2 Ronald E. Mallen & Jeffrey M. Smith, *Legal Malpractice* § 21 (4th ed. 1996).

Arkansas has adhered to the traditional occurrence rule in legal malpractice cases since 1877. *Chapman*, 307 Ark. 87, 817 S.W.2d 425. Under the occurrence rule, the malpractice action accrues when the "last element essential to the cause of action" occurs, unless the attorney actively conceals the wrongdoing. *Id.* at 88, 817 S.W.2d at 426. The rationale is to prevent attorneys from having to defend stale claims, to preserve evidence, and to treat all plaintiffs equally. *Id.* This court has held fast to this now-minority rule for attorneys and other professionals, including

accountants and insurance agents. *See Calcagno*, 330 Ark. 802, 957 S.W.2d 700. In *Flemens v. Harris*, 323 Ark. 421, 915 S.W.2d 685 (1996), this court expressly included the application to legal malpractice actions:

> We hold that the statute of limitations for an insurance agent commences at the time the negligent act occurs, in keeping with our traditional rule in professional malpractice cases. However, in doing so, we recognize the harshness of this rule to the clients of not only insurance agents, *but also of attorneys*, accountants, and others who may avail themselves of this rule in defending against malpractice actions.

Id. at 427, 915 S.W.2d at 689 (emphasis added).

Appellant, nevertheless, argues that our holdings are inconsistent and that this court adopted the damage rule or the injury rule in two legal malpractice cases, *Stroud v. Ryan*, 297 Ark. 472, 763 S.W.2d 76 (1989), and *Pope County v. Friday, Eldredge & Clark*, 313 Ark. 83, 852 S.W.2d 114 (1993). Under the damage rule, now the majority rule, the statute of limitations begins to run at the time the plaintiff is injured or suffers damages. *See Chapman*, 307 Ark. 87, 817 S.W.2d 425. Similarly, the discovery rule delays the accrual of the actionable negligence until the plaintiff discovers, or reasonably should have discovered, the malpractice.

We disagree with Appellant's assessment of *Stroud* and *Pope County*. In those cases, this court recognized an exception to the occurrence rule that effectively tolls the statute of limitations whenever the plaintiff is prevented from bringing his or her malpractice claim. Appellant conceded during oral argument before this court that the facts of this case do not parallel either *Stroud* or *Pope County*.

The facts in *Stroud*, 297 Ark. 472, 763 S.W.2d 76, involved a default judgment rendered against the appellant that had been set aside but was reinstated on a prior appeal. Concluding that the actionable negligence ceased to exist during the period from the time the default judgment was set aside until it was reinstated, this court held that the appellant could not prove her malpractice action until the adverse judgment was entered

against her. Similarly, in *Pope County*, 313 Ark. 83, 852 S.W.2d 114, we held that there was no actionable negligence from the time of the trial court's favorable ruling for the plaintiff until the time it was reversed on appeal. We therefore refute that we adopted the discovery rule in either *Stroud* or *Pope County*.

This court distinguished *Stroud* when it decided *Goldsby*, 309 Ark. 380, 831 S.W.2d 142, and explained that the appellants' malpractice action in *Goldsby* had never ceased to exist from the time the appellee attorney had prepared a warranty deed in 1980 and misrepresented that the appellants had a first mortgage on the subject property. Appellants were not aware of the misrepresentation until 1985 when they suffered a business loss as a result of the alleged misrepresentation. This court held that the three-year statute of limitations barred appellants' 1986 malpractice suit and explicitly rejected the damage rule.

The distinguishing factor in both *Stroud* and *Pope County* was the judgment entered in favor of the appellant. Here, as in *Goldsby*, there was no intervening judgment in Appellant's favor; hence, her malpractice claim never ceased to exist. At a minimum, Appellant was alerted to her claims for actionable negligence when the bankruptcy court entered the disqualification and the fraudulent-conveyance orders against her. Unlike *Stroud*, there was no point where Appellant was prevented from bringing suit. We are therefore not persuaded by Appellant's argument that accrual of her action was delayed; her alleged damages were evident through the trial court's adverse rulings, affirmed on appeal, and thereby never ceased to exist.

The majority of jurisdictions considering this context, regardless of the applicable rule, holds that a pending appeal by the damaged party does not serve to toll the statute of limitations when damages can be presently identified. *See, e.g.*, *Gulf Coast Investment Corp. v. Brown*, 813 S.W.2d 218 (Tex. 1991) (holding that under the discovery rule, the statute of limitations accrued at the time an adverse proceeding was filed against the plaintiff, not when the trial court rendered final judgment against the plaintiff). Additionally, we are not convinced that the discovery rule would be an appropriate solution in response to the question of having to

defend an older drafting, for example, a twenty- or thirty-year-old will. *See Chapman*, 307 Ark. 87, 817 S.W.2d 425. Nor are we convinced by her out-of-state authorities. *See Neel v. Magana, Olney, Levy, Cathcart & Gelfand*, 491 P.2d 421 (Cal. 1971).

Appellant next contends that this court has recognized the termination-of-employment rule, also known as the continuing-representation rule in *Wright*, 315 Ark. 213, 866 S.W.2d 387. This rule parallels the "continuing-treatment doctrine" in medical malpractice cases. *See, e.g., Lane v. Lane*, 295 Ark. 671, 752 S.W.2d 25 (1988). Under either doctrine, the statute of limitations does not begin to run until the relationship between the professional and client has ended for a particular matter. *Id.* We again refute Appellant's contention, because in *Wright*, this court applied the occurrence rule and determined that the alleged negligence was a corporate reorganization the law firm was hired to perform. This court concluded that the "last element essential to the cause of action" was a final stock transfer between the plaintiff's two corporations that was the last step of the reorganization. This court ultimately remanded the case to the trial court, because a question of fact existed among the numerous dates alleged. Such holding does not constitute an embracement of the continuing-representation doctrine.

We further refute Appellant's claim that by applying the occurrence rule, we treat attorneys more favorably than physicians in professional malpractice cases. This court has strictly limited the application of the continuing-treatment doctrine in medical malpractice cases. *See Pastchol v. St. Paul Fire & Marine Ins. Co.*, 326 Ark. 140, 929 S.W.2d 713 (1996) (holding that the continuing-treatment doctrine does not apply where the plaintiff alleges only an isolated act of negligence rather than a continuing course of negligent treatment). Moreover, the Arkansas Medical Malpractice Act follows the occurrence rule and essentially mirrors the application for legal malpractice actions. *Chapman*, 307 Ark. 87, 817 S.W.2d 425. Specifically, Ark. Code Ann. § 16-114-203(b) (Supp. 1997) provides that the cause of action in medical malpractice cases shall accrue on the date of the wrongful act. The act contains a discovery-rule exception for fraudulent concealment and an exception for situations when foreign objects are

left in the patient's body. Appellant's out-of-state authority also requires a series of negligent acts by the attorney in order to apply the continuing-representation doctrine. *Pittman v. McDowell, Rice & Smith*, 752 P.2d 711 (Kan. App. 1988). Here, Appellant does not specifically allege a continuing course of negligent representation that occurred after the time the petition was filed.

Because Arkansas is a fact-pleading state, Appellant's argument fails on the face of her complaint. *Goldsby*, 309 Ark. 380, 831 S.W.2d 142. Allegations of dates and times must give fair notice to defendants of the claims and the basis for such claims. *Id.* (citing ARCP 8 and Newbern, *Arkansas Civil Practice and Procedure* § 8-2 (1985)). Here, Appellant first alleged acts that took place on or before June 19, 1991. The date of July 31, 1992 appeared in Appellant's amended complaint and second amended complaint as the alleged date on which she sustained damages. Because Appellant did not specifically plead the dates on which she alleges that Appellees gave her negligent advice, her pleading is insufficient on its face. *Id.*

In conclusion, Appellant's cause of action accrued when the alleged negligent act occurred. This was on or before the time she filed her Chapter Thirteen petition on June 19, 1991; hence, her legal malpractice claim filed on March 8, 1995, is barred by the three-year statute of limitations. *Chapman*, 307 Ark. 87, 817 S.W.2d 425. Additionally, Appellant did not allege that Appellees concealed their alleged wrongdoing. Furthermore, the exception to the occurrence rule enunciated in *Stroud*, 297 Ark. 472, 763 S.W.2d 76, does not apply to Appellant's situation. Appellant's action never ceased to exist, thus she was not prevented from filing suit. This court narrowly construes the inherent exceptions to the occurrence rule in both medical malpractice cases and legal malpractice cases.

This court has expressly declined to retroactively change the legal malpractice occurrence rule to any of the other approaches. *Chapman*, 307 Ark. 87, 817 S.W.2d 425. The General Assembly's silence for over 100 years indicates tacit approval of this court's statutory interpretation. *Id.* Appellant has offered no compelling arguments or authorities to convince us to alter our

long-standing acceptance and application of this rule of law, absent legislative directive. *Stare decisis* mandates this outcome, given our recent ruling in *Calcagno*, 330 Ark. 802, 957 S.W.2d 700. We respectfully decline this opportunity to change our interpretation of section 16-56-105 and hold that *Goldsby*, 309 Ark. 380, 831 S.W.2d 142, continues to be the Arkansas rule, and accordingly, do not depart from the occurrence rule. This court further clarified in *Goldsby* that *Stroud*, 297 Ark. 472, 763 S.W.2d 76, does not stand for the proposition that Arkansas has adopted the damage rule. *Goldsby*, 309 Ark. 380, 831 S.W.2d 142. We conclude the same and will continue to defer any departures therefrom to the General Assembly.

For her second argument, Appellant argues that the trial court erred in granting the motion for summary judgment on the claim of breach of fiduciary duty because the statute of limitations had not run. Section 16-56-105 governs unwritten breaches of fiduciary duty and provides for a three-year statute of limitations. For the reasons outlined above, this claim for breach of fiduciary duty was also barred. *See Smith v. Elder*, 312 Ark. 384, 849 S.W.2d 513 (1993).

Affirmed.

KEVIN A. CRASS, Sp. J., joins in this opinion.

NEWBERN, J., not participating.

David SMALL *v.* James E. COTTRELL et al.

97-644 964 S.W.2d 383

Supreme Court of Arkansas
Opinion delivered March 12, 1998

Roachell Law Firm, by: *Travis N. Creed, Jr.*, for appellant.

W. Paul Blume, for appellees.

DONALD L. CORBIN, Justice. Appellant David Small, who was terminated from his position as a school mechanic, raises an

issue of first impression that requires us to interpret the Arkansas Public School Employee Fair Hearing Act ("the Act"), codified at Ark. Code Ann. §§ 6-17-1701—1705 (Repl. 1993). Appellees are members of the board of directors of the Forrest City School District ("the District"), Superintendent Emerson Hall, and the Forrest City Public Schools. The St. Francis County Circuit Court upheld the school board's decision. Our jurisdiction is pursuant to Ark. Sup. Ct. R. 1-2(a)(17), as this case presents an issue of significant public interest. We hold that Appellees substantially complied with the requirements of the Act, and we affirm.

The parties do not dispute the underlying facts. Appellant was employed as a mechanic for Appellees for over ten years and also drove a school bus when needed to substitute for absent drivers on regular routes. Appellant worked on a year-to-year contractual basis. At the time of his termination in May 1993, his contract began July 1, 1992, and would have ended June 30, 1993. In early 1993, Appellant filed a grievance with the District. For approximately three years, Appellant had been aware that other employees were given separate contracts and, in some cases, additional pay for bus driving. Appellant's 1992-93 contract stated that his job title was "mechanic," but did not include a job description. However, Appellant's 1991 job description specifically stated that he would "substitute drive on regular routes." Appellant received one and one-half overtime compensation when he worked in excess of his regular schedule. Appellant filed the grievance with his immediate supervisor Joe Carden, who was the director of transportation for the District. Carden did not respond in writing to Appellant's grievance but told him he would pass it along to the next level of administration which was Deputy Superintendent Rodney Echols. Appellant was told he would not receive additional compensation for substitute bus driving.

On January 23, 1993, Appellant refused to drive the bus when Carden directed him. Appellant and Carden discussed that Appellant had not signed a contract with a detailed job description for the 1992-93 school year or for the previous year. Appellant and Carden agreed that Appellant's job description had not changed for the 1992-93 school year, but Appellant refused to

drive. Carden told Appellant that he would recommend termination or suspension to the school board.

On January 27, 1993, Superintendent Hall mailed a letter to Appellant that stated:

> This is to inform you that based on a recommendation from your supervisor, Mr. Joe Carden, and Deputy Superintendent Rodney Echols you are hereby suspended from your job effective immediately. You will be recommended for termination at a later date.

The District's school board met on February 8, 1993, and voted to terminate Appellant without giving him notice of the meeting. On February 25, 1993, Appellant filed a complaint in the St. Francis County Chancery Court against Appellees. Appellant also filed a motion for a preliminary injunction of his termination. On March 10, 1993, Hall sent the following letter to Appellant:

> By this letter, I am advising you that the previous suspension and termination of your employment with the Forrest City School District is rescinded. Enclosed is a check in payment of your salary for the affected period.

On March 12, 1993, Hall again notified Appellant by letter as follows:

> You are hereby notified that I intend to recommend that your contract with the Forrest City School District be terminated. The reasons for my recommendation are as follows:
>
> > Even though the possibility of driving a school bus is included in your job description, and you are, and have been, aware of that fact, you refused to obey the directive of your supervisor, Mr. Joe Carden, to drive the school bus when needed on January 23, 1993. Such refusal to carry out your reasonable and necessary duties constituted gross insubordination.
>
> You have a right to a hearing on this recommendation before the school board. If you desire a hearing, you must make a request for same, in writing to my office, within thirty days of your receipt of this letter. The hearing will be held at the next regular school board meeting following the receipt of your request for a hearing, unless a later date is agreed to in writing.

> If you request a hearing, you have the right to be represented by the person of your choice, and if you so request in writing, a record of the hearing will be preserved and a transcript provided to you at no cost.

Prior to the hearing, Appellant was suspended with pay. He did not return to work. Board meetings were normally held on the second Monday of each month. By letter dated March 31, 1993, Appellant requested a hearing, and the hearing was scheduled for the next regularly scheduled board meeting. The second Monday of April would have been on April 12, 1993. Appellant availed himself on April 12, 1993. However, the meeting took place on April 19, 1993. The District did not give written notice to Appellant of the specific date, although correspondence between Hall and Appellant's representative, Jim Banks of the Arkansas Education Association ("AEA"), indicated that the April 19, 1993 date was discussed between Hall and Banks. Appellees agreed to reschedule the meeting for May 10, 1993, and notified Appellant by letter of the hearing. Appellant attended the May 10, 1993 board meeting with Banks. Before the proceeding, the attorney for Appellees cautioned the board members to consider only the evidence presented at that proceeding and further advised them that their prior vote to terminate Appellant had been rescinded.

Both Appellant and Carden testified that Appellant's job duties were the same as they were for the 1991 contract. Appellant admitted that he was paid an overtime rate of time and one-half if he worked over forty hours per week. Appellant did not deny that he refused to drive the bus when his supervisor directed him to do so on January 23, 1993, and that was one of the duties for which he was hired. Appellees introduced the District's policy which stated that insubordination is a ground for both immediate suspension and termination. Appellees also introduced Appellant's 1991 job description, which contained the duty of driving the school bus on regular routes when necessary for Appellant's position as "mechanic." After the evidence was presented, the board members again voted to terminate Appellant.

On June 16, 1993, Appellant filed an amended complaint in the St. Francis County Chancery Court in which he alleged that

the May 10, 1993 proceeding was "tainted." Appellant further requested reinstatement and front pay, back pay, and punitive damages. Appellant's second amended complaint, which he successfully transferred from chancery to circuit court, alleged that he was denied procedural due process when he was prevented from fully using the district's grievance process. Appellant did not, however, produce any testimony which indicated that the termination hearing was tainted. One board member, Ronald Williams, testified that he voted against Appellant's termination, but that he did not have his mind made up before he went into the hearing.

The circuit court held that the District had substantially complied with the Public School Employee Fair Hearing Act and entered an order in favor of Appellees, dismissing the complaint with prejudice on February 26, 1997. Appellant filed notice of this appeal on March 19, 1997.

This court set forth the standard of review for school board decisions in *Murray v. Altheimer-Sherrill Pub. Sch.*, 294 Ark. 403, 743 S.W.2d 789 (1988):

> The determination not to renew a teacher's contract is a matter within the discretion of the school board, and the circuit court cannot substitute its opinion for that of the board in the absence of an abuse of discretion by the board. *Leola School District v. McMahan*, 289 Ark. 496, 712 S.W.2d 903 (1986); *Chapman v. Hamburg Public Schools*, 274 Ark. 391, 625 S.W.2d 477 (1981). Moreover, it is not this court's function to substitute our judgment for the circuit court's or the school board's. *Leola, supra*; *Moffitt v. Batesville School District*, 278 Ark. 77, 643 S.W.2d 557 (1982). We will reverse only if we find on review of the trial court's decision that the court's findings were clearly erroneous. Ark. R. Civ. P. 52; *Green Forest, supra.*

Id. at 406, 743 S.W.2d at 790.

In *Hamilton v. Pulaski County Special Sch. Dist.*, 321 Ark. 261, 900 S.W.2d 205 (1995), this court recognized that it is our responsibility to determine whether there has been procedural compliance under the Teacher Fair Dismissal Act. When required to review a statute, this court first looks to the plain language of

the statute. *Public Empl. Claims Div. v. Chitwood*, 324 Ark. 30, 918 S.W.2d 163 (1996). When the statutory language is clear and unambiguous, this court follows the plain meaning of the words rather than interpreting it. *Id.*

For his sole argument on appeal, Appellant argues that the trial court erred when it held that his termination by Appellees was proper on the basis that it substantially complied with the provisions of section 6-17-1703. Appellant contends that the Public School Employee Fair Hearing Act requires strict compliance in order to protect his due process rights of notice and opportunity to be heard.

Section 6-17-1703 provides in relevant part:

> (a) The superintendent of a school district may recommend termination of an employee during the term of any contract, or the nonrenewal of a full-time nonprobationary employee's contract, provided that he gives notice in writing, personally delivered, or by letter posted by registered or certified mail to the employee's residence address as reflected in the employee's personnel file.
>
> . . . .
>
> (c) Such written notice shall include a statement of the reasons for the proposed termination or nonrenewal.
>
> (d) The notice shall further state that an employee being recommended for termination, or a full-time nonprobationary employee being recommended for nonrenewal, is entitled to a hearing before the school board upon request, provided such request is made in writing to the superintendent within thirty (30) calendar days from receipt of said notice.

It is clear that the General Assembly promulgated the Act to protect noncertified school employees' rights to notice and opportunity to be heard by providing a reasonable hearing procedure when termination or nonrenewal is imminent. This is our first opportunity to determine the proper standard for compliance under the Act. We have, however, interpreted the Arkansas Teacher Fair Dismissal Act to require strict compliance due to the language contained in Ark. Code Ann. § 6-17-1503 (Repl. 1993), which reads in part:

> A nonrenewal, termination, suspension, or other disciplinary action by a school district shall be void unless the school district strictly complies with all provisions of this subchapter and the school district's applicable personnel policies.

See, e.g., Hannon v. Armorel Sch. Dist. #9, 329 Ark. 267, 946 S.W.2d 950 (1997). Appellant urges us to adopt the identical procedural requirement for noncertified school employees. For the reasons outlined below, we decline to adopt such requirement.

The trial court based its decision against Appellant on *Murray*, 294 Ark. 403, 743 S.W.2d 789, and concluded that substantial compliance is required and was followed under the Act. *Murray* was decided prior to section 6-17-1503. Although *Murray* concerned the Arkansas Teacher Fair Dismissal Act and a nonrenewal of a coach's contract, it contained almost identical procedural facts. Without prior notice to Murray, the school board voted on the superintendent's recommendation not to renew Murray's teaching contract for the following year. The next day, the school district sent notice to Murray which informed him of the superintendent's recommendation. The notice to Murray also provided:

> I am also informing you that you may file a written request with the school board of the district for a hearing within 30 days after you receive this notice.
>
> The hearing may be private unless you or the board shall request that the hearing be public. At the hearing, you may be represented by a person of your choice.

Id. at 405-406, 743 S.W.2d at 790. Later, the school district realized that its vote of nonrenewal took place before Murray was given notice or had an opportunity to be heard in contravention to the Teacher Fair Dismissal Act. The school board reconvened and voted to rescind its previous vote of nonrenewal. Murray requested a hearing which was held. At the conclusion of the meeting, the board again voted not to renew Murray's contract. This court rejected Murray's argument that the procedure violated his due process rights under *Green Forest Pub. Sch. v. Herrington*, 287 Ark. 43, 696 S.W.2d 714 (1985), in which this court held that written notice of nonrenewal after the nonrenewal decision was made did not meet the requirements of substantial compliance

under the Teacher Fair Dismissal Act of 1979, Ark. Stat. Ann. §§ 80-1264—1264.10 (Repl. 1980). Because the Altheimer-Sherrill school board formally rescinded all of its actions taken before Murray's final hearing, this court held that substantial compliance was met. Additionally, counsel for the school board emphasized on the record that the board had rescinded its earlier decision, and further cautioned the board:

> [You] should not vote based on any preconceived notions, indeed, if you have any, but should make your decision solely on what has been brought before you and will be brought before you during this hearing.

Murray, 294 Ark. at 408, 743 S.W.2d at 791. This court concluded:

> This "cautionary instruction" coupled with the board's formal rescission of its original vote cured any error resulting from the April 28 hearing. We presume that the board members are fair-minded and resolve matters presented to them on an impartial basis.

Id. Therefore, this court held that the school district had substantially complied with the procedural requirements inherent in the Teacher Fair Dismissal Act.

The General Assembly amended the Arkansas Public School Employee Fair Hearing Act in 1997 to include subsection (e), providing that noncertified school employees are no longer employees at will. We observe, however, that the General Assembly omitted the requirement of strict procedural compliance for noncertified employees covered under the Act. We therefore reject Appellant's argument that the Act requires strict compliance. The express requirement found in the Teacher Fair Dismissal Act has compelled our recent holdings under the act covering certified teachers. Absent contrary legislative directive, we hold that substantial compliance is the applicable standard under the Arkansas Public School Employee Fair Hearing Act.

In conclusion, although Appellees concede that they initially erred when they terminated Appellant without notice on February 8, 1993, they later corrected the procedural defects under the Act. They complied the second time by sending notice

which contained the reasons for the recommended termination to Appellant and notifying him of his right to a hearing. When Appellant missed the April 19, 1993 hearing, Appellees rescheduled it at the next regularly scheduled meeting time on May 10, 1993, at which time Appellant was given and availed himself of the opportunity to be heard and to cross-examine the witnesses who testified against him. The board was instructed to consider only the evidence presented at the May 10 hearing, and was advised that their previous vote was rescinded. We presume that the board members are fair-minded and did as instructed. There was no testimony to indicate otherwise or that Appellant's hearing was tainted.

Accordingly, we hold that the trial court's ruling which relied on *Murray*, 294 Ark. 403, 743 S.W.2d 789, was not clearly erroneous as applied to noncertified personnel and further hold that substantial compliance is the proper standard to apply pursuant to the Arkansas Public School Employee Fair Hearing Act. The trial court correctly found that Appellees did not violate Appellant's procedural due process rights of notice and opportunity to be heard.

Affirmed.

Phyllis June BROWN *v.* Billy Earl BROWN

97-646 962 S.W.2d 810

Supreme Court of Arkansas
Opinion delivered March 12, 1998

J. Patrick McCarty, for appellant.

Rex W. Chronister, for appellee.

ROBERT L. BROWN, Justice. This appeal involves the distribution of a pension between divorced spouses. Appellant, Billy Brown, and appellee, Phyllis Brown, were married in 1951. In April 1981, Phyllis Brown began working at Hiram Walker & Sons, Inc., in Fort Smith, and the following year, she began to participate in the business's retirement plan. On March 17, 1988, the couple separated, and they were eventually divorced on June 20, 1989. The divorce decree contained the following provision:

> The Defendant (Phyllis Brown) has currently obtained an interest in a pension and savings plan through her employment at Hiram Walker. That the Defendant has been employed with this employer since April 20, 1981. The court finds that the Plaintiff (Billy Brown) shall have a one half interest in those pension and profit sharing benefits up to March 17, 1988.

There were, in fact, two pensions involved in the Browns' divorce decree. Billy Brown's military pension was also divided, with Phyllis Brown being awarded a one-half marital interest in ninety percent of his pension. The Arkansas Court of Appeals later held that her marital share included any postdecretal cost-of-living increases which enhanced the amount of Billy Brown's pension. *Brown v. Brown* 38 Ark. App. 99, 828 S.W.2d 601 (1992).

Phyllis Brown continued to work at Hiram Walker until she retired in January 1996 at age 63. At that time, she began to draw retirement benefits in the amount of $978.72. That same year, her former husband filed this action in chancery court, seeking an accounting and a contempt order against her for failing to pay him the correct share of her pension benefits and refusing to provide him with information of what his share should be.

Phyllis Brown answered, and after receiving briefs and supporting documents, the chancellor ultimately made several findings in a modified order:

- that at the time of the divorce Phyllis Brown had accrued benefits in her retirement account in an amount which would allow her to receive approximately $414.00 per month if she continued to work at her current rate of pay until she retired on the normal retirement date of December 1, 1997;
- that between March 17, 1988, and the date she retired on January 1, 1996, Phyllis Brown received periodic merit increases in her monthly salary totaling $775.00;
- that these salary increases had the effect of raising her retirement benefits from $414.00 to $978.72 per month;
- that Phyllis Brown retired from Hiram Walker on January 1, 1996, and began drawing retirement benefits in the amount of $978.72 per month.

The chancellor initially concluded that even though the 1989 divorce decree was drafted by Billy Brown's attorney, there was no merit to Phyllis Brown's argument that the decree should be interpreted strictly against her former spouse. He next considered Phyllis Brown's postmarital enhancement argument that Billy Brown should not benefit from any increases in her salary following their separation. On this point, he concluded that *Askins v. Askins*, 288 Ark. 333, 704 S.W.2d 632 (1986), was controlling and that all postmarital appreciation in benefits, including the salary increases, should be included for purposes of determining Billy Brown's share in her pension. Accordingly, he awarded Billy Brown a share in her benefits of $978.72 per month.

On appeal, Phyllis Brown first contends that the divorce decree is subject to two interpretations and should be construed against the party under whose auspices the decree was drafted — in this case, Billy Brown. She cites cases to support her contention, but all of the cases she references involve the interpretation of a contract as opposed to a divorce decree. *See Elcare, Inc. v. Gocio*, 267 Ark. 605, 593 S.W.2d 159 (1980) (interpreting a sales contract and a "Care Agreement"); *Sutton v. Sutton*, 28 Ark. App. 165, 771 S.W.2d 791 (1989) (interpreting a separation agreement); *DaCosse v. Ahrens*, 2 Ark. App. 61, 616 S.W.2d 777

(1981) (interpreting a "Reconciliation Agreement"). We agree with the chancellor that this argument is without merit. Divorce decrees are not contracts but are orders of the chancery court. Moreover, the decree did not specify the method to be used in calculating the appropriate shares of Phyllis Brown's pension. Hence, it was left to the chancellor to make that determination by subsequent order, which was done in this case.

Phyllis Brown's second argument is that the chancellor erred in concluding that *Askins v. Askins, supra*, required the chancellor to include postmarital appreciation for purposes of calculating Billy Brown's share in the pension. In the alternative, she urges that if we decide that the *Askins* case mandates such a ruling, we reconsider our decision in that case.

We have previously held that pensions are marital property and subject to distribution as such. *Askins v. Askins, supra*; *Young v. Young,* 288 Ark. 33, 701 S.W.2d 369 (1986). In the instant case, a marital percentage was arrived at by using a numerator/denominator formula. Specifically, Phyllis Brown worked for 70 months while she was married to Billy Brown before separation and for a total time of 164 months, which included her years of marriage before separation and the following months until her retirement as well. This results in a fraction of 70/164 or 42.68% of her pension that was earned prior to separation. Billy Brown was entitled to a pension share based on one-half of the 42.68%, which is 21.34%. Both parties agree that this is the appropriate marital percentage to be applied.

The question for this court to decide is whether Billy Brown is entitled to one-half of Phyllis Brown's accrued pension amount at time of separation on March 17, 1988, or 21.34% of the accrued pension amount, which is based in part on salary enhancements, in 1996.[1] The precise issue is whether Billy Brown is entitled to benefit from any postmarital salary raises, when he did not begin receiving his pension share until Phyllis Brown actually retired some seven years after their divorce.

[1] Phyllis Brown concedes in her brief in this appeal that the proper cutoff date for Billy Brown probably should have been the date of divorce, but the chancellor used the date of separation in his order and that is not an issue before us in this appeal.

The chancellor clearly agreed with Billy Brown that he was entitled to base his pension share on the entire pension actually received by his former spouse, beginning January 1, 1996. Phyllis Brown counters that his marital share should only apply to the pension amount that she had earned at the time of their separation. She contends that the reason for this is any postmarital enhancements after that date should not be considered marital property because they were solely the result of her efforts. The amount of her pension against which the marital percentage of 21.34% should apply, according to Phyllis Brown, is $414.00 as opposed to $978.72.

We perceive the friction in this area to be the result of two competing principles of equitable distribution. On the one hand, there is the principle which Phyllis Brown espouses that all property acquired after divorce (or separation in this case) should not be part of the marital-property mix. On the other hand, there is the principle subscribed to by Billy Brown that both parties are entitled to increases in the value of marital property after divorce and before distribution, particularly when the divorced spouse does not begin receiving a share until some years after the divorce occurs.

We believe, as the chancellor concluded, that the issue of postmarital enhancement in benefits has been fully answered by this court. In *Askins v. Askins, supra,* we declined to exclude postmarital appreciation from the amount of the pension to be divided between divorced spouses. There, we first questioned whether the issue was procedurally barred but went on to hold that the chancellor operated within his discretion in dividing the pension as marital property the way he did. In our decision, we relied on two primary considerations. First, we recognized the fact that enhancements to a retirement plan are often most dramatic in the later years, and we indicated that it might be inequitable to allow a person who had supported his or her spouse through the lean years to be deprived of those later rewards. Secondly, we underscored that the chancellor has considerable discretion to divide marital property other than one-half to each party when it is equitable to do so. *See* Ark. Code Ann. § 9-12-315(a)(1)(A) (Repl. 1993). Those two principles guide us in

affirming the chancellor in the case before us, and we note that other jurisdictions have reached the same conclusion. *See, e.g., In re Marriage of Hunt*, 909 P.2d 525 (Colo. 1995); *Stoerkel v. Stoerkel*, 711 S.W.2d 594 (Mo. Ct. App. 1986); *Gemma v. Gemma*, 778 P.2d 429 (Nev. 1989). *See also Hare v. Hodgins*, 586 So.2d 118 (La. 1991) (approving the *Askins* approach while allowing for exclusion in certain cases).

We are aware that there is a dispute in this case over the nature of Phyllis Brown's postmarital salary increases. She contends that the seven salary increases following her separation were all merit increases. In support of her position, she points to her employer's notices which describe the increases as "merit" increases. Merit increases, she maintains, should not be included to increase Billy Brown's share, and she cites a case from the Louisiana Supreme Court as authority to support her argument. *See, e.g., Hare v. Hodgins, supra.* Billy Brown answers this argument by stating that in spite of the description on the notices, these were, in fact, little more than cost-of-living or longevity increases. He adds that the chancellor did find in his modified order that these were *merit* increases but declined to exclude them as improper enhancements.

We defer to the chancellor in this regard. Here, he considered the increases in Phyllis Brown's salary following the separation and divorce and decided that they constituted legitimate adjustments for retirement benefits in which Billy Brown could participate. We made it crystal clear in *Askins* that this is the chancellor's call under § 9-12-315(a)(1)(A), as is the case with all divisions of marital property. We do not read the chancellor's order in the instant case to say that the *Askins* case divested him of all discretion in this area.

Affirmed.

STATE of Arkansas *v.* Glen HERRED

CR 97-664 964 S.W.2d 391

Supreme Court of Arkansas
Opinion delivered March 12, 1998

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

Louis A. Etoch, for appellee.

ANNABELLE CLINTON IMBER, Justice. Glen Herred pleaded guilty to a charge of attempted possession of a controlled substance with intent to deliver, a Class A felony. He subsequently filed a petition for relief under Ark. R. Crim. P. 26.1 and 37, which the trial court granted. We reverse and hold that the trial court clearly erred in granting relief.

Sometime before midnight on June 19, 1996, the police executed a nighttime search warrant at the residence located at 625 Quarrles Street in Marvell. Among other things the officers seized

a gun, as well as twenty-four grams of cocaine that were discovered in a pair of shorts belonging to Sadere Baker, found underneath Baker's "bed tick." At the time the police entered, Baker was in bed with Herred, her boyfriend. Baker was the mother of Herred's three children. Both Herred and Baker were arrested, along with other people inside the residence.

On July 30, 1996, the police charged Herred with one count of possession of a controlled substance with intent to deliver, a Class Y felony, as well as simultaneous possession of drugs and firearms, a Class Y felony. Baker was charged as well. Herred appeared for trial on December 12, 1996. Represented by retained counsel, Herred entered a negotiated plea of guilty. The State nolle prossed the simultaneous-possession count, and Herred pleaded guilty to a reduced charge of attempted possession of a controlled substance with intent to deliver, a Class A felony. Following a colloquy with Herred, the trial court accepted the plea as well as the State's recommendation of fifteen years' imprisonment, with credit for time served. The trial court further explained to Herred that he was going to allow Herred to remain on bond until December 26, 1996. On December 13, 1996, Sadere Baker pleaded guilty to attempted possession of a controlled substance with intent to deliver, a Class A felony, and received a six-year suspended sentence. On December 18, 1996, the judgment and commitment order in Herred's case was entered.

On December 23, 1996, Herred filed a *pro se* "Verified Petition Under Rule 26.1 and 37, Ark. R. Crim. P. And Ark. Code Ann. § 16-90-111 To Set Aside Guilty Plea, To Vacate, Or To Correct Defendant's Sentence And For Other Proper Relief." Among other things, Herred claimed that he was denied effective assistance of counsel, and that his plea was coerced as a result of threats of prosecution levied against Baker, the mother of his children. On December 26, Herred reported to begin serving his sentence, and on January 28, 1997, the trial court held an evidentiary hearing on the petition. Attorney Louis Etoch, who had previously represented Sadere Baker in connection with the original charges, represented Herred at the postconviction hearing.

Vandall Bland was the attorney who represented Herred at the time he pleaded guilty, and had been retained about a month before the trial date. On that date, Bland had a number of other cases set for trial, as he was the Phillips County Public Defender. He explained that he had filed no written motions in the case, and had not filed a motion to suppress the drugs seized from the residence. While he had filed no discovery motions in the case, the prosecutor had provided him with the file. Bland was prepared to go to trial because he had all of the discovery and all of the witnesses were available to testify. He was not aware that Herred had been drinking that day. In fact, he did not notice any of the telltale signs of intoxication such as slurred speech, blood-shot eyes or unsteadiness. Nor did he smell any alcohol on Herred, although he conceded that he could not "smell that well." Bland knew that Herred could read and write. He also thought that he had read the plea execution form to Herred, and had him initial it. Baker and Herred were crying on the day of the plea.

Bland was aware that the prosecutor had offered Sadere Baker (who had also been charged) probation if she testified against Herred. It was Bland's understanding that the prosecutor would offer Baker a suspended sentence in exchange for Herred's plea. This occurred in the judge's chambers, where Bland, Herred, Baker, and Attorney Louis Etoch (then representing Baker) were all present. Etoch had advised Baker not to testify against Herred.

Victor Owens, a longtime friend of Herred's, testified that the night before the plea he and Herred drank substantial quantities of alcohol, and Herred appeared intoxicated. They stayed out until about 12:30 that night. Herred was ill and taking "Tylenol and a lot of more drugs." Herred expressed his innocence and concern for his children. Owens stated that Herred had lived at the Baker residence with Sadere less than a year, but later clarified that "he wasn't staying there that I know of."

Sadere Baker testified that Herred was not living with her at her residence. Baker stated that the cocaine seized was hers, and that she was keeping it for a friend. On cross-examination, she stated that her intent was to sell it to make money. The cocaine was "in [her] shorts under [her] bed tick." She did not inform

Herred of the cocaine, and he did not see it to her knowledge. The night before the plea, Herred came in around 12:30 or 1:00 in the morning and appeared intoxicated. He was also taking medication for sinus problems, and he drank some more the morning he came to court. On the day of Herred's trial, she understood that the plea negotiations were that she would get probation in exchange for Herred's plea. They were both crying on the day of the plea because the drugs did not belong to Herred and she did not want him to go to jail. He told her that he would rather go to jail. As Bland was discussing the case with Herred, Baker told Herred that she did not want to go to jail. She stated that the gun in her house belonged to Kevin Sanders, apparently Herred's nephew, who was willing to testify to that effect.

Glen Herred testified that he was not incarcerated immediately after his plea, but that he began serving his term on December 26. He stated that he did not live at the Baker residence. He was not aware that his case was going to trial on December 12, 1996, until the day before. He did not sleep well the night before the trial date, and he drank a large quantity of alcohol as well as medication for flu symptoms. On the way to Bland's office the morning of trial he drank a beer. He did not know that cocaine was in the house, and did not possess it. Neither did he know that the gun was in the house. Bland told him that Baker would be sentenced "fifteen to life" if he "didn't take them charges." He also told Bland about Kevin Sanders admitting to possessing the gun, to which Bland responded that he should do the "manly thing and take the charge, because if you let that young kid take the charge, they will try to hang him. So he told me to do the right thing, just take the charges." Etoch explained to Herred that Baker would get probation only if she testified against him, and later that she would only get probation if he pleaded guilty. Herred expressed his innocence to Bland, but he pleaded guilty because he wanted the mother of his children to take care of the children. He did not feel that Bland was prepared to try the case. Bland told him that he would get life if he went to trial. Herred testified that he lied in answering the questions asked of him during the plea colloquy. He stated that he paid some bills at the

Baker residence, and considered it "home" along with his mother's house.

Lovell Ashley Higgins was then the circuit judge who took Herred's plea. He noticed nothing unusual about Herred's appearance or demeanor on December 12 while he took the plea. Judge Higgins had been in Herred's presence for at least one hour before the plea was taken. Part of that time was in the close confines of the judge's chambers where he saw no signs of intoxication. Nor did he smell the odor of intoxicants. Judge Higgins did have concerns about Etoch trying to manipulate Herred.

Following this evidentiary hearing, the trial court entered an order on April 10, 1997, vacating Herred's plea and granting him a new trial. The trial court found that Herred's petition was untimely pursuant to Ark. R. Crim. P. 26.1, and denied Herred's requested relief to the extent that it was a Rule 26.1 motion to withdraw guilty plea. Considering Herred's petition as a Rule 37 motion for postconviction relief, the trial court found that Herred was denied effective assistance of counsel and that his plea was coerced. The trial court's order contains the following findings:

> — Defense counsel had represented Herred for only a month, counsel's time was inadequate for preparation;
>
> — The only motions filed by defense counsel were oral motions made the morning of trial;
>
> — Defense counsel also served as the Phillips County Public Defender during which he had a large number of cases set for trial;
>
> — Defense counsel testified that the prosecutor had voluntarily given him discovery;
>
> — Defense counsel made no motion to suppress the drugs and gun seized pursuant to the nighttime search warrant;
>
> — It was unclear whether the search warrant was properly executed so as to authorize a nighttime search;
>
> — Defense counsel testified "the whole case created a problem";
>
> — Defense counsel issued no subpoenas and did not respond to discovery motions;
>
> — Defense counsel did not move for a continuance;

— Defense counsel testified that he knew that Sadere Baker, Herred's girlfriend and the mother of his children, would receive a five-year suspended sentence if Herred pleaded guilty;
— Defense counsel testified that there was "pressure" on Herred;
— Defense counsel testified that "I think what persuaded him to take the plea . . . he was looking out for Sadera [*sic*]";
— Herred and Sadere Baker were outside the courtroom crying immediately before entering the plea;
— The State did not "deny or refute" Herred's contention that he must plead guilty before the State would offer Baker a suspended sentence;
— Defense counsel testified that the prosecutor reminded him of the "Sam Lanford" case (Herred's defense counsel had also represented Lanford), where the defendant refused a plea bargain, went to trial and received a 120-year sentence;
— Defense counsel testified that the prosecutor "pushed his chest out";
— A longtime friend of Herred's testified that the night before the plea was entered Herred expressed concern for his children, "needed someone to talk to," and consumed substantial amounts of alcoholic beverages;
— "Defendant Herred was granted a hearing and given an opportunity to prove that the entry of the plea was the result of fear or threats that his wife would be tried or brought to trial";
— The trial court found that the State insisted on Herred's guilty plea before offering a suspended sentence to Sadere Baker the next day;
— Sadere Baker was the mother of Herred's children, ages one, two, and three;
— Herred entered the plea as a result of "threats of prosecution of the mother of his children";
— Defense counsel testified that "I might have told him that the manly thing to do was take the charge."

Following these findings, the trial court's order concludes as follows:

> A two part test for reviewing claims of ineffective assistance of counsel was adopted by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984): (1) The Defendant must show that counsel's representations fell below an objectionable [*sic*] standard of reasonable [*sic*] and (2) The Defendant

> must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Based upon the totality of the circumstances and the record herein, the Court finds that the counsel's assistance was ineffective.
>
> The Court hereby grants Defendant's petition to set aside the guilty plea and orders a new trial.

The State brings the present appeal.

I.

The State first argues that the trial court lacked jurisdiction to grant Herred Rule 37 relief because he was not "in custody" when he filed his petition. Rule 37.1, defining the scope of the rule, provides that relief is available to "[a] petitioner in custody under sentence of a circuit court claiming a right to be released, or to have a new trial, or to have the original sentence modified . . . ." In support of this proposition the State primarily relies on *Coplen v. State*, 298 Ark. 272, 766 S.W.2d 612 (1989) and *Malone v. State*, 294 Ark. 376, 742 S.W.2d 945 (1988). In *Coplen* the appellant was convicted of two counts of battery and later sought postconviction relief. At the time petitioner filed his petition with the trial court, "he was not in custody." The *Coplen* court affirmed the trial court's denial of postconviction relief because the petition failed to state any grounds for either habeas corpus relief or relief under Rule 37. In conclusion the court notes that "[petitioner] was not in custody when his petition was filed, a prerequisite for Relief." *Id.* (citing Ark. R. Crim. P. 37.1; *Malone v. State*, 294 Ark. 376, 742 S.W.2d 945 (1988)).

In *Malone*, *supra*, the appellants pleaded guilty to charges of criminal mischief and theft by receiving and were sentenced to two years' imprisonment. They subsequently argued that the trial court erred in denying their motions to withdraw their pleas, in rejecting their contention that they received ineffective assistance of counsel, and in denying their alternative request for Rule 37 relief. The *Malone* court affirmed the denial of relief under Rule 26, noting that their motion was untimely in that it was made more than one month after their conviction orders were entered. The court then noted that "the 'Scope of the Remedy' for pro-

ceedings under Rule 37 is confined to a prisoner, in custody under sentence of a circuit court. [citation omitted]. Here, the appellants were out of custody on their original bonds when they filed their motion for relief under Rule 37." *Id.* Continuing to the merits, the *Malone* court concluded that the appellants' allegations failed to justify postconviction relief.

We must reject the State's argument that the trial court lacked jurisdiction to grant Herred Rule 37 relief. First, Herred in his petition purported to seek relief under Rule 26.1 as well as Rule 37. Rule 26.1(b) provides as follows:

> (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.

We have allowed a petitioner to proceed under this rule when his motion to withdraw a guilty plea has been filed prior to the time sentence has been entered and placed in execution. *Johninson v. State*, 330 Ark. 381, 953 S.W.2d 883 (1997). A judgment has been placed in execution "when the court issues a commitment order unless the trial court grants appellate bond or specifically delays execution of sentence upon other valid grounds." *Redding v. State*, 293 Ark. 411, 738 S.W.2d 410 (1987).

While the trial court entered the judgment and commitment order on December 18, before Herred's petition was filed, the trial court specifically delayed the execution of sentence until December 26, allowing Herred to remain free on bond. Thus, Herred's Rule 26.1 motion to withdraw was timely filed, unlike the appellants in *Malone*. Just as in *Johninson*, *supra*, "Rule 26.1(a) is obviously not applicable because the motion was not made prior to the pronouncement of sentence, we are relegated to subsection (b) and Rule 37." Because Herred was in custody

when the trial court ultimately disposed of his motion,[1] and because his motion was otherwise timely under Rules 26.1(b) and 37.2, we conclude that the trial court had jurisdiction to consider the merits of Herred's Rule 37 motion. *Cf. Johninson, supra.*

II.

When a defendant pleads guilty, the only claims cognizable in Rule 37 proceedings are those which allege that the plea was not made voluntarily and intelligently or was entered without effective assistance of counsel. *Bryant v. State*, 323 Ark. 130, 913 S.W.2d 257 (1996). We will not reverse the trial court's findings granting or denying postconviction relief absent clear error. *See Rowe v. State*, 318 Ark. 25, 883 S.W.2d 804 (1994). To be entitled to withdraw a guilty plea due to ineffective assistance of counsel, the petitioner must show as follows:

> 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).

Johninson, supra (quoting *Duncan v. State*, 304 Ark. 311, 802 S.W.2d 917 (1991) (emphasis supplied in *Johninson*)). A defendant who has pleaded guilty necessarily has difficulty in establishing prejudice given that his or her conviction is premised on an admission of guilt of the crime charged. *See Thompson v. State*, 307 Ark. 492, 821 S.W.2d 37 (1991).

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[1] We note that neither the reported facts in *Coplen* nor *Malone* clearly indicate whether the petitioners where actually in custody when their motions were disposed of.

To the extent that the trial court found that Herred would not have pleaded guilty but for ineffective assistance or that his plea was coerced due to the State's threats of prosecution against Baker, it was clearly erroneous. The State cites us to a number of federal circuits which hold that when a prosecutor threatens or offers leniency to a third party during plea negotiations with a defendant, the prosecutor is held to a "high standard of good faith" in such circumstances that is satisfied by probable cause to prosecute the third party. *See Miles v. Dorsey*, 61 F.3d 1459 (10th Cir. 1995)("The government acts in good faith when it offers leniency for an indicted third party or threatens to prosecute an unindicted third party in exchange for a defendant's plea when the government has probable cause to prosecute the third party . . . . Consequently, so long as the government has prosecuted or threatened to prosecute a defendant's relative in good faith, the defendant's plea, entered to obtain leniency for the relative, is not involuntary."); *United States v. Pollard*, 959 F.2d 1011 (D.C. Cir. 1991)("Where, as here, the government had probable cause to arrest and prosecute both defendants in a related crime, and there is no suggestion that the government conducted itself in bad faith in an effort to generate additional leverage over a defendant, we think a wired plea is constitutional."); *Martin v. Kemp*, 760 F.2d 1244 (11th. Cir. 1985) (threats against third party impose "high burden of good faith" on prosecutor that is met by probable cause to believe that the third party had committed a crime at the time of threat — case remanded to determine what the police knew at the time of the threat); *see also Stanley v. State*, 280 Ark. 245, 657 S.W.2d 285 (1983) (affirming denial of postconviction relief based on involuntary plea despite threats of a quicker trial and a substantial sentence for the appellant's wife, a co-defendant). Under the facts of the present case, there is no doubt that the State had probable cause to prosecute Baker when it informed Herred that it would offer Baker leniency in exchange for Herred's guilty plea. And, there is no doubt that the State had probable cause to search the residence Herred considered his "home." Thus, where the State had probable cause to arrest and prosecute Herred and Baker, Herred's guilty plea could not have been coerced as a result

of promises of leniency or threats of prosecution made against Baker.

We also agree with the State that the trial court clearly erred in granting postconviction relief because it failed to find that any of counsel's purported deficiencies prejudiced Herred. The trial court's order simply recites a number of factual findings and ends with a conclusory remark that "counsel's assistance was ineffective" "[b]ased upon the totality of the circumstances." The trial court never specifically found that but for any of counsel's deficiencies, Herred would not have pleaded guilty and proceeded to trial. The order not only fails to set forth what, if any, additional information or defenses would have been discovered but for one or any combination of counsel's deficiencies. It also fails to find that, with the benefit of this additional information, there existed a reasonable probability Herred would have insisted on going to trial.

Indeed, the record of this case suggests otherwise. Herred initialled and signed a plea statement where he fully acknowledged that he knew what he was doing. Among other things, he initialed statements such as "Have you discussed your case fully with your attorney and are you satisfied with his services?" and "Are you entering a plea of guilty on your own free will and accord without anyone causing you to do so on account of any promises or threats or any force?" Judge Higgins specifically asked Herred if his attorney had gone over the document with him and if he understood the contents of the document — Herred responded affirmatively. In fact, Judge Higgins extensively queried Herred as to whether he understood his rights and the consequences of his actions, to which Herred repeatedly answered yes. Herred never expressed any dissatisfaction with his attorney at this time, and never suggested any coercion or threat, despite every opportunity to do so. Quite the contrary, Herred gained a considerable benefit from the plea. He was able to plead guilty to a substantially reduced charge, a class A felony, rather than two Class Y felonies.

Moreover, none of the purported deficiencies prejudiced Herred. The prosecutor had voluntarily given Herred all of the discovery and all witnesses were available to testify at

trial. While the trial court appeared to criticize Herred's failure to file a motion to suppress because of facial deficiencies in the nighttime search warrant,[2] the warrant itself demonstrated the factual basis required to justify a nighttime search. *See* Ark. R. Crim. P. 13.2(c); *Neal v. State,* 320 Ark. 489, 898 S.W.2d 440 (1995). The warrant form used in the present case had three boxes allowing the judicial official to indicate a finding of reasonable cause to believe that circumstances justifying a nighttime search existed by checking three boxes. Two of these boxes were marked, the one providing "the objects to be seized are in danger of imminent removal," and the other providing "the warrant can only be safely or successfully executed at nighttime or under circumstances, the occurrence of which is difficult to predict with accuracy." Underneath this, there are instructions to "(State the facts relied on in determining the reasonable cause to believe one or more of the circumstances listed above existed.)" In this space, the following is typed:

> (1). THE SUBSTANCES TO BE SEIZED ARE IN DANGER OF IMMINENT REMOVAL, AN [*sic*] THE SUSPECTS ARE SELLING THE CONTR OLLED SUBSTANCES AT THIS TIME.
>
> (2). THE MARKED BUY MONEY IS IN DANGER OF IMMINENT REMOVAL.
>
> (3). IT IS REPORTED THAT THERE ARE WEAPONS IN THE HOUSE, AND THIS INVESTIGATOR FEELS THAT IT WOULD CONTRIBUTE TO OFFICER SAFETY.

These facts were corroborated by the warrant's supporting affidavit, which showed that the controlled buy had taken place hours before and that marked buy money had been used in the transaction. Thus, to the extent that the trial court ruled that counsel was unconstitutionally deficient in failing to object to the warrant's facial sufficiency because "[i]t [was] difficult for the Court

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[2] The trial court's order provided "After examining the search warrant, it is unclear as to whether the appropriate boxes were checked. The second and third boxes appear to have a 'dot' in them. The box does not contain an X nor a Checkmark. It is difficult for the Court to make a determination as to whether or not a night time search was authorized."

to make a determination as to whether or not a night time search was authorized," it was clearly erroneous.

Based on the foregoing, the trial court clearly erred in granting Herred Rule 37 relief. The judgment of the trial court is reversed.

Reversed.

GLAZE, J., concurring. I concur and would dismiss based upon the trial court's lack of jurisdiction.

Marchele (Richardson) MOORE *v.* Curtis RICHARDSON

97-636 964 S.W.2d 377

Supreme Court of Arkansas
Opinion delivered March 12, 1998

Amy Blackwood, for appellant.

Dale Arnold, for appellee.

RAY THORNTON, Justice. Appellant Marchele (Richardson) Moore brings this appeal from the ruling of the Sebastian County Chancery Court finding her in contempt for violation of its child-visitation order. For reversal, Ms. Moore argues that the chancery court's order finding her in contempt was void for want of jurisdiction both under the Parental Kidnapping Prevention Act of 1980 (PKPA) and the Uniform Child Custody Jurisdiction Act (UCCJA), and because appellee Curtis Richardson voluntarily submitted himself to a Texas court's jurisdiction. We hold that the Arkansas court properly exercised continuing jurisdiction and affirm.

The Sebastian County Chancery Court entered a decree of divorce on February 2, 1993, granting Ms. Moore and Mr. Richardson an absolute divorce. The chancery court also awarded Ms. Moore custody of the parties' minor daughter, required Mr. Richardson to pay child support, and awarded him visitation rights.

Ms. Moore filed a petition for modification of this order on October 25, 1995, requesting that the court terminate visitation because Mr. Richardson was being investigated for allegedly abusing the child, and she also requested the court's permission to move to Seymour, Texas, with the child. Debra Brown, a licensed psychological examiner, testified that these allegations had been investigated by the Arkansas Department of Human Services (DHS) and local law enforcement, who decided that the allegations did not warrant further action.

By order dated March 26, 1996, the chancery court granted Ms. Moore permission to move after May 15, but denied her request to terminate visitation with the child's father. The court modified the visitation to require that all future visits be supervised and limited visitation to one weekend a month once Ms. Moore and the child moved to Texas. The court also held Mr. Richardson in contempt for nonpayment of child support.

Mr. Richardson filed a petition in July 1996, requesting that the court hold Ms. Moore in contempt for violating the March order when she cut off all visitation after the move to Texas. In her counterclaim, Ms. Moore contended that Mr. Richardson had failed to pay child support, asserted that the visitation was not properly supervised, and alleged that the child had told Texas DHS workers that she had been physically and emotionally abused after the Arkansas court had ordered that the visits be supervised. Ms. Moore attached copies of affidavits from Rachel Oquendo, a child sexual-assault counselor at First Step in Texas. She also responded that an active DHS case was pending in this matter in Texas, and if she allowed visitation, action would be taken against her by the Texas DHS.

A hearing was held in Sebastian County on October 21, 1996, at which time the court heard testimony from both parents

and conducted an *in camera* interview with the child. In its October 22 order, the court expressed its reluctance to modify the supervised visitation ordered the previous March, where the court had concluded that the child was not in danger. The court then found that the allegations of child abuse in both Arkansas and Texas had not been substantiated, and decided that it would not cut off the child's natural father's visitation rights on the basis of the evidence and testimony presented. However, the chancery court stressed that visitation be supervised at all times by Mr. Richardson's mother, Martha O'Neal, or by Mr. O'Neal, her husband.

On November 25, 1996, a Texas court issued an *ex parte* protective order finding that Ms. Moore was in "clear and present danger of family violence" and ordering Mr. Richardson to appear at a hearing in Seymour, Texas, on December 17, 1996, to show cause why this order should not become permanent. The emergency order was effective for twenty days. Mr. Richardson made a general appearance on December 17, and provided the Texas court with a certified copy of the Arkansas court's October order.

On January 3, 1997, Mr. Richardson filed a motion for contempt in Sebastian County, asserting that he was being denied visitation and that Ms. Moore was seeking to have the State of Texas assume jurisdiction to modify visitation. Mr. Richardson's attorney called the court's attention to a hearing scheduled by the Texas court for February 3, 1997, to consider whether to terminate Mr. Richardson's parental rights.

Chancellor Harry Foltz, who had been exercising continuing jurisdiction in the Arkansas court, sent Judge David Hajek of the 50th judicial district in Seymour, Texas, a letter dated January 17, 1997, attempting to resolve an apparent jurisdictional conflict. In the letter, Chancellor Foltz stated his belief that the Arkansas court retained jurisdiction in the case under 28 U.S.C. § 1738A(d) (1994), because the father continued to reside in Arkansas and the original custody determination was made in compliance with the provisions of the PKPA and the UCCJA. He informed the Texas court that he had a pending motion for contempt before him, set

for hearing on March 13, and requested a response from Judge Hajek.

Ms. Moore filed a motion to dismiss the contempt proceeding on March 4, 1997, alleging that the chancery court (1) did not have personal jurisdiction over the parties, (2) did not have subject-matter jurisdiction over the issue, and (3) could not act because another action was pending between the same parties arising out of the same transaction or occurrence. In her brief in support of her motion to dismiss, Ms. Moore alleged that the Texas court now has jurisdiction over this proceeding. Ms. Moore attached a copy of the protective order that the Texas court entered on February 11, 1997, stating that both parties made a personal appearance on December 17, 1996, and finding that the Texas court properly had jurisdiction over the matter. The Texas court found that Mr. Richardson had committed family violence since the last Arkansas court order, and that it was in the child's best interest to prohibit Mr. Richardson from contacting or approaching the child and Ms. Moore, except within the parameters approved by the court. The Texas court separately modified visitation, ordering that it occur only under the supervision of Diana Lochridge, a licensed professional counselor in Texas.

After the March 13 hearing, the Arkansas court entered an order setting forth its findings. In its March 17 order, the court denied Ms. Moore's motion to dismiss for lack of jurisdiction, stating that it had had jurisdiction over this case and these parties since it entered the initial divorce complaint in 1993, and had exercised this jurisdiction as recently as October 22, 1996, when Ms. Moore, as well as Mr. Richardson, had requested and received relief from the Arkansas court. In the order, the Arkansas court claimed to have jurisdiction under the PKPA, 28 U.S.C. § 1738A(d). The court also stated that it had attempted to comply with the provisions of the UCCJA requiring that two courts involved in simultaneous proceedings communicate with one another, but that the Texas court did not respond. *See* Ark. Code Ann. § 9-13-206 (Repl. 1993). The court found Ms. Moore in contempt for violation of its visitation orders and for failing to appear in violation of its January 3 order to show cause. The court ordered the sheriff to incarcerate Ms. Moore until a hearing

could be held to determine if she should be released, or until she posted a $2,500 bond to insure her presence at the next hearing. From this order, Ms. Moore brings this appeal.

Ms. Moore argues that the Arkansas court erred in ruling that it had continuing jurisdiction because Mr. Richardson, through his general appearances before the Texas court on December 17 and February 7, "submitted himself and fully engaged in the litigation process." She states that, by his appearance, he acquiesced and waived his right to object to the Texas court's assumption of jurisdiction.

Ms. Moore also contends that the Texas court properly had jurisdiction under the PKPA, even though Arkansas had original jurisdiction under the UCCJA. She alleges that the Texas court correctly exercised jurisdiction for two reasons, citing 28 U.S.C. § 1738A(c): (1) because Texas is now the "home state" of the child and is therefore given jurisdictional preference under the PKPA, and 28 U.S.C. § 1738A(c)(2) because it was necessary to protect the child from continued mistreatment or abuse under the "emergency jurisdiction" provision of the PKPA.

[redacted] Ms. Moore attempts to analyze jurisdiction in terms of whether Mr. Richardson's appearance before the Texas court waived his right to object to jurisdiction, mischaracterizing the issue as one of personal jurisdiction, rather than an issue of subject-matter jurisdiction, which is a defense that cannot either be waived by the parties at any time or conferred by the parties' consent. *See* Ark. R. Civ. P. 12(h)(3). Under the PKPA and UCCJA, child-custody jurisdiction is a matter of subject-matter jurisdiction. 1 Jeff Atkinson, *Modern Child Custody Practice* § 3.31, at 175 (1986). Therefore, the fact that Mr. Richardson may have entered a general appearance before the Texas court does not waive his right to contest the Texas court's subject-matter jurisdiction. *See, e.g., McBride v. McBride*, 688 So.2d 856 (Ala. Ct. Civ. App. 1997) (stating that the UCCJA provisions relate to subject-matter jurisdiction, which cannot be vested by the parties even if all parties consent and request an adjudication on the merits).

[redacted] When dealing with state conflicts over child-custody jurisdiction, we analyze the facts under the provisions of the

UCCJA and PKPA. *Snisky v. Whisenhunt*, 44 Ark. App. 13, 17, 864 S.W.2d 875, 878 (1993). Orders providing for visitation or modifying visitation come within the PKPA's definition of "custody determinations." *Id.*; 28 U.S.C. § 1738A(b)(3). Where the UCCJA and PKPA conflict, the PKPA preempts. *Garrett v. Garrett*, 292 Ark. 584, 587, 732 S.W.2d 127, 128 (1987). Congress was seeking to minimize jurisdictional conflicts such as this one when it enacted the PKPA. *Id.* The Act specifically mandates that:

> The appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in subsection (f) of this section, any child custody determination made consistently with the provisions of this section by a court of another State.

28 U.S.C. § 1738A(a).

Under these terms of the PKPA, the Texas court should not have taken jurisdiction to modify the custody or visitation order of the Arkansas court unless it met the following two conditions under subsection (f): (1) Texas must have jurisdiction under one of the criteria of 1738A(c), and (2) the Arkansas court that issued the initial custody order must have either declined jurisdiction or no longer had jurisdiction. In this case, Texas did specifically determine that it had jurisdiction under subsection (c)(2)(A) as the home state of the child; however, under the second prong of subsection (f), Texas was not permitted to exercise jurisdiction unless the Sebastian County Chancery Court had declined to exercise jurisdiction, or no longer had jurisdiction.

Because the Arkansas court had clearly not declined to exercise jurisdiction, we consider only whether the court no longer had jurisdiction. Ms. Moore claims that the Arkansas court erroneously attempted to retain jurisdiction under subsection (c)(2)(A) of the PKPA. On the contrary, Chancellor Foltz stated in his March 17, 1997, order that the chancery court retained continuing jurisdiction in the case under 28 U.S.C. § 1738A*(d)* because the father continued to reside in Arkansas and the original custody determination was made in compliance with the provision of the PKPA and the UCCJA. The chancery court was correct.

Subsection (d) of the PKPA holds great importance in child-custody determinations because in it Congress expressly declared that the "jurisdiction of a court of a State which has made a child custody determination consistently with the provisions of this section continues as long as the requirement of subsection (c)(1) of this section continues to be met and such State remains the residence of the child or of any contestant." Subsection (c)(1) provides that a "child custody determination made by a court of a State is consistent with the provisions of this section only if — such court has jurisdiction under the law of such State."

The Arkansas court must have had jurisdiction under its state UCCJA, Ark. Code Ann. § 9-13-201 to -228 (Repl. 1993), in order to continue to exercise jurisdiction. Under our UCCJA, the Sebastian County Chancery Court clearly had jurisdiction to modify its February 1993 order, the original order granting custody and visitation. Section 9-13-203 provides:

> A court of this state which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if:
>
> (1) This state (i) is the home state of the child at the time of commencement of the proceeding, ...

Ark. Code Ann. § 9-13-203(a)(1). At the time of the divorce decree, the child had lived in Arkansas all of her life. Although Ms. Moore later removed herself and the child, Mr. Richardson continues to reside in Sebastian County and that county's chancery court has continued to exercise its jurisdiction and has modified its original order on several occasions, at both parties' requests. We conclude that the requirements of subsection (c)(1), and therefore of subsection (d), of the PKPA have been met.

Because we have determined that the Arkansas court had neither declined nor lacked jurisdiction to modify its initial visitation decree, we conclude that the Texas court does not have jurisdiction under 28 U.S.C. § 1738A(f).

We note that at the hearing before the Sebastian County Chancery Court on March 13, Ms. Moore's counsel alleged that perhaps the Texas court was exercising concurrent jurisdiction. The PKPA expressly provides that a court cannot

exercise jurisdiction in a proceeding if a court in another state is exercising jurisdiction consistent with the provisions of the PKPA. 28 U.S.C. § 1738A(g). The purpose of this provision is to avoid "the havoc wreaked by simultaneous and competitive jurisdiction." *Murphy v. Danforth*, 323 Ark. 482, 490, 915 S.W.2d 697, 702 (1996); *see also Atkins v. Atkins*, 308 Ark. 1, 823 S.W.2d 816 (1992). However, one state may assume jurisdiction and become an alternate forum where the initial state declines to exercise its jurisdiction. *See Snisky v. Whisenhunt*, 44 Ark. App. 13, 864 S.W.2d 875 (1993).

Ms. Moore argues that the Texas court's jurisdiction takes precedence because Texas is now the "home state" of the child, a status that is given priority under the PKPA. However, we have stated that we give priority to jurisdictional bases under the PKPA in the following order:

> (1) continuing jurisdiction; (2) home-state jurisdiction; (3) significant-connection jurisdiction; and (4) jurisdiction when no other jurisdictional basis is available.

Murphy v. Danforth, 323 Ark. at 490, 915 S.W.2d at 701 (citing 28 U.S.C. § 1738A(c); Atkinson, *Modern Child Custody Practice* § 3.24, at 165). Even if the Texas court is now the home state of the child, the Arkansas court properly exercised continuing jurisdiction because that basis has priority over home-state jurisdiction under the PKPA.

Ms. Moore also claims that the Texas court assumed emergency jurisdiction to protect the minor child from continued abuse or mistreatment, based on the child's allegations.

The PKPA provides for emergency jurisdiction as a means for a state that does not possess exclusive continuing jurisdiction to enter a temporary order until the state with continuing jurisdiction is able to determine the issues. Roger M. Baron, *Federal Preemption in the Resolution of Child Custody Jurisdiction Disputes*, 45 ARK. L. REV. 885, 910 (1993). The PKPA and UCCJA both contain almost identical provisions that allow a court to exercise emergency jurisdiction when the child is physically present and a genuine emergency, such as abandonment or abuse, exists. *Murphy v. Danforth*, 323 Ark. at 491, 915 S.W.2d at 702 (citing 28

U.S.C. § 1738A(c)(2)(C); Ark. Code Ann. § 9-13-203(a)(3)). Jurisdiction based on an emergency under our version of the UCCJA may only be used in extreme or extraordinary situations where the immediate health and welfare of the child is at stake. *Caskey v. Pickett*, 274 Ark. 383, 386, 625 S.W.2d 473, 475 (1981).

We have stated that emergency powers are limited and should not be used to permanently modify a custody order. *Murphy v. Danforth*, 323 Ark. at 491, 915 S.W.2d at 702. Rather, they should only be used to give a party custody for as long as it takes to travel with the child to the proper forum to seek a permanent modification. *Id.* "Emergency jurisdiction may be exercised independently of the order of preferences, but relief under emergency jurisdiction would normally be only temporary and the parties would be directed to return to a court with the most preferred jurisdictional basis." Atkinson, *Modern Child Custody Practice* § 3.01, at 109.

In *Murphy*, we quoted passages from Professor Atkinson's treatise in which he suggests that a state exercising emergency jurisdiction might act to permanently modify an order where the evidence of neglect or abuse is available in that state, but difficult or impossible to obtain in the child's home state. *Murphy v. Danforth,* 323 Ark. at 491, 915 S.W.2d at 702 (quoting Atkinson, *Modern Child Custody Practice* § 3.18, at 148, n. 170). However, Professor Atkinson advises that this problem may be avoided by taking testimony and transmitting the evidence to the other state. *Id.*

In this case, the Arkansas court had affidavits before it from Texas counselors and social workers, as well as Arkansas psychological evaluations, on which it relied in its order requiring that the child's visits with her father be supervised at all times. The Arkansas court had the benefit of evaluations and reports made both in Texas and in Arkansas; therefore, a permanent modification by the Texas court was not appropriate if Texas was exercising authority under the emergency-jurisdiction provisions of the PKPA.

Ms. Moore argues that an emergency existed that required her to turn to the Texas court for relief, and the Texas

court specifically stated in its order that an emergency existed because of the family abuse. However, under the PKPA and our case law, if a true emergency did exist, the Texas court possessed only the *limited* jurisdiction to give relief for the period of time that it took Ms. Moore to go to the appropriate forum to seek permanent modification of the custody order. While its protective order issued on November 17, 1996, may have been a proper exercise of emergency jurisdiction, its order dated February 11, 1997, clearly attempted to modify visitation in excess of those limited terms. It appears that at all times, the child remained in Ms. Moore's custody and was apparently safe. Under these circumstances, she should have sought relief from the Arkansas court, from which she had sought relief several times before, as the court with preferred jurisdiction to permanently modify visitation.

In summary, the Arkansas court, which entered the initial custody and visitation order, retained continuing jurisdiction over the subject-matter and parties in this case under the PKPA and our state's UCCJA. Because the Arkansas chancery court had continuing jurisdiction that it had not declined to exercise, the Texas court was without jurisdiction to permanently modify the Arkansas court's order. Even if the facts had shown that there was a need to exercise emergency jurisdiction, the Texas court's order went beyond the scope of emergency jurisdiction under the PKPA.

Affirmed.

Benjamin H. JORDAN, Sr., d/b/a
Mid-South Masonry & Mechanical Company and
Amwest Surety Insurance Company *v.* Carrie THOMAS

98-139 964 S.W.2d 399

Supreme Court of Arkansas
Opinion delivered March 12, 1998

Benjamin Jordan, Sr., for appellants.

Skokos, Bequette & Billingsley, P.A., by: *Keith I. Billingsley*, for appellee.

PER CURIAM. Appellant Benjamin Jordan, Sr., has filed a motion for a rule on the clerk. The motion reflects that on May 29, 1997, the Pulaski County Circuit Court entered a judgment in

favor of appellee Carrie Thomas on her claim against appellants for breach of a construction agreement. Subsequently, the trial court entered an order dismissing Jordan's personal counterclaim for damages on July 1, 1997. Jordan tendered the record from the trial court to the clerk of this court on October 29, 1997; however, the clerk refused to accept the tender of the record on the basis that it was untimely. Jordan did not pursue the matter until February 6, 1998, when he filed his motion for rule on the clerk.

Upon our review of the record, we conclude that the trial court's May 29, 1997, decree, which granted judgment in favor of appellee, was not appealable because it did not adjudicate all of the claims of the parties. *See* Ark. R. Civ. P. 54(b); *String v. Kazi*, 312 Ark. 6, 846 S.W.2d 649 (1993). The trial court did not enter an order dismissing Jordan's counterclaim until July 1, 1997. Jordan filed a notice of appeal from the July 1 order on July 31, 1997, and he attempted to tender the record on October 29, 1997, the ninetieth day following his notice of appeal. Under Rule 5 of the Rules of Appellate Procedure, Jordan's tender of the record was timely, and the clerk erred in refusing to docket the appeal and file the record. However, we note that Jordan cannot perfect an appeal on behalf of Amwest Surety Insurance Company because a corporation must be represented by a licensed attorney. *See McAdams v. Pulaski County Circuit Court,* 330 Ark. 848, 956 S.W.2d 869 (1997) (per curiam). Jordan is not an attorney, and he cannot perfect an appeal on behalf of the corporation. Accordingly, the motion for rule on the clerk is granted in part.

P.A. STRICKLIN et al. *v.* Patrick Henry HAYS, Mayor of North Little Rock

97-721 965 S.W.2d 103

Supreme Court of Arkansas
Opinion delivered March 19, 1998

[Supplemental opinion on denial of rehearing issued May 7, 1998.]

Lavey & Burnett, by: *John L. Burnett*, for appellants.

Jeannette L. Hamilton, Assistant City Att'y, for appellees.

W.H. "DUB" ARNOLD, Chief Justice. This case involves a salary dispute between the appellants, P.A. Stricklin and other North Little Rock firefighters, and the City of North Little Rock, of which appellee Patrick Henry Hays serves as mayor. Resolution of this appeal requires our interpretation of an initiated ordinance, adopted by popular vote in the November 1990 general election, which provides that North Little Rock firefighters and police officers are to receive salaries and benefits commensurate with Little Rock firefighters and police officers after considering rank, seniority, time in grade, and service. The trial court found that the initiated ordinance was valid but had lapsed, and thus concluded that the city no longer had any obligation to provide "parity pay" to the firefighters. Because we agree with the firefighters that the trial court erred in interpreting the initiated ordinance, we reverse and remand.

A procedural review of the history of the initiated ordinance is as follows. On June 18, 1980, an initiative petition was filed in the office of the North Little Rock City Clerk's office. The text of the proposed ordinance read as follows:

> "AN ORDINANCE TO PROVIDE THE NORTH LITTLE ROCK POLICE AND FIREMEN WITH SALARIES AND BENEFITS COMMENSURATE WITH THOSE OF THE LITTLE ROCK POLICE AND FIREMEN."
>
> BE IT ENACTED BY THE PEOPLE OF THE CITY OF NORTH LITTLE ROCK, ARKANSAS:
>
> *SECTION 1.* That the North Little Rock Police and Firemen are to be provided with salaries and benefits commensurate with or greater than those of the Little Rock Police and Fire Departments, rank, seniority, time in grade and service considered.
>
> *SECTION 2.* That the number of employees, ranks, and positions within each rank for the North Little Rock Police Department and Fire Department shall not be reduced to a level below

> that authorized as of January 1, 1980, except in case of extreme emergency.

After the citizens of North Little Rock approved this initiated ordinance in the November 1980 election, the city council passed Ordinance No. 5203 on January 5, 1981, adding the following two sections:

> *SECTION 3.* That the sum of $700,000 is hereby appropriated from the general fund of the City of North Little Rock to fund the provisions of this ordinance.
>
> *SECTION 4.* That the present salaries and benefits of the North Little Rock police and firemen have caused many of the policemen and firemen in the City to seek higher paying jobs leaving a serious shortage of trained police and firemen, therefore an emergency is hereby declared to exist and this Ordinance being necessary for the preservation of the public peace, health and safety, shall be in full force retroactive to January 2, 1981.

In December 1981, the city council passed Ordinance No. 5363, which directed the mayor to negotiate with each department head and assistant department head in the city to establish a salary. The ordinance contained a repealer clause, specifically repealing Ordinance No. 5203. Thereafter, Police Chief William Younts and his assistant filed suit against the city in Pulaski County Circuit Court, alleging that the city had considered factors other than rank, seniority, time in grade, and service in determining their salaries. The trial court found that the city council had not complied with Ordinance No. 5203, and that Ordinance No. 5363, purportedly repealing Ordinance No. 5203, was void. This court affirmed in *Thompson v. Younts*, 282 Ark. 524, 669 S.W.2d 471 (1984).

In 1983, the city council passed Ordinance No. 5494, amending Ordinance No. 5203 to exclude the Police Chief, Assistant Police Chief, and Fire Chief from the parity-pay obligation. Later in 1983, the city council referred to the voters Resolution No. 2521, a proposal to repeal parity pay, and, specifically, Ordinance No. 5203. At a special election held on February 7, 1984, the voters defeated this proposal.

In 1994, the requirements of the parity-pay ordinance were met by an agreement between the city and the firefighters' union.

This agreement expired by its own terms on December 31, 1994. The agreement renewed automatically for one year and expired on December 31, 1995. After the parties were unable to reach a new agreement, the firefighters filed the present complaint in Pulaski County Circuit Court on January 15, 1996, claiming that their salaries and benefits are not commensurate with or greater than those firefighters in Little Rock.

The parties agreed to file motions for summary judgment on the issue of the validity of the initiated ordinance. The city maintained in its motion that, when it provided the increases by making the $700,000 appropriation in Ordinance No. 5203 in 1981, it met its obligation under the initiated ordinance regarding parity pay. The city further claimed that it had no "continuing obligation" to provide further parity-pay increases after the increases it provided in January 1981.

In the firefighters' motion for summary judgment, they argued that the city's interpretation was inconsistent with its own previous treatment of the ordinance, and that the ordinance contained no language that parity-pay requirement was a "one-time-only" obligation. The trial court agreed with the city and dismissed the firefighters complaint. The firefighters appeal that decision.

We apply the same statutory construction rules to ordinances as we do to statutes. *Tackett v. Hess*, 291 Ark. 239, 723 S.W.2d 833 (1987). In interpreting a statute, we will give the words in the statute their ordinary meaning and common usage. *Burcham v. City of Van Buren*, 330 Ark. 451, 954 S.W.2d 266 (1997). If the language of a statute is plain and unambiguous, our analysis need go no further. *Id.*

In reviewing the text of the initiated ordinance in question, we observe that it does not contain a "sunset provision," whereby the ordinance would expire on a certain date. *See Williams v. State*, 325 Ark. 432, 930 S.W.2d 297 (1996). Were we to agree with the trial court's interpretation that the ordinance has "lapsed," we would be "resorting to subtle and forced construction for the purpose of limiting or extending the meaning." *Thompson v. Younts*, 282 Ark. at 527, *citing City of North Little Rock v. Montgomery*, 261 Ark. 16, 546 S.W.2d 154 (1977); *Hicks v. Ark.*

State Medical Board, 260 Ark. 31, 537 S.W.2d 794 (1976). Moreover, as the firefighters point out in their brief, the city's interpretation of the ordinance in question is inconsistent with its previous interpretations of the measure. Particularly, the city observed the obligation under Ordinance No. 5203 as continuing when it referred Resolution No. 2521 to the people in 1984, proposing to repeal the ordinance and the parity pay requirement. As we have recognized, "[a] cardinal rule in dealing with a statutory provision is to give it a consistent and uniform interpretation so that it is not taken to mean one thing at one time and something else at another time." *Morris v. McLemore*, 313 Ark. 53, 852 S.W.2d 135 (1993). It is also significant that the voters rejected the proposal to repeal Ordinance No. 5203 and parity pay. As any doubtful interpretation of the initiated ordinance must be resolved in favor of the popular will, *see Thompson v. Younts, supra*, we must conclude that the trial court erred in accepting the city's interpretation that the initiated ordinance had lapsed and that the city no longer had an obligation to provide parity pay to the firefighters.

The dissent raises an interesting issue; however, it was not developed below and the trial court did not consider it. While it might be appropriate for future consideration, under these circumstances, we will not consider it at this time.

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

CORBIN, J., dissents.

DONALD L. CORBIN, Justice, dissenting. I am concerned that this court is overlooking an important principle of law regarding the authority of city councils, and I dissent. I believe the initiated ordinance passed by the citizens of North Little Rock is invalid, as it is not the type of ordinance subject to the initiative power of the people as stated in Amendment 7 to the Arkansas Constitution of 1874. The ordinance is administrative in nature and infringes upon the duties given to the city councils by the General Assembly.

Arkansas Code Annotated § 14-43-502 (1987) provides in pertinent part:

> (a) The city council shall possess all the legislative powers granted by this subtitle and other corporate powers of the city not prohibited in it or by some ordinance of the city council made in pursuance of the provisions of this subtitle and conferred on some officer of the city.
>
> (b)(1) The council shall have the management and control of finances, and of all the real and personal property belonging to the corporation.

Arkansas Code Annotated § 14-55-101 (1987) provides that municipal corporations shall have the power to make and publish ordinances. Arkansas Code Annotated § 14-55-301 (1987), on the other hand, provides that the city council may refer any proposed ordinance to the people for its adoption or rejection, in accordance with the procedures outlined in Amendment 7.

Amendment 7, in turn, establishes that the legislative power of the people of this State shall be vested in the General Assembly, but that the people reserve the power to propose *legislative measures*, including those on a local level. This authority does not, however, include the right to initiate administrative measures, such as the fixing of salaries for employees of a city's police and fire departments. This authority was granted to the city council by the General Assembly in Ark. Code Ann. § 14-51-304 (1987), which provides:

> The city council or board [of civil service commissioners] shall from time to time fix the number of employees and the salaries to be drawn by each rank in the fire and police departments of their respective cities.

This court has long recognized that not all ordinances enacted by a city council are considered to be municipal legislation. *Scroggins v. Kerr*, 217 Ark. 137, 228 S.W.2d 995 (1950). "City governments in Arkansas know no such complete separation of powers as would automatically classify all aldermanic activities as legislative in character." *Id.* at 142, 228 S.W.2d at 998. City councils also possess quasi-judicial functions to which Amendment 7 reserves no power of referendum to the people of those cities. *Id.* Moreover, city councils often enact resolutions and ordinances that are administrative or executive in nature. *Id.* This court explained the difference between such council functions:

> "Both legislative and executive powers are possessed by municipal corporations . . . . *The crucial test for determining what is legislative and what is administrative is whether the ordinance is one making a new law, or one executing a law already in existence . . . . Executive action evidenced by ordinance or resolution is not subject to the power of the referendum,* which is restricted to legislative action as distinguished from mere administrative action. The form or name does not change the essential nature of the real step taken. *The referendum . . . is designed to be directed against 'supposed evils of legislation alone'. 'To allow it to be invoked to annul or delay executive conduct would destroy the efficiency necessary to the successful administration of the business affairs of a city.'*" 1 McQuillin, Municipal Corporations (2d Ed., Rev., 1940) 1000.

Id. at 143, 228 S.W.2d at 998 (emphasis added). This court explained further:

> [I]f there is a law already enacted which authorizes the very action provided for by a later resolution or ordinance, then there is no right to have a referendum on the new measure. It is not a new law, but only a procedural device for administering an old law. The right of referendum should have been exercised when the original measure, the enactment that put the law on the books, was newly adopted.

Id. at 145, 228 S.W.2d at 999. *See also City of North Little Rock v. Gorman*, 264 Ark. 150, 568 S.W.2d 481 (1978). This court similarly held that, under Amendment 7, the right of referendum "may not be invoked except against a 'legislative proposal or enactment.'" *Chastain v. City of Little Rock*, 208 Ark. 142, 144, 185 S.W.2d 95, 96 (1945) (quoting Amendment 7). Thus, it is clear from these decisions that the power of the people to initiate measures by referendum, as outlined in Amendment 7, applies only to laws and ordinances that are legislative in nature. Conversely, those laws or ordinances that are administrative or executive in nature are not subject to the power of referendum.

Correspondingly, in *Czech v. Baer*, 283 Ark. 457, 677 S.W.2d 833 (1984), where the proposed city ordinance involved the fixing of salaries of police and fire personnel and an agreement to binding arbitration in such matters, this court held:

> The basic defect in this ordinance lies in the rule of law, twice stated in the Constitution, that *no municipal corporation shall be authorized to pass any law contrary to the general laws of the state.* Ark. Const., Art. 12 § 4, and Amendment 7. It is provided by state law that a city's legislative body is to fix the number and salaries of its policemen and firemen. Ark. Stat. Ann. § 19-1617 (Repl. 1980) [currently codified as section 14-51-304]. It is fundamental that a city's legislative power cannot be delegated to a committee or an administrative body. *City of Harrison v. Snyder*, 217 Ark. 528, 231 S.W.2d 95 (1950). Nor can the city directors delegate or bargain away their legislative authority. In holding that a city cannot be compelled to bargain collectively with its employees, we have said:
>
>> Basically, the reason for the rule is that the fixing of wages, hours, and the like is a legislative responsibility *which cannot be delegated or bargained away.*

Id. at 460, 677 S.W.2d at 835-36 (emphasis added) (quoting *City of Fort Smith v. Council No. 38, AFL-CIO*, 245 Ark. 409, 413, 433 S.W.2d 153, 155 (1968)). This court held further:

> As we have noted, the Initiative and Referendum Amendment itself provides that "no local legislation shall be enacted contrary to the Constitution or any general law of the State." *Since state law prohibits a city from abdicating or delegating its legislative power to fix its employees' pay, that result cannot be accomplished by an initiated ordinance. Hence the binding-arbitration ordinance would be invalid even if approved by the voters.*

Id. at 461, 677 S.W.2d at 836 (emphasis added). Thus, the decision in *Czech* demonstrates that the people's power to initiate ordinances by referendum has no application where there is state law to the contrary, and that any ordinance so initiated would be invalid.

Accordingly, the ordinance passed by the voters of North Little Rock establishing that the police and fire personnel of that city would be paid a salary commensurate with similar positions and seniority occupied by such persons employed by the city of Little Rock is invalid. State law had already established that only the city council or the board of civil service commissioners is to fix such employees' salaries. An ordinance that effectively strips

these legislative bodies of their statutory authority to make such determinations is invalid for the reasons outlined in *Czech*. Furthermore, beyond its invalidity, the practical implications of the ordinance creates a potential crisis for the city of North Little Rock, were it ever unable to fiscally fund such commensurate salaries.

In sum, whether we consider this ordinance to be administrative in nature or a legislative ordinance that is in conflict with an already established law of this State, the ordinance is not the type subject to the people's power of referendum and is, thus, invalid. It impermissibly infringes upon the power of the city council to fix the salaries of its police and fire personnel and effectively ties the hands of the individual council members, such that they are no longer part of a deliberative body acting independently, exercising their best judgments on this issue. *See Donovan v. Priest*, 326 Ark. 353, 931 S.W.2d 119 (1996), *cert. denied*, 117 S. Ct. 1081 (1997). The ordinance should be considered as nothing more than an advisory indication of how the voters of that city wish their tax dollars to be spent; it cannot be binding law. If it is the continuing desire of the citizens of North Little Rock that their city police and fire personnel be paid the same as their counterparts in Little Rock, they need only voice such desires to their elected council members. The council members, in turn, could debate the feasibility of the request, exercising their judgments in the best interest of both the city and its residents. Likewise, if those citizens are unhappy with the individual performances of the council members, their remedy is to voice their disapproval at the polls by voting for candidates who share their views; they have no recourse to ensure such a measure from the referendum procedure established by Amendment 7. I would thus affirm the trial court's ruling, as it reached the right result, even though it may have been for a different reason. *See Calcagno v. Shelter Mut. Ins. Co.*, 330 Ark. 802, 957 S.W.2d 700 (1997).

SUPPLEMENTAL OPINION ON DENIAL
OF REHEARING

MAY 7, 1998

965 S.W.2d 103

Lavey & Burnett, by: *John L. Burnett*, for appellants.

Jeannette L. Hamilton, Asst. City Attorney, for appellees.

W.H. "DUB" ARNOLD, Chief Justice. The appellants, P.A. Stricklin and other North Little Rock firefighters, challenged an initiated city ordinance that provided that North Little Rock firefighters and police officers are to receive salaries and benefits commensurate with Little Rock firefighters and police officers after considering rank, seniority, time in grade, and service. Specifically, the firefighters appealed the trial court's decision that the ordinance had lapsed. We reversed, noting that there was no "sunset provision" in the ordinance indicating that it expired on a certain date. The dissenting opinion responded that the people had no power to initiate the ordinance in the first place, since the subject matter involved a power reserved to the city council under Ark. Code Ann. § 14-51-304 (1987), namely the power to fix salaries of employees in the fire and police departments. Under Amendment 7 to the Arkansas Constitution, the dissenting justice wrote, the people only reserve the power to propose legislative measures.

The majority opinion included the following language:

> The dissent raises an interesting issue; however, it was not developed below and the trial court did not consider it. While it might be appropriate for future consideration, under these circumstances, we will not consider it at this time.

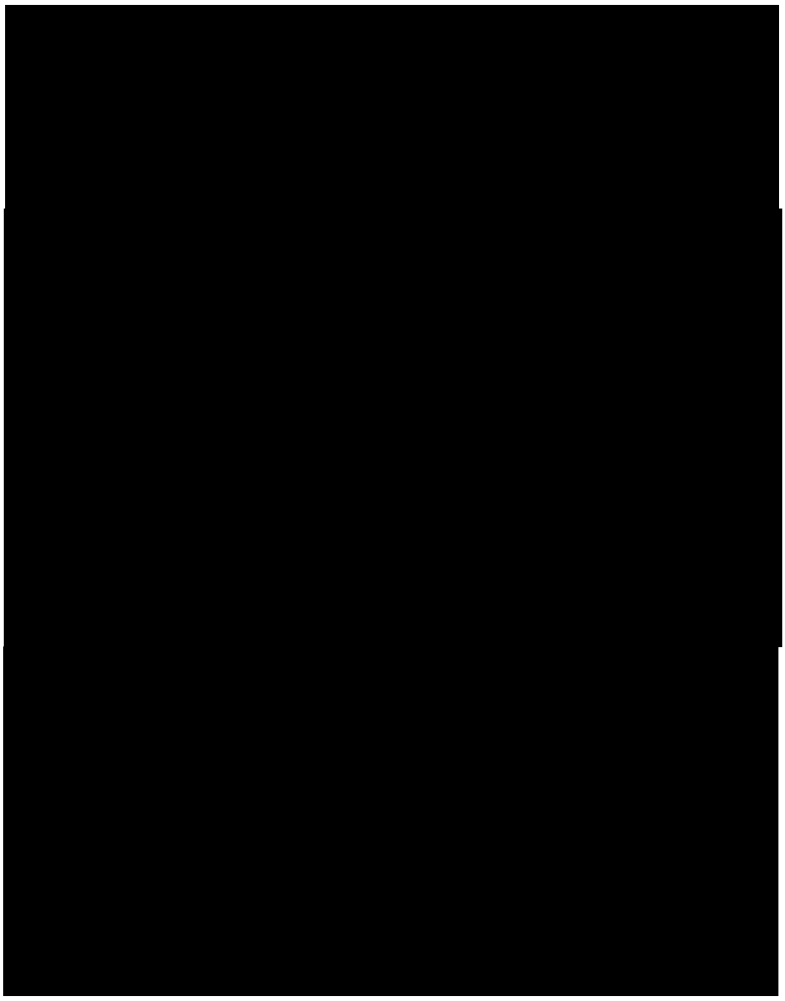
In their petition, the firefighters ask us to "correct" these sentences. They claim that these constitutional issues were raised by the City in its counterclaim, and the trial court ruled against the City. While the abstract reflects that the issue of the constitutionality of the ordinance was raised in the City's counterclaim, as we stated in our opinion, the issues raised by the dissenting opinion were never developed below. Particularly, the firefighters responded to the City's counterclaim that the constitutionality of the ordinance was resolved against the City in *Thompson v. Younts*, 282 Ark. 524, 669 S.W.2d 471 (1984). To be sure, the issues raised by the dissenting opinion in the present case are not the same as those in *Thompson v. Younts*, *supra*. In any event, the trial court dismissed the City's counterclaim, and the City did not appeal that decision to this court. In sum, the present case was argued to the trial court and to this court on appeal on the issue of whether the initiated ordinance had lapsed. We decided that issue in the firefighters' favor. The petition for rehearing is denied.

Petition denied.

Michael SNYDER *v.* STATE of Arkansas

CR 97-570 965 S.W.2d 121

Supreme Court of Arkansas
Opinion delivered March 19, 1998



Val P. Price, for appellant.

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

DAVID NEWBERN, Justice. Michael Snyder, the appellant, was convicted of two counts of rape by deviate sexual activity with an eight-year-old boy. He was sentenced to fifteen years' imprisonment on each count, to be served consecutively. Mr. Snyder argues that the Trial Court erred by admitting evidence, during the sentencing phase of his trial, of a prior juvenile delinquency adjudication. He contends that the prior adjudication was inadmissible pursuant to the law extant at the time the prior juvienile delinquency petiton was filed and at the time the adjudication occurred. He argues that the application of the current statute, which would allow its admissibility was a violation of the *ex post facto* legislation principle, citing cases interpreting the United States Constitution. He also argues that the Trial Court's order that his name be registered as an habitual child sex abuser was in

error because his prior juvenile adjudication was not a "conviction," and thus his case does not fall within the statutory mandate for registration. We agree with the latter point of appeal but not with the former; thus we affirm in part and reverse and remand in part.

1. Juvenile delinquency adjudication

Mr. Snyder fails to cite the law applicable in 1991 to admissibility of juvenile adjudications in subsequent criminal proceedings. He contends, however, that it would have made the adjudication inadmissible in the proceedings now before us.

The current law dealing with admissibility of juvenile adjudications in subsequent criminal-trial sentencing proceedings is found in Act 535 of 1993, § 2(c)(3) and Act 551 of 1993, § 2(c)(3). Those acts are codified as Ark. Code Ann. § 16-97-103 (Supp. 1997). Section 16-97-103(3)(i) provides that prior juvenile adjudications are admissible only if the relevant value of the adjudication outweighs its prejudicial value. Mr. Snyder does not argue on appeal that his prior adjudication is inadmissible based on this provision. The statutory provision also provides that prior juvenile delinquency adjudications can only be admitted for crimes for which the juvenile could have been tried as an adult. § 16-97-103(3)(ii). Mr. Snyder, whose prior adjudication was based on rape, does not contend that he could not have been tried as an adult based on his crime of rape. The only time limitation on use of such an adjudication in the sentencing phase of a trial resulting from a subsequently committed offense is, "That in no event shall delinquency adjudications for acts occurring more than ten (10) years prior to the commission of the offense charged be considered; . . . ." § 16-97-103(3)(iii). Mr. Snyder does not contend that the acts for which he was adjudicated delinquent occurred more than ten years prior to the acts of which he stands convicted in the case now before us.

Mr. Snyder argues that the admission of the prior juvenile delinquency adjudication violates the *ex post facto* clause, citing *Weaver v. Graham*, 450 U.S. 24, 27 (1981), in which the United States Supreme Court stated: "[O]ur decisions prescribe that two critical elements must be present for a criminal or penal law to be

ex post facto: it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it." He contends that § 16-97-103 was applied retrospectively and that he was disadvantaged by its application. Assuming that there was a law in 1991 that would have prevented admissibility of Mr. Snyder's juvenile delinquency adjudication in a subsequent criminal trial, we cannot agree that application of the law applicable at the time of the subsequent trial would violate the *ex post facto* principle.

The United States Supreme Court, in *California Dept. of Corrections v. Morales*, 514 U.S. 499 (1995), stated that although the *Weaver* case "suggested that enhancements to the measure of criminal punishment fall within the *ex post facto* prohibition because they operate to the 'disadvantage' of covered offenders, . . . that language was unnecessary to the results in those cases and is inconsistent with the framework developed in *Collins v. Youngblood*, 497 U.S. 37, 41 (1990)." *Id.* at 506 n. 3. The Supreme Court further explained that "[a]fter *Collins*, the focus of the *ex post facto* inquiry is not on whether a legislative change produces some ambiguous sort of 'disadvantage,' nor, . . . on whether an amendment affects a prisoner's 'opportunity to take advantage of provisions for early release,' . . . but on whether any such change alters the definition of criminal conduct or increases the penalty by which a crime is punishable." *Id.*

Mr. Snyder does not argue that the admissibility of the evidence of the prior juvenile adjudication changed the nature or definition of the offense for which he was tried and convicted or that it increased the penalty. It is thus clear to us that the *ex post facto* principle was not violated. *Cogburn v. State,* 292 Ark. 564, 732 S.W.2d 807 (1987); *Smith v. State,* 291 Ark. 163, 722 S.W.2d 853 (1987). Although not in the context of considering a prior juvenile adjudication, we have held that the provisions for admissibility of evidence in a sentencing proceeding found in § 16-97-103 do not violate the *ex post facto* principle. *Williams v. State,* 318 Ark. 846, 887 S.W.2d 530 (1994). We affirm the conviction.

2. Habitual Child Sex Offender Registration Act

In his second point on appeal, Mr. Snyder argues that the Trial Court erred in certifying him as an habitual child sex offender pursuant to Act 587 of 1987, the Habitual Child Sex Offender Registration Act, since replaced by Act 989 of 1997, the Sex and Child Offender Registration Act of 1997, Ark. Code Ann. §§ 12-12-901 through 12-12-920 (Supp. 1997). His argument is that his juvenile delinquency "adjudication" should not be considered a prior "conviction" for purposes of the prior Act. At the time of Mr. Snyder's conviction, the Act imposed a registration requirement on persons who had been "convicted" of certain sex offenses a second or subsequent time. *See* Act 587, §2.

We adhere to the basic rule of statutory construction which is to give effect to the intent of the General Assembly. *Coleman v. State*, 327 Ark. 381, 938 S.W.2d 845 (1997). Absent a clear indication that "a drafting error or omission [has] circumvent[ed] legislative intent," we do not "interpret a legislative act in a manner contrary to its express language." *Id. See City of Little Rock v. Arkansas Corp. Comm.*, 209 Ark. 18, 180 S.W.2d 382 (1945) ("[I]f the words are free from ambiguity and doubt, and express plainly, clearly and distinctly the sense of the framers of the instrument, there is no occasion to resort to other means of interpretation.").

The clear language of Act 587, § 1, provided, in part, that a "'[h]abitual child sex offender' includes any person who, after August 1, 1987, is *convicted* a second or subsequent time . . . . [Emphasis supplied.]" The General Assembly has recognized that there is a difference between a conviction and an adjudication. *See, e.g.,* Ark. Code Ann. § 16-97-104 (Supp. 1997) ("Proof of prior convictions, both felony and misdemeanor, and proof of juvenile adjudications shall follow the procedures outlined in §§ 5-4-502 — 5-4-504."). *See also* Ark. Code Ann. § 5-73-130(a) (Repl. 1997) ("Whenever a person under eighteen (18) years of age is unlawfully in possession of a firearm, the firearm shall be seized and, after an adjudication of delinquency or a conviction, shall be subject to forfeiture.").

We reverse the order applying the Habitual Child Sex Offender Registration Act because Mr. Snyder does not have a prior "conviction" of a sex offense. We remand the case for orders consistent with this opinion.

Affirmed in part, reversed and remanded in part.

McLANE COMPANY, INC. *v.* Richard A. WEISS, Director of the Arkansas Department of Finance and Administration, and Tim Leathers, Commissioner of Revenue for the State of Arkansas.
Earl Gill Wholesale, Inc.; Glidewell Distributing, Inc.; Shinn Wholesale Co., Inc.; Tom Fitts Tobacco Co., Inc.; Warehouse Distributing Co., Inc.; Southern Cigar & Candy, Inc.; M & K Grocer Co., Inc.; Northwest Tobacco & Candy Co., Inc.; and Douglas Tobacco Co., Inc., Intervenors

97-559 965 S.W.2d 109

Supreme Court of Arkansas
Opinion delivered March 19, 1998

[redacted]

Morphew & Olson, by: *Joe Morphew* and *Williams & Anderson*, by: *Peter G. Kumpe* and *Stephen B. Niswanger*, for appellants.

Malcolm P. Bobo, for appellees Richard A. Weiss and Tim Leathers.

Lax, Vaughan, Pender & Evans, P.A., by: *Audrey R. Evans* and *Walter Skelton*, for intervening appellees.

TOM GLAZE, Justice. Appellant McLane Company, Inc., a wholly owned subsidiary of Wal-Mart Stores, Inc., is a Texas corporation and wholesaler of cigarettes and other products, and is licensed to do business in Arkansas. McLane brings this appeal, questioning the constitutionality of Arkansas's Unfair Cigarette Sales Act, Ark. Code Ann. § 4-75-701 -713 (Repl. 1996), which was enacted in 1951. The declared purpose of the Act is to promote fair and honest competition by prohibiting the sales of cigarettes below cost in the wholesale or retail trades that are made with the intent of injuring competitors or destroying or substantially lessening competition.

The Unfair Cigarette Sales Act defines the cost to wholesalers as the wholesaler's basic cost of the cigarettes plus the cost of doing business as evidenced by the standards and methods of accounting regularly employed by the wholesaler. § 4-75-702(11)(A).[1] Especially significant to this litigation, the Act pro-

[1] Section 4-75-702(11)(A) further provides the cost of doing business must include, without limitation, labor costs, including salaries of executives and officers, rent, depreciation, selling costs, maintenance of equipment, delivery costs, all types of licenses, taxes, insurance, and advertising.

vides that, in the absence of proof of a lesser or higher cost of doing business by the wholesaler making the sale, the "cost of doing business shall be *presumed to be two percent* of the basic cost of the cigarettes" to the wholesaler plus cartage to the retailer outlet, "which cartage cost in the absence of proof of a lesser or higher cost, shall be *presumed to be three-fourths of one percent* of the wholesaler's basic cost of the cigarettes."[2] (Emphasis added.)

Also pertinent to this case on appeal are those provisions of the Act that provide that the State's Director of the Department of Finance and Administration (Director), an appellee herein, is empowered with the authority to prescribe, adopt, and enforce rules and regulations to enforce the Act. § 4-75-706. Under this authority, the Director promulgated Miscellaneous Tax Regulations 1988-2, which provides that a wholesaler's cost of doing business is presumed to be four percent, not the two percent set out in the Act, and the regulation stated the four percent cost of doing business had been determined as a result of cost surveys and other information compiled and received. *See* §§ 4-75-706(a)(2) and 4-75-711(b).

This legal dispute actually began when, on October 18, 1995, McLane contacted the Department of Finance & Administration (DFA), requesting it to repeal Regulation 1988-2 and the Regulation's four percent requirement. In accordance with the provisions of the Act and the Regulation allowing a wholesaler to present proof of a lesser cost-of-doing-business amount, McLane submitted to the DFA a detailed and lengthy cost analysis and report, reflecting a lesser cost of doing business than that presumed by either the Act or Regulation 1988-2. After the DFA's review of McLane's proof, the Director approved and established a lesser doing-business cost at one-half of one percent of the basic cost of cigarettes, thereby making the minimum selling price the basic cost of cigarettes plus one-half of one percent, rather than the pre-

[2] Basic cost of cigarettes under the Act means whichever of the two following costs is lower, namely, the invoice cost of cigarettes to the wholesaler, or the lowest replacement cost of cigarettes to the wholesaler, within thirty days prior to the sale, in the quantity last purchased less all trade discounts except customary discounts for cash, plus the full face value of any stamps or any tax required by any state or local cigarette tax if not already included in the wholesaler's invoice cost. *See* § 4-75-702(10).

sumed two or four percent. The Director's approval resulted in the DFA promulgating Miscellaneous Tax Regulation 1995-5, which established that a wholesaler's cost of doing business is one-half of one percent of the basic cost of cigarettes. On October 25, 1995, the Director notified McLane in writing that, on November 6, 1995, McLane could commence to sell cigarettes at the new minimum price.

On November 1, 1995, events began to change. On this date, McLane's competitors filed suit for a preliminary injunction in Chicot County Chancery Court, requesting that the DFA be prohibited from implementing the new Regulation 1995-5 until such time as the DFA developed administrative rules and procedures to review the statutorily mandated proof required to establish a wholesaler's cost of doing business. The Chicot County Chancery Court granted the petitioners' request for injunctive relief. Though McLane was not a party to the Chicot County suit, the chancery court's order enjoined the Director from establishing one-half of one percent above the basic cost of cigarettes as the cost of doing business to McLane. The DFA subsequently rescinded its earlier approval of McLane's new cost-of-doing-business amount.

On November 16, 1995, McLane filed this suit in Pulaski County Chancery Court against the Director, alleging the State's Act and Regulation 1988-2 are overbroad and unconstitutional deprivations of McLane's due process rights.[3] On December 4, 1995, the Pulaski County Chancellor permitted McLane's competitors (collectively referred herein as Intervenors), to intervene, and the Director and Intervenors defended the Act's and Regulation's constitutionality. On October 30, 1996, the Pulaski County Chancery Court upheld the laws' constitutionality by granting Intervenors' motion for summary judgment, denying McLane's summary judgment motion, and dismissing McLane's complaint. McLane brings this appeal, contending the chancellor erred in holding the Act and Regulation to be constitutional, but

[3] Tim Leathers, the Commissioner of Revenue and Deputy Director of the DFA, was also made a party defendant, but since he serves under the Director in these circumstances, for writing purposes, we refer merely to the Director.

alternatively urges further that Regulation 1988-2 is facially inconsistent with the Act and was arbitrarily promulgated. McLane adds, too, that the Act and Regulation are invalid because they are so vague that they can be and have been enforced arbitrarily.

The Intervenors initially argue that McLane's appeal should be dismissed for its having failed to comply with Ark. R. App. P. 5(b) by obtaining an improper extension and filing an untimely record. The Intervenors' dismissal motion was previously considered and denied by this court on June 9, 1997, and we do not revisit that issue a second time. However, we do address the Intervenors' preservation-of-issue arguments concerning McLane's alternative contentions (1) that Regulation 1988-2 is facially inconsistent with the Act, and (2) that both the Act and Regulation are so vague that they can be and have been arbitrarily enforced. McLane concedes the lower court's order did not specifically address these two arguments. However, McLane in its summary judgment motion below did contend Regulation 1988-2 was contrary to the Act and invalid, and in response, the trial court summarily rejected McLane's contention, by ruling the Regulation was neither arbitrary nor contrary to the Act. However, we fail to find in the chancellor's order where he ruled on McLane's "vagueness" argument. Thus, though we conclude McLane adequately preserved its argument asserting Regulation 1988-2 is facially inconsistent with the Act, we will not reach its vagueness argument, since the trial court neither addressed it, nor did the court rule on the issue. *See Morrison v. Jennings*, 328 Ark. 278, 284, 943 S.W.2d 559, 562 (1997).

Before leaving procedural matters, the Intervenors also claim McLane failed to preserve its argument that the disputed Act and Regulation violate McLane's due process rights under Art. 2, § 8, of the Arkansas Constitution. In making its claim, Intervenors attempt to enlarge and strengthen their constitutional due process argument to a review of cases decided in other jurisdictions where Intervenors suggest that a majority of the courts have found statutes similar to our State's Unfair Cigarette Sales Act to be constitutional. McLane, on the other hand, leans heavily on Arkansas cases *Ports Petroleum v. Tucker*, 323 Ark. 680, 916 S.W.2d 749

(1996), and *Wal-Mart Stores, Inc. v. American Drugs, Inc.*, 319 Ark. 214, 891 S.W.2d 30 (1995), when arguing the Act is constitutionally infirm. We believe McLane unequivocally preserved its due process claim under the Arkansas Constitution, and did so by relying upon the case of *Ports Petroleum*, where we held that Section 4 of Act 380 of 1993 (of the Arkansas Petroleum Trade Practices Act) violated the Due Process Clause of the Arkansas Constitution. In sum, we concluded in *Ports Petroleum* that Act 380 was overbroad in that it prohibited legitimate and innocent competition fostered by below-cost sales, and that the Act failed to include a prohibition against such sales made with predatory intent to damage and destroy competition. McLane argued below, and now on appeal, that *Ports Petroleum* is controlling here and subjects Arkansas's Unfair Cigarette Sales Act to the same constitutional-death knell administered to Section 4 of the Arkansas Petroleum Trade Practices Act. Consequently, we disagree with Intervenor's claim that McLane is precluded from arguing the Unfair Cigarette Sales Act's validity under the Due Process Clause in Art. 2, § 8, of the Arkansas Constitution.

We now turn to McLane's primary argument that Arkansas's Unfair Cigarette Sales Act and Regulation 1988-2 are unconstitutional because the assigned presumption of predatory intent, arising from a below-cost sale under the enactments, too broadly imposes restrictions on McLane's liberty to conduct its business as it chooses. In simple terms, McLane contends that on their face, the Act and Regulation are unconstitutional because they create a presumption of illegality from the mere fact of a below-cost sale.

As previously mentioned, the Act provides that, in the absence of proof of a lesser or higher cost-of-doing-business amount, that cost amount shall be presumed to be two percent of the basic cost of cigarettes to the wholesaler plus cartage to be presumed at three-fourths of one percent of the basic cost. § 4-75-702(11)(B). The Act further states that a wholesaler's sale at less than the fixed minimum price shall be prima facie evidence of intent to injure competition, which, if unrebutted, is a criminal misdemeanor punishable by a fine of up to $500.00. *See* § 4-75-708(e) and (d). McLane submits that the fact of a below-cost sale is not enough to give rise to a presumption of predatory intent,

and such a presumption must be regarded as irrational or arbitrary, and hence unconstitutional, unless it can be said with substantial assurance that the presumed fact (of predatory intent) is more likely than not to flow from the proved fact (minimum price or below-cost sale) on which it is made to depend. *See Stone v. Lockhart*, 414 F.Supp. 1180 (E.D. Ark. 1976).

The *Wal-Mart Stores* and *Ports Petroleum* decisions relied upon by McLane are not controlling even though in both cases this court upheld below-cost sales. *Wal-Mart Stores* involved Ark. Code Ann. § 4-75-209(a)(1) of the Unfair Practices Act which makes it unlawful for any corporation doing business in this state to sell at less than cost for the purpose of injuring competitors and destroying competition. There, because Wal-Mart was selling items below cost as loss leaders, its competitors filed suit, alleging Wal-Mart's pricing was violating the Unfair Practices Act. We disagreed, stating that isolated or occasional instances of selling below cost, while predatory or illegal in nature, do not necessarily indicate a specific intent to monopolize. This court held that, if the policy of this state is to render illegal the loss-leader tactic or to recognize a prima facie case of purposeful intent to destroy competition by below-cost sales in disparate articles that are changed on a regular basis, that policy should be clearly announced by the General Assembly in appropriate legislation. In reversing the chancellor, this court ended its decision by holding § 4-75-209(a)(1) does not provide a sufficient statutory basis to support the chancery court's inference that Wal-Mart had a specific intent to destroy its competition.

As is obvious by its reading, the *Wal-Mart Stores* decision did not involve a sustained below-cost effort over a substantial period of time directed at a single article, as is the situation here. But, more important, the Act in *Wal-Mart Stores* did not contain a comparable statutory scheme to the one in the Unfair Cigarette Sales Act, which affords a competitor the right to establish a lower or higher minimum price. We will discuss this point further below, but first we address McLane's reliance on *Ports Petroleum*.

Ports Petroleum also fails to help McLane's cause. As mentioned previously above, *Ports Petroleum* dealt with the consti-

tutionality of Section 4 of Act 380 of the Arkansas Petroleum Trade Practices Act (APTP Act), which provided that no dealer shall make a retail sale of motor fuel at below cost, where *the effect* may injure competition. We recognized in *Ports Petroleum* that what separates predation from legitimate price cutting is the *intent* of the predator to damage and destroy competition and then recoup the losses through a greater share of the market. *Id.* at 690, citing *State v. Mapco Petroleum, Inc.*, 519 So.2d 1275 (Ala. 1987). We then adopted the following principle to use when reviewing state economic regulations for a due process violation:

> Generally speaking, the test is whether the legislation is designed to accomplish an end within legislative competence and whether the means it employs are reasonably designed to accomplish that end without unduly infringing upon protected rights . . . . Specifically, in these "sale below cost" cases, the primary issue will be whether the legislation too broadly imposes restrictions on individuals' liberty to conduct their business as they choose. If the act penalizes innocent acts not reasonably related to the problem of monopolistic practices or other deceptive, disruptive, or destructive price cutting, the act strikes too broadly.

Our court in *Ports Petroleum* found that the APTP Act did not require *predatory intent* and, in that respect, the act was overbroad and violated Arkansas's Due Process Clause. In the present case, the Unfair Cigarette Sales Act requires predatory intent, so for McLane to prevail here, it must look elsewhere than to our actual holding in *Ports Petroleum.*

McLane submits that the Act here is even more overbroad than the one in *Ports Petroleum* because, while it seems to require a showing of a below-cost sale with intent to injure competition, the Act then says a below-cost sale constitutes "prima facie evidence of intent to injure competitors." Similarly, McLane adds, the Regulation in issue provides that wholesalers are prohibited from selling cigarettes at less than minimum price, and if they do sell under such price, they will be *presumed* to have acted with purpose to injure competition. *See cf. Mott's Super Markets, Inc. v. Frassinelli*, 172 A.2d 381 (Conn. 1961). In addition, McLane argues that, because the Act and Regulation in issue here provide for fines and penalties, a person accused of selling below cost has

the burden of proving his innocence. We believe McLane's arguments are misdirected.

Initially, we mention the well-settled rule that statutes are presumed constitutional, and if it is possible to construe a statute so as to pass constitutional muster, this court will do so. *Clinton v. Bonds*, 306 Ark. 554, 816 S.W.2d 169 (1991). However, it has also been held that a statutory presumption cannot be sustained if there is no rational connection between the fact proved and the fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience. *See Tot v. United States*, 319 U.S. 463 (1943). Where the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them, it is not competent for the legislature to create it as a rule governing the procedure of courts. *Id.* at 468. Under the "rational connection test," a permissive presumption is only required to meet a preponderance standard, and the test is satisfied and a rational connection is shown if the basic fact is more likely than not to lead to the presumed fact. *County Court of Ulster County v. Allen*, 442 U.S. 140 (1979). As previously indicated above, we agree with the Intervenors on this point. Therefore, we conclude the statutory scheme under the Unfair Cigarette Sales Act provides for the rational connection between the presumed cost-of-doing business and minimizing-price amounts in the Act and the Regulation and the presumed fact of predatory intent provided.

The Act does not make all below-cost sales of cigarettes unlawful, but instead exempts (1) isolated transactions not made in the usual course of business, (2) clearance sales for discontinued items, (3) sales of imperfect or damaged items, (4) sales related to the liquidation of a business, or (5) sales made by a fiduciary acting under the order or direction of a court. *See* § 4-75-703(1)–(5). In addition, § 4-75-704 exempts sales below cost made to meet a competitor's prices. We believe the Intervenors are arguably correct in stating that, once the foregoing exempted sales are removed from consideration, it is rational to conclude that it is more likely than not that other below-cost sales are made for improper purposes. But other, perhaps more palatable, reasons

support the Act's and Regulation's presumed-minimum-price amounts.

The Regulation, for example, specifically reflects the wholesaler's presumed basic cost of four percent and the minimum price, which can be charged by a wholesaler for cigarettes, resulted from cost surveys and other information compiled and received by the DFA. Because wholesalers are given the opportunity to sell below these established minimums, it is, once again, reasonable to presume other below-cost sales indicate an intent to injure. Finally, but significantly, we emphasize that a wholesaler, who had a desire to charge a lesser price for cigarettes, has a right under the Act and Regulation to submit to the Director a request to charge a lesser price; the wholesaler must do so by setting forth in detail the accounting standards and methods, computations, and other relevant information, supporting the wholesaler's claimed cost of doing business. McLane, in fact, followed this procedure, and the DFA approved McLane's one-half of one percent amount until the Intervenors obtained their injunctive relief from the Chicot County Chancery Court. However, McLane never challenged the DFA's rescission of McLane's cost-of-doing business amount by raising the issue in the Pulaski County Chancery Court. Nor, to our knowledge, did McLane attempt to pursue its right to request a lesser price except by this litigation, which only seeks to set aside the Act and Regulation as being invalid. In any event, we are convinced, for the reasons stated herein, that, on their face, both the Act and Regulation afford McLane the due process it requests and are therefore constitutional.

We move now to McLane's remaining alternative arguments that Regulation 1988-2 is invalid because it is facially inconsistent with the Act and, at the very least, a question of fact exists as to whether DFA acted arbitrarily and capriciously when it promulgated the Regulation. Concerning McLane's initial point, the law is elementary that an agency has no right to promulgate a rule or regulation contrary to a statute. *See State, Ex Rel. Attorney General v. Burnett*, 200 Ark. 655, 140 S.W.2d 673 (1940), cited with approval in *Pledger v. C.B. Form Co.*, 316 Ark. 22, 871 S.W.2d 333 (1994), and *American Trucking Ass'n v. Gray*, 288 Ark.

488, 707 S.W.2d 759 (1986). McLane first points to the Act's definition of "Basic cost of cigarettes" which reads as follows:

> (1) "Basic cost of cigarettes" means whichever of the two (2) following amounts is lower, namely, the invoice cost of cigarettes to the wholesaler or retailer, as the case may be, or the lowest replacement cost of cigarettes to the wholesaler or retailer, as the case may be, within thirty (30) days prior to the date of sale, in the quantity last purchased, whether within or before the thirty-day period, less, in either of the two (2) cases, all trade discounts except customary discounts for cash, plus the full face value of any stamps or any tax which may be required by any cigarette tax act of this state or political subdivision thereof, now in effect or hereafter enacted, if not already included in the invoice cost of cigarettes to the wholesaler or retailer, as the case may be.

Ark. Code Ann. § 4-75-702(10) (1987).

McLane then draws our attention to the Regulation's definition of "basic cost," and accurately points out that the Regulation omits elements contained in the foregoing Act, and those omissions fail to make the wholesaler account for cartage or amounts received as trade discounts. Furthermore, the Regulation increases the presumption by one and one-quarter percent without any clear explanation as to how that amount was calculated or whether the cost-of-doing-business amount was determined under the Act or Regulation. McLane argues that, by enacting the Unfair Cigarette Sales Act, the General Assembly enumerated the types of costs a wholesaler should consider in order to give the seller more pricing flexibility, but by taking out the foregoing elements, DFA constricted this flexibility.

The Intervenors rejoin McLane's argument by saying that the Act provides that the presumptive cost of doing business shall be two percent plus three-quarter percent cartage in the absence of proof of a lesser or higher cost of doing business. Both Director and Intervenors summarily conclude that, because the DFA interpreted the Act to permit it to promulgate the Regulation establishing a higher cost, DFA's actions in doing so should be deemed reasonable. Clearly, this response in no way explains how DFA's Regulation and its actions fall within the language of

the Act or whether DFA followed the Act or the Regulation when it determined and increased the basic cost of cigarettes.

If DFA employed Regulation 1988-2 when it determined an increased presumptive-cost amount, then it omitted at least two core elements required by the Act. Thus, in this respect, the DFA Regulation was contrary to the Act and invalid. However, the fact that a portion of a regulation is void does not invalidate the whole regulation where such portion is distinctly separable from the remainder which in itself contains the essentials of a complete regulation. *See McClendon v. City of Hope*, 217 Ark. 367, 230 S.W.2d 57 (1950). Here, Regulation 1988-2 was promulgated for the purposes of administering and enforcing the Act, and except for the foregoing flaws of omission mentioned bearing on determining the basic cost of cigarettes, the Regulation appears consistent with the Act. Thus, the issue arises as to whether DFA's Regulation and actions may prevail even though portions of the Regulation are invalid.

To answer this question, we turn to McLane's assertion that the trial court erred in granting the Intervenors' motion for summary judgment. We believe McLane is right, based in part on the factual question discussed above — whether the DFA utilized the Act or its Regulation when it determined "basic cost." Because summary judgment is a remedy that should be granted only when it is clear that there is no genuine issue of material fact to be litigated, that remedy was not appropriate here. *See Wallace v. Broyles*, 331 Ark. 58, 961 S.W.2d 712 (1998); [rehearing denied, *see* per curiam March 5, 1998]. Thus, we reverse and remand this matter for further proceedings to determine under what authority the DFA determined basic cost.

Another factual issue also arises that should be considered by the trial court on remand, and that issue involves the broader question as to what method the DFA used to alter the Act, to increase the presumptive cost of doing business. McLane urges that, for DFA to make such a change to the Act by regulation, the Act requires the DFA to support the change or regulation with a cost survey in accordance with recognized statistical and cost-accounting practices.

McLane argues that there is substantial evidence that shows the DFA did not use a cost survey to determine the four percent presumptive cost of doing business. As a consequence, it argues that a fact question exists as to whether DFA relied on a cost survey when it adopted Regulation 1988-2. To support its argument, McLane reviews the testimony of various DFA officials who stated that they had never conducted cost surveys, and that no surveys were found in their files.

The Director suggests there is ample evidence in the record that cost surveys were done before Regulation 1988-2 was adopted. That evidence, however, was circumstantial and at most reveals only that a fact issue exists as to whether the Regulation was actually supported by cost-survey information.

The Intervenors' response differed from the Director's, arguing that the Act does not *require* cost surveys to be made in connection with the promulgation of regulations by the Director. Without indicating what method the Director used when establishing the four percent minimum-price markup, the Intervenors simply relate that cost surveys are not the *sole* method by which the DFA may establish a presumptive cost of doing business. Once again, the Intervenors' response serves only to show that a fact question exists concerning how the presumptive cost of doing business was established.

The trial court's grant of the Intervenors' motion for summary judgment is reversed and remanded for further proceedings to determine how and under what authority the DFA acted when it determined and increased the basic cost of cigarettes.

Michael Sherman PHILLIPS *v.* STATE of Arkansas

CR 97-814 965 S.W.2d 137

Supreme Court of Arkansas
Opinion delivered March 19, 1998

Joel O. Huggins, for appellant.

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

TOM GLAZE, Justice. Appellant Michael Sherman Phillips brings this appeal from jury verdicts and convictions finding him guilty on the charges of possession of heroin with the intent to deliver and accomplice to the delivery of cocaine. His sole point for reversal is that the trial court erred by refusing to instruct the jury on possession of heroin as a lesser included offense. We affirm.

Phillips was arrested for and charged with the two drug crimes as a result of drug transactions on June 18 and 19, 1996. The Fourth Judicial Drug Task Force (DTF) utilized a confidential informant named Jerry Hernandez to purchase marijuana from Brad Goss, the target of DTF's investigation. During his first buy from Goss on June 18, Hernandez inquired about purchasing more marijuana, as well as methamphetamine, and Goss said he should have some later that night. Hernandez then left Goss to join police officers, and told them he thought he could get a quantity of methamphetamine from Goss. The officers gave Hernandez $960.00 to make another purchase from Goss, and wired Hernandez so they could monitor the second buy. Early on the morning of June 19, Hernandez entered Goss's apartment and was informed by Goss that no marijuana or methamphetamine was available, but that he could purchase some cocaine. Hernandez asked how much cocaine he could get for $960.00, whereupon, Goss went outside his back door to confer with Phillips, and returned with about a half ounce of cocaine. After Hernandez gave the money to Goss, Goss returned to the back door, and gave it to Phillips. The police then entered Goss's apartment, arrested Goss and his girlfriend, and also arrested Phillips who was outside, near Goss's back door. Inside the apartment, the officers found cocaine, marijuana, numerous items of paraphernalia, and heroin. Phillips was searched, and officers found $1,400.00, including the $960.00 "buy money." They also found on him about one-half a gram of heroin.

At trial, Phillips did not testify or offer any evidence in his defense concerning the heroin found on him and in Goss's apart-

ment. The State, on the other hand, presented seven witnesses, including Goss and the officers involved in Phillips's arrest. The officers testified, giving details of the two buys, the seizing of the heroin from Phillips, and the obtaining of drugs from Goss's apartment. Goss testified that he received the heroin found in his residence from Phillips only fifteen minutes before the officers' raid, and explained that the heroin was for having arranged the drug transactions between Phillips and Hernandez.

Although Phillips had offered no evidence, he requested the trial court to give an instruction on the lesser-included offense of possession. He claimed that he was entitled to the instruction based on the State's testimony, indicating that only a "user amount" of heroin was found on Phillips. The trial court denied Phillips's request because Phillips had offered no testimony to support such an instruction, but instead denied being guilty of any charge. The trial court was correct.

Our court has consistently held that, where the evidence shows the guilt of the defendant as to the greater offense, it is not error to refuse instructions on the lesser-included offenses. *Taylor v. State*, 303 Ark. 586, 799 S.W.2d 519 (1990). The case of *Dollar v. State*, 287 Ark. 61, 697 S.W.2d 868 (1985), is directly on point. There, Dollar asserted he was entitled to a lesser-included instruction on possession because he only intended to personally use the marijuana, which had been seen thrown from his and accomplice Joe Cross's truck. Like Phillips in the present case, Dollar did not testify, but his accomplice, Cross, did. Cross's testimony reflected that Dollar's truck was used to harvest the marijuana, and that they planned to divide it between them. In upholding the trial court's ruling to deny an instruction on possession, this court stated there was no testimony given that afforded a rational basis for concluding that Dollar only wanted the marijuana for personal use.

Our decision in *Whitener v. State*, 311 Ark. 377, 843 S.W.2d 853 (1992), is also on point and controlling. In *Whitener*, an undercover officer purchased a quarter-ounce bag of marijuana from Whitener for $30.00, and based on that sale, Whitener was charged with delivery of marijuana. At trial, Whitener chose not

to testify, but requested a jury instruction on the lesser-included offense of possession of marijuana, which the trial court denied, finding no rational basis to give the instruction. On appeal, this court affirmed the trial court's ruling, stating as follows:

> The charge and proof by the State were for the actual delivery of marijuana, and Whitener did not testify. A jury, conceivably could have disregarded [the State's proof], acquitted Whitener of delivery, and found her guilty of the less serious charge of possession, but any rational basis for such a verdict is not readily apparent.

In *Washington v. State*, 319 Ark. 583, 892 S.W.2d 505 (1995), we again upheld the trial court's refusal to instruct on the possession charge where the defendant did not testify and the State offered proof of delivery. We said that, based on the proof presented, no rational basis for a lesser verdict existed.

Here, unlike *Whitener* and *Washington*, the charge against Phillips by the State was not for the actual delivery of the heroin to Goss, but for possession with intent to deliver the heroin police found on Phillips. The State's evidence shows the officers found approximately one-half a gram, or 500 milligrams, of heroin on Phillips at the time of his arrest. That amount is five times in excess of the quantity limit of 100 milligrams required in Ark. Code Ann. § 5-64-401(d) (Repl. 1997) to create a rebuttable presumption that Phillips possessed the heroin with the intent to deliver. Section (d) provides that the presumption for heroin may be overcome by the submission of evidence sufficient to create a reasonable doubt that the person charged possessed a controlled substance with intent to deliver. However, Phillips presented no evidence to rebut the statutory presumption. For a jury to find on the evidence presented that Phillips had only a personal use interest in the heroin found on him, it would have had to disregard the statutory presumption that Phillips possessed the heroin with the intent to deliver.

Additionally, the jury would have had to ignore the evidence in the record indicating that Phillips and Goss were both drug dealers. When police searched Goss's apartment, they found cocaine, marijuana, heroin, and drug paraphernalia, including syr-

inges and two sets of scales. Goss's uncontroverted testimony established that Phillips had provided Goss with the cocaine and marijuana he sold to Hernandez, as well as the cocaine, marijuana, and heroin found in Goss's apartment. Goss testified that one set of scales found in his apartment actually belonged to Phillips, and that Goss had borrowed them to "weigh up" some marijuana. Goss also stated Phillips owned another set of scales that "fit in your pocket," that Phillips told him he used to "weigh up" the cocaine that was sold to Hernandez. This, in addition to the fact that Phillips was arrested with $1,400.00 in his pocket — $960.00 of that the DTF's "buy money" — is more than sufficient to show that Phillips and Goss were drug dealers, and Phillips offered no evidence to the contrary. Because there was no rational basis to give an instruction on mere possession, the trial court ruled correctly to exclude it.

We affirm.

Oscar STILLEY *v.* Wanda McBRIDE

97-628 965 S.W.2d 125

Supreme Court of Arkansas
Opinion delivered March 19, 1998

Appellant, pro se.

Dailey & Woods, P.L.L.C., by: *Wyman R. Wade, Jr.*, for appellees.

TOM GLAZE, Justice. On behalf of two clients, appellant Oscar Stilley, an attorney, filed a § 1983 action in federal court against two Fort Smith police officers, Patricia Sullivan and Ronald Pippin. Stilley sought to obtain the officers' home addresses from their personnel records from Wanda McBride, a City of Fort Smith employee. Stilley wanted the addresses, so he could serve the officers by mail, which was cheaper than having them served in person. When McBride refused Stilley's request, Stilley immediately reduced his request to writing, demanding the addresses pursuant to the Arkansas Freedom of Information (FOI) Act, Ark. Code Ann. § 25-19-101 -107 (Repl. 1996). On the same day, the Fort Smith City Attorney, Stanley A. Leasure, by letter, denied Stilley's demand, and stated the records requested were exempt from disclosure under § 25-19-105(b)(10) of the FOI Act. That provision generally provides that personnel records are not open to the public if their disclosure would constitute a "clearly unwarranted invasion of personal privacy." Six days later, Stilley, pro se, filed this lawsuit in circuit court, seeking Sullivan's and Pippin's home addresses. Fort Smith answered, again denying Stilley's requests, and stating the information sought is exempt under § 25-19-105(b)(10). The circuit court promptly set the matter for a hearing.

At the hearing, counsel revealed that not only had Stilley already obtained the officers' addresses, but also both the City

and the officers had filed their answers in the federal lawsuit. In fact, the federal suit had been dismissed prior to the circuit court's hearing. Nonetheless, the parties and the circuit court proceeded with stipulations of facts, testimony, and arguments, after which the circuit court held that the officers' home addresses were exempt from disclosure under § 25-19-105(b)(10) because the information is a clearly unwarranted invasion of personal privacy. Stilley appeals, claiming the trial court erred.

We first are met with the doctrine of mootness, and the well-settled rule that this court does not render advisory opinions, nor answer academic questions. *Wilson v. Pulaski Ass'n of Classroom Teachers*, 330 Ark. 298, 954 S.W.2d 221 (1997). Under Arkansas law, a case becomes moot when any judgment rendered would have no practical effect on an existing legal controversy. *Id.* However, when the case involves the public interest, or tends to become moot before litigation can run its course, or a decision might avert future litigation, we have, with some regularity, refused to permit mootness to become the determinant. *Campbell v. State*, 300 Ark. 570, 781 S.W.2d 14 (1989). The FOI case now before us unquestionably presents an issue of public interest. Accordingly, we address and decide it.

■ In *Young v. Rice*, 308 Ark. 593, 826 S.W.2d 252 (1992), this court considered whether personnel records, containing written examinations and evaluations of police officers seeking promotions, were exempt from disclosure under § 25-19-105(b)(10). We sustained the trial court's ruling that the public's right of scrutiny would be satisfied under the circumstances, if the evaluation or assessor report forms were released after the names of the officers were deleted. In affirming the trial court, we stated the following:

> The fact that section 25-19-105(b)(10) exempts disclosure of personnel records only when a clearly unwarranted personal privacy invasion would result, indicates that certain "warranted" privacy invasions will be tolerated. Thus, section 25-19-105(b)(10) requires that the public's right to knowledge of the records be weighed against an individual's right to privacy. The public's interest, the right to know that its safety is protected by competent and the best-qualified police lieutenants, is substantial.

> Because section 25-19-105(b)(10) allows warranted invasions of privacy, it follows that when the public's interest is substantial, it will usually outweigh any individual privacy interests and disclosure will be favored.

In the *Young* decision, while recognizing the federal FOI Act personnel exemption is not identical to Arkansas's, we adopted the federal court's standard of balancing the public's and individual's privacy interests when deciding whether personnel information should be disclosed under § 25-19-105(b)(10). We cited *Brown v. FBI*, 658 F.2d 71 (2d Cir. 1981), with approval, stating that the federal courts have found that a substantial privacy interest exists in records revealing the intimate details of a person's life, including any information that might subject the person to embarrassment, harassment, disgrace, or loss of employment or friends. We concluded in *Young* that the release of embarrassing behaviors potentially contained in the records regarding officer promotions touched on the intimate details of the officer-candidates' lives, and was, therefore, a substantial personal privacy interest and would result in a clearly unwarranted invasion of the officers' personal privacy.

Since our decision in *Young*, the Supreme Court has decided the case of *Department of Defense v. FLRA*, 510 U.S. 487 (1994), which is worthy of our review before deciding the question now before us. There, the Court held the disclosure of the home addresses of federal civil service employees constituted a "clearly unwarranted invasion of the employees personal privacy" within the meaning of the federal FOI Act, 5 U.S.C. § 552(b)(6).[1] In *FLRA*, two local unions requested agencies of the Department of Defense to provide them with the names and home addresses of the agency employees in the bargaining units represented by the unions, but the agencies withheld home addresses, claiming such information was prohibited by the Privacy Act of 1974. Eventually, a divided panel of the United States Court of Appeals for the Fifth Circuit rejected the agencies' claim and held that, because

[1] Section 552(b)(6) provides that the FOI Act's disclosure requirements do not apply to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."

exemption § 552(b)(6) of the federal FOI Act did not apply, the FOI law mandated full disclosure. 975 F.2d 1105 (1992). The Fifth Circuit majority panel reasoned that because the weighty interest in public-sector collective bargaining identified by Congress in the Labor Statute would be advanced by the release of the home addresses, disclosure "would not constitute a clearly unwarranted invasion of privacy."[2] The Fifth Circuit adopted the unions' argument that the home addresses of bargaining-unit employees constitute information that was "necessary" to the collective-bargaining process because through them, unions could communicate with employees more effectively than would otherwise be possible.

Upon its certiorari review of the Fifth Circuit Court decision, the Supreme Court reversed, and in doing so, noted that its duty on review was to weigh the privacy interest of bargaining-unit employees in nondisclosure of their addresses against the only relevant public interest in the FOI balancing analysis — the extent to which disclosure of the information sought would "shed light on an agency's performance of its statutory duties" or otherwise let citizens know "what their government is up to." *FLRA*, 510 U.S. at 497. The Court determined that, while the disclosure of the addresses might allow the unions to communicate more effectively with employees, such disclosures would reveal little or nothing about the employing agencies or their activities. *Id.*

After finding the relevant public interest supporting disclosure of home addresses to be negligible, at best, the Court then proceeded to weigh the interest of bargaining-unit employees in nondisclosure of their home addresses. It commenced this stage of its balancing of competing interests, by stating that, because there is little relevant public interest shown for releasing employees' home addresses, it is sufficient under the circumstances to observe that the employees' privacy interest in nondisclosure is not insub-

[2] Under 5 U.S.C. § 7111(a), the Labor Statute requires an agency to accord exclusive recognition to a labor union that is elected by employees to serve as the representative of a bargaining unit. Moreover, an exclusive representative must represent fairly all employees in the unit, regardless of whether they choose to become union members. § 7114(a)(1).

stantial. *Id.* at 500. The Court first pointed out that whether such personal information may be available from other sources such as telephone directories and voter registration lists is not relevant for balancing purposes. *Id.*

The Court generally discussed the employees' various reasons for choosing not to provide the unions with their addresses, such as the employees' lack of familiarity with unions, their opposition to unions, or their reluctance to be disturbed at home by work-related matters. The Court expressed its reluctance to disparage the privacy of home, which is accorded special consideration in our Constitution, laws, and traditions. In addition, the Court said that, when it considered that other parties, such as commercial advertisers and solicitors, must have the same access under the FOI Act as the unions to the employee address lists sought, it is clear that the individual privacy interest that would be protected by nondisclosure was far from insignificant.[3] *FLRH*, 510 U.S. at 501.

In turning to the situation at hand, we initially emphasize that, under Arkansas's FOI Act, records kept in the scope of public employment are presumed to be public records, *see* § 25-19-103(1), but even so, such a record may be exempt from disclosure as is provided under § 25-19-105(b)(10). However, any exemption from disclosure is to be narrowly construed. *Young*, 308 Ark. at 596, 826 S.W.2d at 254.[4] Thus, like the City of Little Rock did in *Young*, the City of Fort Smith here had the burden to show that the officers' privacy interests outweighed that of the public's under the circumstances presented.[5] *Id.*

The City of Fort Smith undertook and met its burden at the circuit court hearing by presenting the testimony of Police Sergeant Patrick Young. Sergeant Young testified, touching on two concerns relating to the disclosure of police officers' addresses

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[3] The Court's analysis previously related that all FOI requesters have an equal, and equally qualified, right to information; the fact that the unions are seeking to vindicate the policies behind the Labor Statute was irrelevant to the FOI analysis.

[4] No issue is raised as to whether the records sought here are public records.

[5] No question was raised below or on appeal concerning the standing of the City to defend Stilley's FOI claim as it related to Officers Sullivan and Pippin.

to the public. His first concern was that, when an officer goes home, the officer expects to be safe, and when he or she is on duty, the officer does not need the added burden of worrying about his family at home. A second concern, given by Sergeant Young, was the potential harassment or nuisance of people visiting or contacting officers at home.

As previously mentioned, Stilley's sole reason for requesting Officers Sullivan's and Pippin's addresses was to utilize a cheaper method of obtaining service of process on the officers. Similar to the federal FOI Act, the purpose of our FOI law is to keep our electors advised of the performance of their public officials and to make it possible for them, or their representatives, to learn and to report fully the activities of their public officials. Ark. Code Ann. § 25-19-102 (1996). The reason given by Stilley for requesting home addresses of police officers — has little or nothing to do with learning or reporting the officers' activities. This is especially true here, since Stilley's federal lawsuit had been filed before he requested the officers' addresses, and the suit had been dismissed before any hearing had been held by the circuit court. Stilley's request, in short, was triggered largely by his intent to save a few dollars in serving process on Sullivan and Pippin, not to learn about or report on those officers' activities.

For the foregoing reasons, we uphold the circuit court's decision, denying Stilley's FOI request for the home addresses of officers Sullivan and Pippin.

Eileen HEIGLE *v.* Jimmie D. MILLER

97-652 965 S.W.2d 116

Supreme Court of Arkansas
Opinion delivered March 19, 1998

Pope, Ross, Dendy & Cazort, by: *Brad A. Cazort*; and *John K. Shamburger*, for appellant.

Snellgrove, Laser, Langley, Lovett & Culpepper, by: *Todd Williams*, for appellee.

DONALD L. CORBIN, Justice. This is a premises liability case. Appellant Eileen Heigle appeals the judgment of the Cleburne County Circuit Court granting summary judgment to Appellee Jimmie D. Miller. On appeal, Appellant asserts that the trial court erred (1) in finding that Appellant was a licensee rather than an invitee in Appellee's home; (2) in applying the wrong standard of care to her negligence claim; and (3) in granting summary judgment when there were genuine issues of material fact to be adjudicated. Our jurisdiction of this appeal is pursuant to Ark. Sup. Ct. R. 1-2(a)(15), as it presents questions involving the law of torts.[1] We find merit to Appellant's second point, and we reverse.

The undisputed facts are as follows. Appellant had been invited by Appellee to come over to Appellee's house for dinner and to spend the night. Appellee was essentially home bound, having to take care of her eighty-year-old husband who suffered from deteriorating health conditions, including incontinence and poor eyesight. As a result of his health problems, Appellee's hus-

[1] We have revised our Supreme Court Rules such that we no longer review cases involving questions on the law of torts. *See 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 (June 30, 1997) (*per curiam*). Because the record in this case was lodged prior to September 1, 1997, jurisdiction of this appeal lies properly in this court.

band frequently urinated on the bathroom floor, in his attempts to relieve himself. On the night in question, Appellant was injured when she slipped on Appellee's bathroom floor, which had been wet with urine. Appellee was asleep when the accident occurred. Appellee normally kept a piece of carpet on the bathroom floor to help prevent the floor from being slick with urine when her husband went to the restroom. Periodically, the carpet was not in the bathroom, as it was being cleaned and allowed to air out for several days. The carpet had been taken up a day or two prior to the date that Appellant fell. Appellant alleged in her complaint that Appellee was negligent for failing to warn her of the slick condition, despite Appellee's knowledge of it.

The trial court granted Appellee's motion for summary judgment, finding that Appellant was a licensee in Appellee's home and that, as a result, the duty of care owed to Appellant was to refrain from injuring her through willful or wanton conduct or to warn of hidden dangers where the licensee does not know or has no reason to know of the conditions or risks involved. The trial court analyzed the claim as a "slip-and-fall" case, ruling that Appellant must prove either (1) that the presence of a substance upon the premises was the result of Appellee's negligence, or (2) that the substance was on the floor for such a length of time that Appellee knew or should have known of its presence and failed to use ordinary care to remove it. The trial court found that, while it was undisputed that the bathroom floor was wet, Appellant did not present any proof that the liquid was negligently placed there or allowed to remain there. The trial court found further that there was no evidence showing that anyone had fallen previously or that Appellee had knowledge that the bathroom floor was wet prior to Appellant's entering the room that night and falling. Additionally, the trial court determined that there was no proof of a breach of a duty to warn Appellant of any hidden dangers.

■ ■ 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). Where reasonable minds could differ as to the conclusions they could draw from the facts presented, summary judgment should

not be granted. *Brunt v. Food 4 Less, Inc.*, 318 Ark. 427, 885 S.W.2d 894 (1994). 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.*

I. Appellant's Status

For her first point for reversal, Appellant argues that the trial court erred in ignoring the law set out in AMI 1106 and thereby failing to recognize her status as an invitee rather than a licensee. She contends that she was invited to Appellee's home and that her visit there on that evening was for a purpose mutually beneficial to both of them. She asserts that Appellee received several benefits from her visit, namely that she brought Appellee food and cigarettes and provided an emotional benefit to Appellee by serving as an outlet for her need to socialize with someone other than her husband. Appellant contends that the trial court erred in classifying her as a licensee instead of an invitee. We disagree.

This court has defined "invitee" as "one induced to come onto property for the business benefit of the possessor." *Bader v. Lawson*, 320 Ark. 561, 564, 898 S.W.2d 40, 42 (1995) (citing *Lively v. Libbey Mem'l Physical Medicine Ctr., Inc.*, 311 Ark. 41, 841 S.W.2d 609 (1992); *Kay v. Kay*, 306 Ark. 322, 812 S.W.2d 685 (1991); *Coleman v. United Fence Co.*, 282 Ark. 344, 668 S.W.2d 536 (1984)). A "licensee" is one who goes upon the premises of another with the consent of the owner for one's own purposes and not for the mutual benefit of oneself and the owner. *Id.* This court has declined to expand the "invitee" category beyond that of a public or business invitee to one whose presence is primarily social. *See Bader*, 320 Ark. 561, 898 S.W.2d 40; *Tucker v. Sullivan*, 307 Ark. 440, 821 S.W.2d 470 (1991).

In *Tucker*, 307 Ark. 440, 821 S.W.2d 470, this court was faced with the question of whether the meaning of "mutual benefit," as used in the definition of "invitee," should be extended to include situations in which the primary purpose of the invitation is social. There, Tucker lived in Sullivan's house and was engaged to marry him. During that time, Tucker was severely burned in an accident at Sullivan's home. Tucker filed suit against Sullivan, alleging that he failed to use ordinary care to maintain the premises in a reasonably safe condition, and that he knew of the danger caused by the proximity of the gasoline to the unguarded gas dryer, but failed to warn her. Sullivan argued that Tucker was a licensee, as she was either a tenant on the premises or a social guest. In holding that the definition of "invitee" should not be extended to such social situations, this court stated that, even assuming Sullivan had extended an invitation to Tucker to live with him, "courts usually require a showing that the invitee's 'presence on the land was, actually or apparently, desired by the defendant, generally for some purpose other than social intercourse.'" *Id.* at 444, 821 S.W.2d at 472 (quoting 62 Am. Jur. 2d *Premises Liability* § 89 (1990)). This court held that Tucker was properly categorized as a licensee, as there was no evidence that they had contemplated anything other than a social arrangement; the fact that Tucker paid some bills and living expenses was "merely incidental to the romantic relationship," as there was no indication that she was obligated to do so. *Id.*

Similarly, in *Bader*, 320 Ark. 561, 898 S.W.2d 40, this court held that a child who was injured while playing on her neighbor's trampoline was not an invitee because her presence on the neighbor's property was primarily social. The plaintiff, the child's father, had argued that the child was an invitee due to the fact that the two families often entertained each other and that, from time to time, each family had looked after the children of the other, thus conferring some economic benefit on one another. Relying on *Tucker*, this court declined to extend the definition of "invitee" to a social situation.

Here, the facts demonstrate that Appellant was a licensee in Appellee's home. The primary purpose of her presence on that occasion was social; she had been invited there for dinner and

to spend the evening. That she brought some food and cigarettes to Appellee was merely incidental to her social purpose of visiting a friend. Moreover, the fact that her social visit was emotionally beneficial to Appellee does not alter the nature of the relationship between the two women or Appellant's purpose for going to Appellee's home on the night in question. We thus agree with the trial court's finding that Appellant was a licensee. We now turn to the issue of the duty of care owed to Appellant.

II. Duty of Care

Appellant argues that even if she were properly classified as a licensee, the trial court erred in applying the wrong standard of care. We agree.

The question of the duty owed by one person to another is always a question of law and never one for the jury. *Bader*, 320 Ark. 561, 898 S.W.2d 40. A landowner owes a licensee the duty to refrain from injuring him or her through willful or wanton conduct. *Id.* Where, however, the landowner discovers that a licensee is in peril, he or she has a duty of ordinary care to avoid injury to the licensee. *Id.* This 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, Appellant concedes that the facts of this case do not support a finding that Appellee acted willfully or wantonly in causing her injuries; instead, she argues that Appellee knew of the recurring condition that made the bathroom floor particularly unsafe, but she failed to warn Appellant of the danger.

On the subject of hidden dangerous conditions, Professors Prosser and Keeton have written:

> The theory usually advanced in support of this duty is that, by extending permission to enter the land, he represents that it is as safe as it appears to be, and when he knows that it is not there is "something like fraud" in his failure to give warning. The licensee may be required to accept the premises as the occupier uses them, but he is entitled to equal knowledge of the danger, and should not be expected to assume the risk of a defective bridge, an uninsulated wire, *an unusually slippery floor*, or a dangerous step, in the face of a misleading silence.

> The duty arises only when the occupier has actual knowledge of the risk, although this may be shown by circumstantial evidence, and he is held to the standard of a reasonable person in realizing the significance of what he has discovered . . . . The duty ordinarily is not to maintain the land in safe condition, but to exercise reasonable care to warn the licensee of the danger; so that if it is known or must be obvious to him, he must look out for himself, and there is no further obligation . . . . The perils of darkness usually are held to be assumed by one who voluntarily proceeds into it, *but if the occupier has any special reason to believe that the licensee will encounter a particular danger there, of which he is unaware, there may still be a duty to give warning.*

W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 60, at p. 417-18 (5th ed. 1984) (footnotes omitted) (emphasis added).

In her deposition, Appellee stated that her husband had problems controlling his bladder and that, at times, he would wet himself. She stated that her house had only one bathroom, and that there was a little night light in the room that she kept on for her husband. She stated that she knew her husband would get up two or three times during the night to go to the bathroom, and that every time he did, he would miss the toilet. She stated that she kept a piece of carpet in the bathroom because the floor was slick. She stated that when the carpet was in the bathroom, the floor was not slick. She stated that she periodically took the carpet out of the bathroom in order to wash it and let it air out for several days. She stated that she had taken up the carpet to clean it a day or two before Appellant came to her home, and that she always left it out for several days when she cleaned it. She also stated that she was asleep when the accident occurred. She stated that after the incident had happened, she apologized to Appellant for not warning her about the condition of the bathroom; she admitted that had she warned Appellant about her husband's urinating on the bathroom floor, Appellant probably would have been more careful and would not have slipped and hurt herself. She stated that no one else had ever slipped or fallen in the bathroom and that it had not occurred to her to warn Appellant of the condition.

Netta Sue Heigle, Appellant's sister-in-law, stated in her deposition that she was present in Appellee's home on the date in question. She indicated that she had helped Appellee take care of her husband in the past. She stated that she saw Appellee's husband go into the bathroom and then come out of the room. She stated that a few minutes later, she saw Appellant go into the bathroom and then heard a loud thump. She stated that she then went into the bathroom and saw urine all over the floor. She stated that when the carpet was on the bathroom floor, the floor was not slick, but that when the carpet was not in place, the floor was definitely slick. She stated that the night light in the bathroom provided enough light to see the toilet and the sink, but not enough to see the urine on the floor. She stated that she was aware that Appellee's husband would urinate on the floor almost every time he went to the restroom. She stated that she had not heard Appellee ever warn Appellant about the condition of the bathroom floor.

Based upon the foregoing testimony, we conclude that there was an issue of disputed facts with regard to whether Appellee had a duty to warn Appellant of the dangerous condition in the bathroom. A jury could have determined that the dangers associated with the recurring condition that made the bathroom floor unsafe were hidden or, at least, not easily recognized, especially given the darkness of the area at the time of the accident. *See Lively*, 311 Ark. 41, 841 S.W.2d 609. As such, summary judgment was inappropriate.

Appellant additionally contends that the trial court erroneously analyzed her negligence claim as a "slip-and-fall" case. Although we believe that this is a "slip-and-fall" case, we agree that the particular facts alleged in this case involve a duty of care different from that focused on by the trial court.

Typical "slip-and-fall" cases occur in public places, which often occupy a great deal of space, and involve isolated incidents where anything could have been spilled or placed on the floor by anyone at anytime without the owner's knowledge. As such, our case law provides that in order to prevail in a "slip-and-fall" case, a plaintiff must show that: (1) the presence of the sub-

stance upon the premises was the result of the defendant's negligence, or (2) the substance had been on the floor 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. *Mankey v. Wal-Mart Stores, Inc.*, 314 Ark. 14, 858 S.W.2d 85 (1993). *See also Derrick v. Mexico Chiquito, Inc.*, 307 Ark. 217, 819 S.W.2d 4 (1991); *Wal-Mart Stores, Inc. v. Kelton*, 305 Ark. 173, 806 S.W.2d 373 (1991); *Skaggs Co., Inc. v. White*, 289 Ark. 434, 711 S.W.2d 819 (1986). This was the legal analysis employed by the trial court.

Here, the presence of the foreign substance on the bathroom floor was not a one-time incident; the facts presented show that there was a recurring condition that frequently made the bathroom floor slick and unsafe. Moreover, Appellee admittedly knew that virtually every time her husband used the restroom, he would urinate on the floor. She further knew that when the piece of carpet was not in place in the bathroom, the floor was slick. Thus, the particular facts of this case do not require an analysis under a traditional "slip-and-fall" theory of recovery; rather, the issue presented requires a determination of the duty to warn of hidden dangers. Accordingly, we reverse the ruling of the trial court as to the issue of whether Appellee breached the duty owed to Appellant as a licensee, and we remand the case for further proceedings consistent with this opinion.

Reversed and remanded.

R.L. NEWTON, Individually and In His Official Capacity as an Officer with the Arkansas State Police; and T. David Carruth, Individually and In His Official Capacity as Deputy Prosecuting Attorney for the First Judicial District, Monroe County *v.*
Louis A. ETOCH

97-325 965 S.W.2d 96

Supreme Court of Arkansas
Opinion delivered March 19, 1998

Winston Bryant, Att'y Gen., by: *Rick D. Hogan*, Deputy Att'y Gen., for appellants.

Charles E. Halbert, Jr., and *Ryals & Soffer, P.C.*, by: *Stephen Ryals*, for appellee.

ROBERT L. BROWN, Justice. This is an interlocutory appeal from a denial of a motion to dismiss filed by appellants R.L. Newton and T. David Carruth on immunity grounds. Appellee Louis A. Etoch, an attorney licensed to practice in Arkansas since

1989, filed a complaint in Phillips County Circuit Court against Newton, individually and in his official capacity as an officer with the Arkansas State Police, and T. David Carruth, individually and in his official capacity as deputy prosecuting attorney for the First Judicial District, Monroe County. In his complaint, Etoch alleged:

> Newton either acting under the direction and supervision of Carruth or conspiring with Carruth, drafted a materially false affidavit for warrant of arrest alleging therein that Etoch had given conflicting incriminating statements to Newton with regards to two automobiles owned by an alleged criminal defendant. The material statements in the affidavit were in accurate (sic), incomplete, and drafted in an effort to mislead the magistrate.

He further asserted that "Newton knew the allegations to be materially false [and] inaccurate, and Newton intentionally misled the Municipal Court Judge for the City of Hazen[.]" This resulted in the Municipal Judge's issuing an arrest warrant for Etoch. He again alleged that this was done at Carruth's "urging, direction and supervision" or "pursuant to the conspiracy."

Etoch further asserted that on June 22, 1995, as a result of that arrest warrant, while appearing on behalf of numerous clients in West Helena Municipal Court, Phillips County, he was arrested, handcuffed, and shackled by Newton without probable cause in a place, time, and manner "calculated and effectuated in an attempt to purposely embarrass, humiliate, and damage Etoch's business and personal reputation." He was then transported by car from West Helena to Hazen in Prairie County.

Upon his arrival in handcuffs and shackles at Hazen Municipal Court, Etoch alleged that he was met by a large number of people, including members of the media and Carruth, and added:

> Carruth, acting alone or with others, completely and totally outside his jurisdiction and without any authority under the law, orchestrated the public display of Plaintiff in custody, in handcuffs and shackles, as he appeared in court and alerted [media] sources to assure that the arrival and presentment of Etoch in court in Hazen be given maximum coverage and exposure, all for the malicious purpose of causing Plaintiff humiliation, embarrass-

> ment, harm and damage to his personal and professional reputation and to detrimentally effect (sic) his law practice.

According to the complaint, Carruth also made statements to the media at that time that Carruth knew or reasonably should have known were false, all for the purpose of injuring him.

In addition, Etoch alleged in the complaint that Newton and Carruth undertook their activities with the expectation that Etoch would never be prosecuted and adds that a criminal information was never filed prior to the expiration of the speedy-trial period under Ark. R. Crim. P. 28. Etoch asserted causes of action against Newton and Carruth for a violation of his Fourth Amendment rights under 42 U.S.C. § 1983 and for the state-law torts of false imprisonment, malicious prosecution, abuse of process, and outrage. Etoch also sought damages against Carruth for slanderous statements made to members of the media and to others in connection with his arrest. Newton and Carruth moved to dismiss Etoch's complaint for lack of subject-matter and personal jurisdiction pursuant to Ark. R. Civ. P. 12(b)(1) and (2). They stated in their motion that the trial court lacked subject-matter jurisdiction due to sovereign immunity under Ark. Const. art. 5, § 20, and that personal jurisdiction was absent due to the immunity provisions for public employees and officials set out in Ark. Code Ann. § 19-10-305 (Repl. 1994). They further asked to dismiss the false imprisonment and slander counts due to the one-year statute of limitation found at Ark. Code Ann. § 16-56-104 (1987). Carruth asserted generally that he was not subject to suit due to prosecutorial immunity, which is absolute.

After a hearing, the trial court denied the motions to dismiss and entered an order, which concluded: (1) accepting as true the allegations in the complaint, the false imprisonment and slander counts were not time-barred; (2) sovereign immunity did not protect officers and employees of the state from their malicious actions; and (3) Carruth was not entitled to absolute prosecutorial immunity because the complaint alleged that he was acting outside of the scope of his duties.

I. Sovereign Immunity

On appeal, Newton and Carruth make the same immunity points argued before the trial court. We first consider the question, however, of whether this is an appealable order and answer in the affirmative.

This court has held that an appeal may be taken from an order denying a motion to dismiss under Ark. R. App. P.—Civ. 2(a)(2) based on the movant's assertion that he is immune from suit. *See Virden v. Roper*, 302 Ark. 125, 788 S.W.2d 470 (1990); *Robinson v. Beaumont*, 291 Ark. 477, 725 S.W.2d 839 (1987). The rationale justifying an interlocutory appeal is that the right to immunity from suit is effectively lost if the case is permitted to go to trial. *Robinson v. Beaumont, supra.* Because Newton and Carruth contend that they are immune from suit, as opposed to being immune solely from liability, the denial of the motion to dismiss on immunity grounds is an appealable order. *Cf. Jaggers v. Zolliecoffer*, 290 Ark. 250, 718 S.W.2d 441 (1986) (involving the denial of summary judgment motions premised on statutory immunity from liability).

When a party appeals an adverse ruling on a motion brought under Ark. R. Civ. P. 12, this court treats the facts alleged in the complaint as true and views them in the light most favorable to the party who filed the complaint. *Brown v. Tucker*, 330 Ark. 435, 954 S.W.2d 262 (1997); *Van Dyke v. Glover*, 326 Ark. 736, 934 S.W.2d 204 (1996); *Cross v. Coffman*, 304 Ark. 666, 805 S.W.2d 44 (1991). Newton and Carruth contend that, even under this standard of review, they are entitled to immunity.

We turn then to the issue of sovereign immunity. Sovereign immunity is jurisdictional immunity from suit, although we have not couched the immunity in terms of subject-matter jurisdiction. *See Cross v. Arkansas Livestock & Poultry Comm'n*, 328 Ark. 255, 943 S.W.2d 230 (1997); *Department of Human Servs. v. Crunkleton*, 303 Ark. 21, 791 S.W.2d 704 (1990). One reason for this distinction is that sovereign immunity may be waived by the State, where subject-matter jurisdiction can never be waived. *See, e.g., State v. Tedder*, 326 Ark. 495, 932 S.W.2d 755 (1996).

Article 5, Section 20, of the Arkansas Constitution reads: "The State of Arkansas shall never be made a defendant in any of her courts." The first question presented, then, is whether the State of Arkansas is the defendant in the instant case. Clearly, the State has not been named as a party, but our inquiry does not stop there.

We established the test for whether a suit is one brought against the State in *Page v. McKinley*, 196 Ark. 331, 336-37, 118 S.W.2d 235, 238 (1938):

> While a suit against state officials or agencies is not necessarily a suit against the state, the general rule that a state cannot be sued without its consent cannot be evaded by making an action nominally one against the servants or agents of a state when the real claim is against the state itself, and it is the party vitally interested. Accordingly, it is well settled, as a general proposition, that, where a suit is brought against an officer or agency with relation to some matter in which defendant represents the state in action and liability, and the state, while not a party to the record, is the real party against which relief is sought so that a judgment for plaintiff, although nominally against the named defendant as an individual or entity distinct from the state, will operate to control the action of the state or subject it to liability, the suit is in effect one against the state and cannot be maintained without its consent[.]

Id. See also Cross v. Arkansas Livestock & Poultry Comm'n, supra; *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); *Beaulieu v. Gray*, 288 Ark. 395, 705 S.W.2d 880 (1986). We have further held that the end result of tapping the State's treasury for payment of damages will render the State a defendant. *State of Arkansas Office of Child Support Enforcement v. Mitchell*, 330 Ark. 338, 954 S.W.2d 907 (1997).

Tapping the State's treasury may well be the end result when only employees and officers of the State are parties. This is so because the General Assembly has mandated the State to pay actual damages based on judgments obtained against its officers and employees, so long as the action by the officer or employee was "without malice and in good faith within the course and

scope of his employment and in the performance of his official duties." Ark. Code Ann. § 21-9-203(a) (Repl. 1996). Thus, to the extent the State will be obligated to pay damages under this provision, it is the real party in interest, and sovereign immunity comes into play. *See Beaulieu v. Gray, supra. See, e.g., Assaad-Faltas v. Univ. of Ark. for Medical Sciences*, 708 F. Supp. 1026 (E.D. Ark. 1989).

Our law is clear that in order for Etoch to counter an assertion of sovereign immunity, he must allege sufficient facts in his complaint to support the claim of malicious conduct by Newton and Carruth. In 1981, the General Assembly enacted law which provides that an officer or employee of the State is immune from an award of damages if that officer or employee acted without malice and within the scope of his employment. Ark. Code Ann. § 19-10-305(a) (Repl. 1994). *See also Cross v. Arkansas Livestock & Poultry Comm'n, supra; Smith v. Denton*, 320 Ark. 253, 895 S.W.2d 550 (1995); *Beaulieu v. Gray, supra.* Conversely, an officer or employee who acts maliciously or outside the scope of his employment is not protected by § 19-10-305(a). *See Bland v. Verser*, 299 Ark. 490, 774 S.W.2d 124 (1989); *Beaulieu v. Gray, supra.* By its enactment the General Assembly has clearly waived the State's sovereign immunity for certain actions taken by its officers and employees.

Construing the complaint liberally in favor of Etoch, as this court must do, *see Brown v. Tucker, supra*, Etoch has alleged a conspiracy between Newton and Carruth to have him arrested for the malicious purpose of embarrassing him and damaging his professional reputation and with knowledge that (1) no probable cause existed; (2) the allegations contained in the affidavit for arrest were false; and (3) no prosecution would ensue. We are convinced that Etoch's complaint contains sufficient allegations of malicious conduct to take the conduct outside the protection of § 19-10-305(a) and, accordingly, outside of the bounds of the Arkansas Constitution because the coffers of the State are not at risk for malicious conduct.

There is also the point that Etoch has sued Newton and Carruth both individually and in their official capacities,

which is relevant for purposes of his § 1983 claim. The United States Supreme Court has held that states are not "persons," which is the status required for § 1983 lawsuits, and also that a suit against a state official in his or her official capacity is not a suit against that person but, rather, is a suit against that official's office. *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989). Thus, suits against persons in their official capacities do not qualify as suits against persons for § 1983 purposes. Counsel for Etoch acknowledged at oral argument that it was error to sue Newton and Carruth in their official capacities for a § 1983 violation. For purposes of this opinion we will treat the two state officers as if they were sued only as individuals.

This leaves the § 1983 count pending against Newton and Carruth as individuals. Newton and Carruth contend they are immune as individuals because they were acting within the scope of their duties as state officers. A § 1983 suit is one brought pursuant to an act of Congress for a deprivation of civil rights against persons operating under color of state law. It establishes a federal cause of action to be enforced in either federal or state courts. *See Arkansas Writers' Project, Inc. v. Ragland*, 293 Ark. 395, 738 S.W.2d 402 (1987); *Robinson v. Beaumont, supra*; *Jaggers v. Zolliecoffer, supra.* As such, it is the supreme law of the land, and any state claim of immunity must yield to it. U.S. Const. art. 6, § 2; *Howlett v. Rose*, 496 U.S. 382 (1990). Sovereign immunity, accordingly, is not dispositive of the § 1983 claim for this additional reason. Hence, the trial court reached the right conclusion.

We hold that Newton and Carruth are not immune under the doctrine of sovereign immunity from the § 1983 cause of action or from the state-law tort claims.

II. Prosecutorial Immunity

Carruth also contends that he is entitled to absolute immunity as opposed to qualified immunity under our decision of *Culpepper v. Smith*, 302 Ark. 558, 572, 792 S.W.2d 293 (1990). The U.S. Supreme Court has distinguished qualified immunity and absolute immunity by stating that qualified immunity depends on the circumstances and the prosecutor's motives, as established

by the evidence. *Imbler v. Pachtman*, 424 U.S. 409 (1976). Absolute immunity, on the other hand, defeats a suit at the outset so long as the official's actions were within the scope of his or her duties. *Id.* Malicious conduct will still be protected by absolute immunity. *See Imbler*, 424 U.S. at 427. Malice, however, can defeat a claim of qualified immunity.

In *Culpepper v. Smith, supra*, we relied on *Imbler v. Pachtman, supra*, and stated:

> The decision of a prosecutor to file criminal charges is within the set of *core functions* which are protected by absolute immunity. This is so even if the prosecutor makes that decision in a consciously malicious manner, vindictively, without adequate investigation, or in excess of his jurisdiction.

Culpepper, 302 Ark. at 572, 792 S.W.2d at 300 (citations omitted) (emphasis added). This court noted, however, that the relevant question was whether the wrong complained of was committed by the prosecutor within the scope of his official duties. *Id.* In the current litigation, Etoch contends that *Culpepper* is not controlling because he has alleged that Carruth took actions outside the scope of his authority under law. Specifically, Etoch alleges that Carruth was outside of his judicial district as a prosecutor when he obtained an arrest warrant against Etoch in Hazen.

The U.S. Supreme Court has spoken on this issue in a line of cases involving § 1983 actions. The State does not discuss these cases, some of which were cited by Etoch, or attempt to distinguish them. In *Imbler v. Pachtman, supra*, the prosecutor was sued in a civil suit under § 1983 for allegedly using perjured testimony at the plaintiff's criminal trial and for suppressing material exculpatory evidence. The Court held that a prosecutor is immune from a § 1983 suit for damages for activities within the scope of the prosecutor's duties in "initiating a prosecution and in presenting the State's case." *Imbler*, 424 U.S. at 431. The Court acknowledged that, at common law, courts were virtually unanimous in holding that prosecutors had "absolute immunity" for actions undertaken within the scope of their prosecutorial duties. *Id.* at 420. The Court continued by discussing immunity from § 1983 actions in conjunction with common law tort immunities

and determined that awarding only qualified immunity in conjunction with the prosecution of a case would undermine the performance of prosecutorial duties and subject prosecutors to the "constant dread of retaliation." *Id.* at 428, *quoting Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950). The Court then cautioned:

> It remains to delineate the boundaries of our holding . . . . We agree with the Court of Appeals that [the prosecutor's] activities were intimately associated with the judicial phase of the criminal process, and thus were *functions* to which the reasons for absolute immunity apply with full force. We have no occasion to consider whether like or similar reasons require immunity for those aspects of the prosecutor's responsibility that cast him in the role of an administrator or investigative officer rather than that of an advocate.

Id. at 430-31 (citations omitted) (emphasis added). Thus, the Court in *Imbler* focused on what function the prosecutor was engaged in at the time of the alleged wrong, and it drew a distinction between the prosecutor's role as advocate and the role of an administrator or investigator.

In a subsequent decision, the Court adhered to this "functional approach," and held that a prosecutor was absolutely immune against liability for participating in a probable-cause hearing and eliciting false testimony from witnesses during that hearing. *See Burns v. Reed*, 500 U.S. 478 (1991). The Court observed that this activity by the prosecutor was "intimately associated with the judicial phase of the criminal process." *Burns*, 500 U.S. at 492, *quoting Imbler v. Pachtman*, 424 U.S. at 430. Following the *Imbler* functional approach, the Court concluded that the prosecutor's appearance clearly involved his role as the advocate for the state rather than a role as administrator or investigator. The Court went on, however, and held that the prosecutor only had qualified immunity pertaining to the legal advice he gave to police officers about putting a criminal suspect under hypnosis because giving advice to investigative officers was not intimately connected with the judicial phase of the criminal process.

Next, in *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993), the Court granted only qualified immunity to prosecutors in the face

of allegations that they had fabricated evidence during the preliminary investigation of a crime for the purpose of obtaining an indictment. The Court held that this conduct by the prosecutor was not undertaken in a judicial role: "Their mission at that time was entirely investigative in character. A prosecutor neither is, nor should consider himself to be, an advocate *before he has probable cause to have anyone arrested.*" *Buckley*, 509 U.S. at 274 (citation omitted) (emphasis added). The Court emphasized that when a prosecutor performs investigative functions normally performed by a police officer, it is neither appropriate nor justifiable that for the same act immunity should absolutely protect the prosecutor but not the police officer. The Court in *Buckley* also granted only qualified immunity for statements made by one of the prosecutors to the press. The Court reasoned that not only was there no common law immunity for this conduct, but it was also clear under *Imbler*'s functional approach that these statements were not intimately tied to the judicial phase of the criminal process.

Most recently, the Court, in *Kalina v. Fletcher*, 118 S.Ct. 502 (1997), held that a prosecutor was not entitled to absolute immunity when she vouched under penalty of perjury for the truth of matters contained in a "Certification for Determination of Probable Cause," in connection with the issuance of an arrest warrant. The Court did, however, afford her absolute immunity for certain functions undertaken in connection with preparing and filing the information and the motion for the arrest warrant. The Court explained:

> [P]etitioner argues that the execution of the certificate was just one incident in a presentation that, viewed as a whole, was the work of an advocate and was integral to the initiation of the prosecution. That characterization is appropriate for her drafting of the certification, her determination that the evidence was sufficiently strong to justify a probable-cause finding, her decision to file charges, and her presentation of the information and the motion to the court. Each of those matters involved the exercise of professional judgment; indeed, even the selection of the particular facts to include in the certification to provide the evidentiary support for the finding of probable cause required the exercise of the judgment of the advocate. But that judgment could not affect the truth or falsity of the factual statements themselves.

> Testifying about facts is the function of the witness, not of the lawyer. No matter how brief or succinct it may be, the evidentiary component of an application for an arrest warrant is a distinct and essential predicate for a finding of probable cause. Even when the person who makes the constitutionally required "Oath of affirmation" is a lawyer, the only function that she performs in giving sworn testimony is that of a witness.

Kalina, slip op. at 11-12. Thus, the Court made a clear distinction between a prosecutor's preparing a probable-cause affidavit for a complaining witness to sign in connection with an arrest warrant and criminal information, which is more the role of the prosecutor as lawyer, and the actual swearing to the truthfulness of that same affidavit as complaining witness. The latter role is more properly that of an investigator or victim.

To summarize, this line of Supreme Court cases appears to foreclose absolute immunity for Carruth for Etoch's allegations relating to (1) his knowing direction and supervision of Newton in drafting a materially false affidavit and his conspiracy with Newton to accomplish that end outside of his jurisdiction as a prosecutor, and (2) his slanderous statements made to the press and others concerning the arrest. *See Kalina v. Fletcher, supra; Buckley v. Fitzsimmons, supra.* Whether the latter conduct is entitled to absolute immunity was expressly decided against Carruth's position by the Supreme Court in *Buckley v. Fitzsimmons, supra.* As to the former, knowingly directing and supervising false testimony for an arrest-warrant affidavit appears to be closely akin to allegations that a prosecutor fabricated evidence during the preliminary investigation of a crime, which was the issue in the *Buckley* case. The Court held in *Buckley* that this activity fell under the investigative, as opposed to the judicial or advocate, function. Also, the Court recently held that a prosecutor does not receive absolute immunity for swearing to false information in an affidavit for an arrest warrant in *Kalina v. Fletcher, supra.* It logically follows that knowingly directing the preparation of a materially false affidavit would not pass muster.

There is one additional point which we emphasize. The Supreme Court uses a presumption that qualified immunity initially applies to the conduct of a prosecutor with the burden

placed on that prosecutor seeking absolute immunity to establish that it is justified for the particular function in question. *See Burns v. Reed*, 500 U.S. at 486–87. Carruth in his brief and in oral argument provided us with no rationale for why absolute immunity should apply to Etoch's allegations, and, thus, he failed to meet his burden on all causes of action. This is so even while there are myriad cases on this subject. *See generally* Annotation, *When is Prosecutor Entitled to Absolute Immunity from Civil Suit for Damages under 42 USCS § 1983: Post-Imbler Cases*, 67 A.L.R.Fed. 640 (1984 & Supp. 1997). Carruth directs our attention only to *Culpepper v. Smith, supra,* in support of his contention of absolute immunity. That case, though, was decided before the *Burns, Buckley,* and *Kalina* decisions by the Court and is not controlling on its face.

Ordinarily, we would deem a prosecutor to be immune absolutely from claims of malicious prosecution or abuse of process. Here, though, the conduct alleged against Carruth falls outside of traditional prosecutorial functions and, indeed, in part outside of Carruth's jurisdiction as a prosecutor. Should it subsequently develop that Carruth was engaged in conduct intimately connected to his role as prosecutor in the judicial process, absolute immunity would attach. We conclude that Carruth does not have absolute immunity for the conduct alleged in Etoch's complaint.

We emphasize what is before this court today. The sole issue is one of prosecutorial immunity raised by Carruth as a jurisdictional matter under Ark. R. Civ. P. 12(b)(1) and 12(b)(2). No issue has been raised at this juncture under Ark. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. And no discovery has occurred which might give rise to future motions based on the discovered facts.

Affirmed.

TOWN OF HOUSTON, Arkansas;
and Carl G. Hillis, Agent for Petitioners *v.*
Anna CARDEN et al.

97-715 965 S.W.2d 131

Supreme Court of Arkansas
Opinion delivered March 19, 1998

James F. Goodhart, P.A., for appellants.

McMillan, Turner, McCorkle & Curry, by: *Ed McCorkle*, for appellees.

ROBERT L. BROWN, Justice. On June 23, 1995, appellant Carl G. Hillis and numerous other landowners petitioned the Perry County Court that 900 acres of land lying west of the Town of Houston be annexed into the town pursuant to Ark. Code Ann. § 14-40-601 (1987). The Perry County Court found that the petition was "right and proper" under Ark. Code Ann. § 14-40-603(a) (1987), and ordered the annexation.

Appellees Anna Carden and other landowners, who live within the annexed area (Carden) filed an action in circuit court against the Town of Houston (Town) and Hillis to prevent the annexation. Carden had received a permit to operate a hog farm in the annexed area, and under a Houston ordinance, she could not do so. At the ensuing trial, witnesses testified and evidence

was received, following which the trial court entered an order annulling the annexation. The court specifically found that none of the five factors announced in *Vestal v. Little Rock*, 54 Ark. 321, 15 S.W. 891 (1891) had been satisfied.

At trial, Carden presented evidence on why the annexation should be annulled and called Jerry Lawson, Mayor of Houston. The mayor testified that the Town was one square mile, or 640 acres, in size and that the population was approximately 175 persons. He testified that the Town did not have a water treatment plant or sewer system and that it received its water by pipeline from the nearby town of Perryville. He admitted that while some of the residents who lived on the periphery of the proposed annexation received water from Houston, others used well water, and that Perryville had restricted the Town's ability to add new customers. Mayor Lawson also testified that Houston had a volunteer fire department that included members who lived outside of the Town and that service was provided to out-of-town residents. He stated that the Town lacked a street department and equipment but that the Town had reached an agreement with the county judge for the maintenance of portions of a county road located within the proposed annexation.

Mayor Lawson admitted that Houston lacked a planning commission, other than the Town council, and that it did not provide for garbage pickup. He admitted that the population of the Town had decreased in the last twenty or thirty years and that the Town only had three businesses: a general store, an automobile-repair station, and a realty company. He testified that only three to five buildings had been built in the Town the last five years and that no building permits were in existence for the proposed annexation. Although he testified that he heard that persons had land for sale in the proposed annexation, he stated that he knew of no person who was platting land into blocks and lots.

Mayor Lawson described Ordinance No. 95-1, which was passed on December 14, 1995. He testified that that Ordinance was the only ordinance in effect in the Town and that it prevented commercial livestock operations from conducting business within the Town limits. In connection with the ordinance, he admitted

that he "heard a lot of talk" about Carden, who lived within the proposed annexation and who had received permission from the Arkansas Department of Pollution Control and Ecology (Department) to operate a hog farm. He maintained that Carden's activities were not the reason for the ordinance, but he admitted that he wrote to the Department and requested that it revoke her permit. The request was denied.

Mayor Lawson also told the circuit court that the Town had been considering annexation for at least four years in order to receive population-based matching-fund money and to improve its fire department by locating a pumper fire truck and fire house within the proposed annexation. He also believed that the proposed annexation would lead to better security, possibly in the form of a marshall; better lighting; better roads; and city water due to the possibility that the Town would expend money to provide these services.

He further explained that Ordinance No. 95-1 was an exercise of the Town's police power to prevent nuisances from occurring within the Town's limits. He agreed that the ordinance was passed, in part, due to noxious odors from a separate hog farm located to the east of town. In apparent contradiction of his testimony on direct examination, he explained that the population of Houston had grown in the last five to ten years with the construction of several new homes. He explained that if the Town had increased revenues, it would be more likely to spend money to provide water service to the annexed land.

Carden next testified that she owned 91 acres of land located within the proposed annexation that she used for raising cattle. She stated that she received her hog-farm permit on December 30, 1995. She related that although a hearing was held on her permit before the Department where appellant Carl Hillis and others testified in opposition, no appeal was sought by them after she was awarded the permit. In her opinion, the purpose of the annexation was to stop the operation of her proposed hog farm.

Carden then described the area to be annexed. She testified that the vast majority of the 900 acres was pasture and timber, with homes located on several parcels of land, and a greenhouse

and a "New Beginnings" ministry on others. She testified that she was not aware of the operation of any businesses within the proposed annexation and that she did not know of any land for sale or land being platted for subdivisions. Carden also stated that no roads extended throughout the proposed annexation.

Appellee Toby Davis, who owned approximately 45 acres within the proposed annexation, testified that he raised beef cattle on his property. He stated that he had hoped to operate one or two chicken houses, but that now he could not do so as a result of Ordinance No. 95-1. He added that prior to the annexation, Hillis contacted him about supporting the annexation and told him: "[W]e need to pull together to stop hog farms." It was clear from his conversation that Hillis was referring to Carden. He testified that there were no roads crossing through the proposed annexation and that he was not aware of any property being for sale.

The Town and Hillis then put on their case. Hillis, who owned 80.5 acres within the annexation, explained that landowners owning 27 parcels of land within the 900-acre proposed annexation joined him in his petition for the annexation. Hillis reiterated that the reasons behind the annexation were better fire and police protection, water, and street lights. He believed that he and other landowners would eventually develop portions of their land into a subdivision once the area was annexed and "absolutely" agreed that Carden's plans to operate a hog farm played a role in the annexation because he believed it was the only way to address such a nuisance. He stated that he was well aware of the problems caused by hog farms because the noxious odors from the Brook Hog Farm, which was located east of Houston, were generally experienced throughout the community.

Hillis also testified about the use of the land in the proposed annexation. He stated that no people within the area were engaged in row-crop farming because of the quality of the land, which, he opined, was not suited for that farming activity. Much of the land, he said, was pasture, and timber was raised on only one plot. He did admit on cross-examination that he and other landowners used their pastures to raise cows and that numerous

landowners held property that contained standing timber. He testified that most of the land was used for residential purposes and that there was a "New Beginnings" ministry, a church, a greenhouse, and a printing business in the affected area. He also admitted that he and other appellants were members of Citizens United Against the Proliferation of Hog Farms, which was engaged in various lawsuits throughout the state to prevent the establishment of hog farms.

Other proponents of the annexation living in the area testified that the best use of the area was not agricultural and that the hog farm would depreciate the value of their property and cripple their ability to enjoy the outdoors. They further claimed that improved Town services for them was a definite factor in favor of annexation.

The circuit court issued a letter opinion and subsequent order in which he annulled the annexation and found that the area in question did not meet any of the *Vestal* criteria. *See Vestal v. Little Rock, supra.* The circuit court specifically found:

- There was no evidence the town needed the annexed land for any proper town purpose like extension of streets, sewer, gas, or water.
- There was no evidence the town needed the area for business purposes.
- There was no evidence of crime in the town or surrounding areas.
- There was no evidence that the annexed land had a higher or better use for municipal purposes.
- Prevention of a hog farm is not a prong for annexation and stopping foul odors is not a reason for proper annexation of property.

The Town and Hillis contend on appeal that the circuit court erred in its decision for two reasons: (1) the court improperly shifted the burden of proof to the proponents of the annexation, and (2) the court's findings were not supported by substantial evidence. We first consider the issue of the burden of proof.

The burden of proof in an action to prevent annexation is placed on the remonstrants to prove that the area should not be

annexed. *Gay v. City of Springdale*, 298 Ark. 554, 769 S.W.2d 740 (1989) (*Gay II*); *Chastain v. Davis, supra*; *City of Crossett v. Anthony*, 250 Ark. 660, 466 S.W.2d 481 (1971). *See generally* Morton Gitelman, *Changing Boundaries of Municipal Corporations in Arkansas*, 20 ARK. L. REV. 135 (1966). For their argument that the circuit court improperly placed the burden of proof on them, the Town and Hillis point initially to the circuit court's statements in its order: (1) there was "no testimony" the proposed property was needed for street purposes; (2) there was "no evidence" that Houston needed the annexed property for any town purpose, such as for streets or a sewer, gas, or water system; (3) there was no evidence that the town's people needed the space for business purposes; (4) there was no proof Houston needed to extend its police regulations because there was "no evidence" of any crime, inside or outside the city; and (5) there was "no evidence" that the agricultural land within the proposed annexation had a "higher or better use for municipal purposes."

In response, Carden contends that the circuit court merely performed its task under Ark. Code Ann. § 14-40-604(a)(2)(A), which provides in part that if the court is satisfied the requirements for annexation have not been complied with, the court "shall" make an order restraining any further action pertaining to the annexation order of the county court and annulling it. According to Carden, the circuit court was merely summarizing the evidence submitted on whether the annexation satisfied the requirements of *Vestal v. Little Rock, supra.*

The appellants' argument is without merit. Carden clearly had the burden of proof, and she put on her case first relating to the effect of the annexation on Houston, the highest and best use of the annexed area, and the scheme to stop her hog farm. One of her witnesses was the mayor of the Town, Jerry Lawson, who addressed the issue of whether the land was needed for any municipal purpose. The circuit court's letter opinion and order addressed this proof and found in Carden's favor. Regardless of how the court couched its findings, we are convinced that the burden of proof was not impermissibly shifted to the Town and Hillis.

We turn next to the merits of the case. The five *Vestal* criteria used to justify annexation by adjoining landowners which were alluded to by the circuit court are as follows:

> (1) Whether the property is platted and held for sale or use as municipal lots;
>
> (2) Whether platted or not, if the lands are held to be sold as suburban property;
>
> (3) Whether the lands furnish the abode for a densely settled community or represent the actual growth of the municipality beyond its legal boundary;
>
> (4) Whether the lands are needed for any proper municipal purposes such as for the extension of needed police regulation; and
>
> (5) Whether the lands are valuable by reason of their adaptability for prospective municipal uses.

See also Ark. Code Ann. § 14-40-603(a) (1987) (requiring that the prayer of the petitioner for annexation be "right and proper").

We have stated that these five criteria should be considered in the disjunctive, and an annexation is proper if any one of the five factors is met. *Gay II, supra; Lee v. City of Pine Bluff*, 289 Ark. 204, 710 S.W.2d 205 (1986); *Gay v. City of Springdale*, 287 Ark. 55, 696 S.W.2d 723 (1985), *reh'g denied*, 287 Ark. 58-A, 698 S.W.2d 300 (1985)(*Gay I*). The criteria apply regardless of whether the annexation proceeding was initiated by the city or by adjoining landowners. *Chastain v. Davis*, 294 Ark. 134, 741 S.W.2d 632 (1987); *Louallen v. Miller*, 229 Ark. 679, 317 S.W.2d 710 (1958); *Cantrell v. Vaughn*, 228 Ark. 202, 306 S.W.2d 863 (1957). If a part of the proposed area does not meet one of the five requirements, the annexation of the entire area is void *in toto*. *Gay II, supra; Chastain v. Davis, supra; Chappell v. City of Russellville*, 288 Ark. 261, 704 S.W.2d 166 (1986). Furthermore, agricultural and horticultural lands are not to be annexed when their highest and best use is for agricultural or horticultural purposes. *Chappell v. City of Russellville, supra; Louallen v. Miller, supra.*

An action to prevent annexation such as that brought by Carden is not an appeal of the county court's order. Rather, it is an independent attack on the annexation authorized under Ark. Code Ann. § 14-40-604 (1987). *Re: Proposed Annexa-*

tion to Town of Beaver v. Ratliff, 282 Ark. 516, 669 S.W.2d 467 (1984); *Britton v. City of Conway*, 38 Ark. App. 232, 821 S.W.2d 65 (1991). In annexation cases, this court places a high degree of reliance upon the findings of the trial judge and does not reverse unless they are clearly erroneous. *Gay II, supra*; *Lewis v. City of Bryant*, 291 Ark. 566, 726 S.W.2d 672 (1987). Furthermore, this court views the evidence in the light most favorable to the appellee. *Id.*

The circuit court was correct in being skeptical about the propriety of this annexation. There is very little, if any, credible testimony to the effect that the Town itself would be benefited by annexing this property. For example, Mayor Lawson testified that the Town would be improved because it would receive additional matching-fund money due to the population increase of approximately 110 people, but he focused primarily on the benefits to the area to be annexed in terms of better security, roads, and fire protection rather than the benefit to the Town. While Hillis testified that the additional land would allow the Town to employ a marshall and expand, there was no credible proof that the Town required additional space for businesses or residences or that security was a problem. Thus, while the prospective benefits to Hillis and the other proponents living in the area to be annexed seem fairly clear, we do not believe the circuit court clearly erred in finding that the contemplated benefits to the Town were indeed slim or even nonexisting.

It is, of course, undisputed that predominantly agricultural land may be annexed if it can be made to serve a municipal purpose *and* its highest and best use is not agricultural. But we, again, question whether there is a viable municipal purpose for the land under the *Vestal* criteria. Moreover, the cases cited by the Town and Hillis are distinguishable. For example, in *Chappell v. City of Russellville, supra,* we affirmed the circuit court's order upholding the annexation of 4,150 acres of land, some of which was woodland, swampland, and farmland. In doing so, we focused on the fact that the mere presence of farmland, when its highest and best use is not for agricultural purposes, will not prevent annexation and that swampland and wooded areas may also pass muster for annexation when the value of the land is derived from its actual

and prospective use for city purposes. *Chappell v. City of Russellville*, 288 Ark. at 262-63, 704 S.W.2d at 167, *citing Holmes v. City of Little Rock*, 285 Ark. 296, 686 S.W.2d 425 (1985).

In *Chappell*, the circuit court also found specifically that (1) much of the lands to be annexed represented the actual growth of the city beyond its legal boundary; (2) the lands were needed for extension of police and fire protection for city residents; (3) the lands were valuable by reason of their adaptability for prospective municipal purposes; and (4) that the highest and best use of the land was for purposes other than agriculture.

In sum, the *Chappell* case is wholly different from the case at bar, where it is difficult to ascertain any benefit to the Town to be gained by annexing the 900 acres under the *Vestal* criteria. *See also Lee v. City of Pine Bluff*, 289 Ark. at 209, 710 S.W.2d at 208 (affirming annexation of a flood plain as part of an "honest effort" to encompass the growth of the city, but cautioning: "That does not mean we will recognize annexation proposals that are essentially land grabs[.]"); *Gay I* (involving a "land grab" by the city). Stated simply, Carden successfully proved that Houston, a town of 640 acres and approximately 175 persons, has no real need for an additional 900 acres and 110 persons. Certainly, Houston does not need to annex 900 acres for the purpose of placing a fire station in that area. Crime is not a factor. And increased revenue from matching funds due to 110 new citizens which can be used for street lights in Houston seems very tenuous.

There is the remaining issue of Houston's exercise of its police power to stop the hog farm. Testimony at trial clearly established that the prevention of commercial hog farms from operating in the area was a primary reason for the annexation. In the past, this court has indicated that health considerations are proper. *See, e.g., City of Little Rock v. Findley*, 224 Ark. 305, 272 S.W.2d 823 (1954) (affirming trial court's order nullifying annexation under substantial-evidence test but acknowledging that arguments relative to curing health and sanitation problems were "persuasive"); *Walker v. City of Pine Bluff*, 214 Ark. 127, 214 S.W.2d 510 (1948) (affirming circuit court's annexation order under substantial-evidence test and including evidence that the

proposed area was a "health menace"). The question for us to decide is whether the Town's police power is broad enough to thwart the foul odors emanating from a hog farm which is at issue in this case. *See, e.g., Springfield v. City of Little Rock*, 226 Ark. 462, 290 S.W.2d 620 (1956) (involving the city's authority to raze sixteen housing units that were unsanitary and dangerous to public health due to disrepair); *Gus Blass D. G. Co. v. Reinman*, 102 Ark. 287, 143 S.W. 1087 (1912) (involving the city's authority to abate the operation of a livery stable).

Regardless of the interest of the Town in preventing foul odors, we hold that the circuit court correctly concluded that that purpose alone cannot be the sole reason for upholding the annexation of 900 acres. As has already been emphasized, if a part of the annexation does not meet one of the *Vestal* requirements, then annexation of the entire area is void *in toto*. *See Gay II, supra; Chastain v. Davis, supra; Chappell v. City of Russellville, supra.* Carden's land, on which the purported hog-farm nuisance is to be located, comprises only 91 of the 900 acres. Therefore, the remaining 809 or so acres are not necessary for annexation under the exercise of a police power, even assuming that preventing noxious odors was a legitimate health reason for the annexation.

We affirm on the twin bases that the circuit court did not shift the burden of proof in this case and the findings of the court are not clearly erroneous. This being the case, the circuit court's decision is supported by substantial evidence. *See Chastain v. Davis, supra.*

Affirmed.

William Phillip COTTRELL *v.* Myrldehne COTTRELL

97-654 965 S.W.2d 129

Supreme Court of Arkansas
Opinion delivered March 19, 1998

Jon R. Sanford, for appellants.

Susan A. Fox, for appellees.

ANNABELLE CLINTON IMBER, Judge. The appellants, William and Deborah Cottrell, sued the appellees, Myrldehne Cottrell and the Cottrell Corporation, for fraud and breach of an oral employment contract. The trial court granted summary judgment to the appellees. We affirm.

Ralph and Myrldehne Cottrell owned and operated the Cottrell Corporation located in Springdale, Arkansas. In 1992, Ralph was diagnosed with terminal cancer. At the time, Ralph's son, William Cottrell, and William's wife, Deborah, were living in Terre Haute, Indiana. In October of 1992, Ralph and Myrldehne asked William and Deborah to move to Arkansas so that William could visit regularly with his father and help run the Cottrell Corporation. Myrldehne also told William that she suspected someone was stealing from the Cottrell Corporation, and that she was afraid of being placed in a nursing home after Ralph died. To entice William and Deborah to move to Arkansas, Ralph and Myrldehne orally promised the couple free housing and jobs with the Cottrell Corporation for a combined salary of $400 a week.

In reliance on these promises, William and Deborah quit their jobs, sold their home, and moved to Arkansas in late January of 1993. Ralph Cottrell died on February 28, 1993, leaving all of his property, including the Cottrell Corporation, to his wife, Myrldehne. The day after Ralph Cottrell's funeral, Myrldehne terminated William's and Deborah's employment, and a few days later, she evicted the couple from their home.

On January 18, 1994, William and Deborah filed a legal action for fraud against Myrldehne and the Cottrell Corporation. Myrldehne and the Cottrell Corporation filed a motion for summary judgment contending that there was no evidence of fraud, and that the termination did not constitute a breach of contract. On March 26, 1997, the trial court found that the parties had entered into an oral employment contract without a specific duration. Thus, pursuant to the employment-at-will doctrine, Myrldehne and the Cottrell Corporation were free to terminate William and Deborah at any time and without cause. The court also granted summary judgment on the fraud claim because there was no evidence of any misrepresentation by Myrldehne or the Cottrell Corporation.

On appeal, William and Deborah claim that the trial court erred when it granted summary judgment on their claim for breach of contract, but they do not contest the trial court's ruling on their fraud claim. As we have said on numerous occasions, summary judgment is appropriate if there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. In making this determination, we review the proof submitted in the light most favorable to the party resisting the motion, and resolve all doubts and inferences against the moving party. *Lovell v. Brock*, 330 Ark. 206, 952 S.W.2d 161 (1997); *Sublett v. Hipps*, 330 Ark. 58, 952 S.W.2d 140 (1997). Summary judgment is also appropriate when, as in this case, the trial court finds that the allegations, taken as true, fail to state a cause of action. *See, e.g., O'Mara v. Dykema*, 328 Ark. 310, 942 S.W.2d 854 (1997); *Hollomon v. Keadle*, 326 Ark. 168, 931 S.W.2d 413 (1996); *Rainey v. Keadle*, 312 Ark. 460, 850 S.W.2d 839 (1993).

I. The Employment-At-Will Doctrine

For their first challenge to the order of summary judgment, William and Deborah contend that the court erred when it found that their employment agreement was governed by the employment-at-will doctrine. It is well established under Arkansas law that when an employment contract is silent as to its duration, either party may terminate the relationship at will and without cause. *Marine Servs. Unlimited, Inc. v. Rake*, 323 Ark. 757,

918 S.W.2d 132 (1994); *City of Green Forest v. Morse*, 316 Ark. 540, 873 S.W.2d 155 (1994); *Wal-Mart Stores, Inc. v. Baysinger*, 306 Ark. 239, 812 S.W.2d 463 (1991). In *Griffin v. Erickson*, 277 Ark. 433, 642 S.W.2d 308 (1982), we distinguished that a "'contract at will' . . . may be terminated by either party, whereas a contract for a definite term may not be terminated before the end of the term, except for cause or by mutual agreement, unless the right to do so is reserved in the contract." Although we have recognized several exceptions to the at-will doctrine, none are applicable to the facts at hand. *See Sterling Drug, Inc. v. Oxford*, 294 Ark. 239, 743 S.W.2d 380 (1988); *Gladden v. Arkansas Children's Hosp.*, 292 Ark. 130, 728 S.W.2d 501 (1987).

In this case, it is undisputed that the parties did not reach an agreement as to the duration of their employment. Accordingly, we hold that the trial court correctly ruled that, pursuant to the employment-at-will doctrine, Myrldehne and the Cottrell Corporation were free to terminate William and Deborah at any time and without cause.

In reply, William and Deborah ask us to read a reasonable duration into the employment agreement pursuant to Section 204 of the Restatement of Contracts, which provides that:

> When the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court.

Restatement (Second) of Contracts § 204 (1981). We refuse to adopt this Restatement provision in employment cases as it would completely abrogate the employment-at-will doctrine, which, as explained above, is firmly rooted in Arkansas jurisprudence.

II. Good Faith and Fair Dealing

Next, William and Deborah contend that Myrldehne's actions constituted a breach of the implied covenant of good faith and fair dealing. William and Deborah did not make this argument before the trial court, and thus they are precluded from raising it for the first time on appeal. *Wilson v. Rebsamen Ins., Inc.*, 330 Ark. 687, 957 S.W.2d 678 (1997); *Slaton v. Slaton*, 330 Ark.

287, 956 S.W.2d 150 (1997); *McGhee v. State*, 330 Ark. 38, 954 S.W.2d 206 (1997).

III. Motion for Costs

Myrldehne and the Cottrell Corporation have prepared a supplemental abstract and request $625 in fees and expenses. We agree that William and Deborah's abstract was flagrantly deficient, and that the supplemental abstract was appropriate pursuant to Ark. Sup. Ct. R. 4-2(b)(2). *See also Miller v. Nix*, 315 Ark. 569, 868 S.W.2d 498 (1994); *Rhodes v. State*, 276 Ark. 203, 634 S.W.2d 107 (1982); *Roach v. Terry*, 263 Ark. 774, 567 S.W.2d 286 (1978). Accordingly, we award Myrldehne and the Cottrell Corporation $500 in fees and expenses.

Affirmed.

Travis Vincent PEREZ, Jr. *v.*
Donna Sue Ellis TANNER

97-668 965 S.W.2d 90

Supreme Court of Arkansas
Opinion delivered March 19, 1998

Rice, Adams & Pace, P.A., by: *Ben E. Rice*, for appellant.

Kelly & Huckabee, by: *Sandy Huckabee*, for appellee.

RAY THORNTON, Justice. This case involves a jurisdictional dispute between conflicting decrees of Arkansas and Mississippi courts in a child-custody matter. Travis Vincent Perez and Donna Sue Ellis Tanner lived together in Mississippi for approximately five years. During this time, Mrs. Tanner gave birth to a daughter, C.P., and a son, T.V., in 1989 and 1990 respectively. Although both parties acknowledge Mr. Perez as the biological father of these children, the parties have never been married to one another and no court has issued an order establishing paternity.

The initial pleadings relating to custody of the minor children were filed in the Jackson County, Mississippi, Chancery Court on January 16, 1992. At various times, each party has been awarded custody in the context of approximately sixteen different Mississippi court orders. As the Mississippi court exercised continuing jurisdiction over custody and visitation proceedings under the provisions of the Parental Kidnapping Prevention Act of 1980

(PKPA) and the Uniform Child Custody Jurisdiction Act (UCCJA), we reverse and dismiss.

In November 1995, allegations surfaced that Mr. Perez's brother had sexually abused C.P. An Alabama hospital examination on November 10 revealed no evidence of abuse; however, in a November 14 examination, Dr. John Shriner, an Alabama pediatrician, found evidence of abuse. Consequently, on December 21, the Mississippi court ordered Mr. Perez's visitation restricted to his sister's home in Mississippi and ordered Mr. Perez's brother to not have any contact with C.P. On March 13, 1996, Mr. Perez's brother appeared before a grand jury in Mississippi that returned a decision not to indict him on charges of child molestation.

A hearing was scheduled in Mississippi for March 6, but two weeks before that date, Mrs. Tanner, who had custody of the children pursuant to a previous Mississippi court order, moved to Arkansas. On March 4, 1996, two days before the hearing scheduled in Mississippi, Mrs. Tanner petitioned the Lonoke County, Arkansas, Chancery Court to suspend Mr. Perez's visitation in an *ex parte* proceeding. The Arkansas court granted Mrs. Tanner's petition on that same date.

A hearing was held in Mississippi on March 6, and Mrs. Tanner did not appear. In its May 9 order, the Mississippi court issued a temporary order finding Mrs. Tanner in contempt for failing to appear and for violating its order in refusing to honor Mr. Perez's visitation rights. The Mississippi court found that it had continuing jurisdiction over the matter, awarded Mr. Perez temporary custody of both children, and directed that Mr. Perez's brother have no contact with the children until a full evidentiary hearing could be held. The court made this temporary order a permanent one in an order filed June 29, 1996. No appeal was taken from this Mississippi order.

In an April 1996 letter, Mr. Perez advised the Arkansas court that Mrs. Tanner had requested similar modifications in two other states. He further claimed that an Alabama court declined jurisdiction in January 1996, on the basis that the Mississippi court retained jurisdiction.

On July 9, 1996, Mr. Perez filed a motion in the Arkansas court challenging its exercise of jurisdiction in this case and asking the court to give full faith and credit to the rulings of the Mississippi court giving him custody of the children. In her reply, Mrs. Tanner urged that Mr. Perez had submitted to the Arkansas court's jurisdiction by requesting that the court award him visitation. She also counterpetitioned, requesting that the Arkansas court find Mr. Perez in contempt for failure to pay child support as ordered by the Mississippi court.

The Arkansas court heard testimony on the issue on August 22, 1996. In its September 17 order, the Arkansas court decided to maintain jurisdiction until home studies could be conducted on both parties and allowed Mr. Perez to have visitation in the office of the children's counselor and via telephone. The home studies were filed with the court and indicated that both parents could provide a suitable home.

On February 25, 1997, the Arkansas chancery court issued a ruling stating that the court accepted and retained jurisdiction in this matter under Ark. Code Ann. section 9-13-203(a)(3) (Repl. 1993), the emergency-jurisdiction provision of the UCCJA. The court noted that the Mississippi court orders granted "paramount custody, care and control" of the children to Mrs. Tanner from the time the older child entered first grade, which she did in the 1995-96 school year. The Arkansas court awarded full custody to Mrs. Tanner.

The Arkansas court also refused to extend full faith and credit to the Mississippi orders because it found that Mr. Perez was a "stranger" to the children under Arkansas law. The court refused to recognize the validity of the Mississippi court's orders. The Arkansas court reasoned that giving visitation and/or custody to a putative father whose paternity has not been established in accordance with the requirements of our Code violated Arkansas law, notwithstanding that the paternity determination complied with Mississippi law. The court also refused to hold Mr. Perez in contempt for nonpayment of child support on the basis that Arkansas law does not provide for an award of support against a putative father until after a judicial decree establishes paternity.

Mr. Perez filed a motion in the Arkansas court for a new trial on March 6, 1997, which the court denied. Mr. Perez appeals this order of the Lonoke County Chancery Court. Mr. Perez raises four points on appeal. Because our analysis of the first and third points is similar, we address those points together.

In points one and three, Mr. Perez argues that the Full Faith and Credit Clause, the PKPA, and Arkansas's UCCJA require the Arkansas chancery court to give full faith and credit to the Mississippi chancery court's orders. We agree.

Jurisdiction over child-custody disputes is governed by two acts, the UCCJA, Ark. Code Ann. §§ 9-13-201 to -223 (Repl. 1993), and the federally preemptive PKPA, 28 U.S.C. § 1738A (1994). Issues of child visitation are considered under the definition of "custody determination." 28 U.S.C. § 1738A(b)(3); Ark. Code Ann. § 9-13-202(2). The PKPA applies directly to modification proceedings; however, it also indirectly governs initial custody determinations. *Atkins v. Atkins*, 308 Ark. 1, 823 S.W.2d 816 (1992). We have stated that this is due to the fact that the PKPA does not accord a custody decree full faith and credit in another state if the decree failed to conform to the requirements of the PKPA. *Id.*

The purposes stated in our UCCJA include avoiding jurisdictional conflicts with other state courts and avoiding the relitigation of custody decisions made in other states. Ark. Code Ann. § 9-13-201. We have previously looked to the Florida appeals court for guidance and quoted the following with respect to the purposes of the UCCJA: "Those purposes are not served when a court, with knowledge that the subject matter of child custody is pending in another state, totally ignores the foreign proceeding and exercises jurisdiction over a child, who has been in the state for less than a month, for the purpose of making a permanent award." *Norsworthy v. Norsworthy*, 289 Ark. 479, 486, 713 S.W.2d 451, 455 (1986) (quoting *Bonis v. Bonis*, 420 So.2d 104 (Fla. Dist. Ct. App. 1982)).

Based on these principles of law, we first consider whether the Arkansas court properly took jurisdiction in this case under the PKPA and UCCJA. Before a state may exercise juris-

diction in a custody or visitation dispute, it must determine whether a sister state is exercising jurisdiction. Under the PKPA, if a state finds that another action is pending, the state must look to subsection (g). Subsection (g) provides that a state shall not exercise jurisdiction in a custody proceeding that is commenced while a proceeding is pending in a sister state, which is exercising jurisdiction consistent with the PKPA. 28 U.S.C. § 1738A(g). This provision means that no two states shall exercise concurrent or simultaneous jurisdiction.

The PKPA provides that a court may modify a custody order of a sister state only if two criteria are met. First, the court must determine that it has jurisdiction to make child-custody determinations. 28 U.S.C. § 1738A(f)(1). Second, the court of the sister state must no longer have jurisdiction or must have declined to exercise jurisdiction to modify the order. 28 U.S.C. § 1738A(f)(2). If the sister state still has jurisdiction under the laws of that state and the state remains the residence of one of the parties or the child, then the sister state retains continuing jurisdiction and the other court shall not modify the order. 28 U.S.C. § 1738A(d).

Turning to the second criterion, we look at whether the sister state had proper jurisdiction to enter the initial decree. Mississippi has adopted a version of the UCCJA, Miss. Code Ann. §§ 93-23-1 to 93-23-47 (Supp. 1993). Under its UCCJA, the Mississippi chancery court may exercise jurisdiction where Mississippi is the "home state of the child at the time of commencement of the proceeding." Miss. Code Ann. § 93-23-5(1)(a). Additionally, the PKPA gives priority to home-state jurisdiction in *initial* custody determinations. *Garrett v. Garrett*, 292 Ark. 584, 732 S.W.2d 127 (1987); *see also* 1 Jeff Atkinson, *Modern Child Custody Practice* § 3.01, at 106. In this case, when the initial proceeding was commenced in 1992, Mississippi had been the residence of both children since their birth. Therefore, Mississippi properly exercised its home-state jurisdiction under both the UCCJA and the PKPA in entering the initial custody order.

Having decided that the Mississippi court had original jurisdiction in this dispute, we next determine whether the Mississippi

court had declined to exercise jurisdiction or no longer had jurisdiction. *See* 28 U.S.C. § 1738A(f). Under the Mississippi Code, the Mississippi court could have declined to exercise jurisdiction to modify its own order if it had found that Mississippi was an inconvenient forum and that the court of another state was more convenient. Miss. Code Ann. § 93-23-13(1). The Mississippi court may make this determination upon its own motion, or upon motion of one of the parties or of the child. Miss. Code Ann. § 93-23-13(2).

In this case, the Mississippi court did not decline to exercise jurisdiction. Furthermore, it does not appear that Mrs. Tanner ever made a motion to the Mississippi court requesting that it decline jurisdiction in favor of a more appropriate or convenient forum, even though Mississippi law provides for such a request. Instead, the Mississippi court was continuing to exercise jurisdiction under subsection (d) of the PKPA.

Subsection (d) of the Act provides that the jurisdiction of the court of the state that "has made a child custody determination consistently with the provisions of this section continues as long as the requirement of subsection (c)(1) of this section continues to be met and such State remains the residence . . . of any contestant." 28 U.S.C. § 1738A(d). Subsection (c)(1) of the PKPA requires that the court must have "jurisdiction under the laws of such State." As discussed above, the Mississippi court entered the initial custody order in compliance with its UCCJA, as the home state of the children. The Mississippi court retains jurisdiction under its UCCJA to modify its decree if the state was the children's home state at the commencement of the proceeding and "a parent or person acting as parent continues to live within this state." Miss. Code Ann. § 93-23-5(1)(a). Since Mr. Perez continues as a resident of Mississippi, the Mississippi court has jurisdiction under Mississippi law. Therefore, we conclude that the requirements of subsection (c)(1) of the PKPA, as well as subsection (d), have been met.

When the issue is which state has jurisdiction to *modify* a custody decree, the PKPA gives preference to the state with continuing jurisdiction. *Moore v. Richardson*, 332 Ark. 255,

964 S.W.2d 377 (1998) (citing *Murphy v. Danforth*, 323 Ark. 482, 915 S.W.2d 697 (1996)). Because the Mississippi court still had continuing jurisdiction as the decree state and had not declined to exercise it, the Arkansas court did not have jurisdiction under the PKPA to modify the Mississippi court's order. The PKPA requires that the Arkansas court give the Mississippi court's order full faith and credit. We conclude that the Arkansas court had no jurisdictional basis under which to enter the modifications, and we reverse and dismiss.

We note that much of this jurisdictional confusion might have been avoided had the Arkansas court complied with the UCCJA's directive to communicate with the Mississippi court. *See Norsworthy v. Norsworthy*, 289 Ark. 479, 713 S.W.2d 451 (1986) (citing Ark. Code Ann. § 9-13-207(d) in reaching the conclusion that it was incumbent on the Arkansas court under the UCCJA to enter into some form of direct communication with the foreign court to ascertain which forum was the better one in which to decide custody); *Mellinger v. Mellinger*, 26 Ark. App. 233, 764 S.W.2d 52 (1989). The Arkansas court clearly had knowledge as early in the case as April 16, 1996, that another proceeding was pending in Mississippi because it granted Mrs. Tanner's request for a protective order directing her not to leave Arkansas to appear at the April 17 hearing in Mississippi.

Mrs. Tanner argues that it was necessary for the Arkansas court to assume jurisdiction in this proceeding because an emergency existed in which the child's welfare was in danger. We disagree.

The UCCJA and the PKPA both contain language providing that a foreign court may exercise jurisdiction in an emergency situation. Ark. Code Ann. § 9-13-203(a)(3); 28 U.S.C. § 1738A(c)(2)(C). The requirements for exercising emergency jurisdiction are the physical presence of the child in the state and the existence of a genuine emergency, such as abandonment or neglect. *Id.*; *Murphy v. Danforth*, 323 Ark. at 491, 915 S.W.2d at 702. This jurisdictional basis is available only in extraordinary or extreme situations where the immediate health and welfare of

the child is threatened. *Caskey v. Pickett*, 274 Ark. 383, 625 S.W.2d 473 (1981).

Courts' emergency powers are limited under both acts. *Murphy*, 323 Ark. at 491, 915 S.W.2d at 702. Emergency jurisdiction may only be used to enter a temporary order to give a party sufficient time to travel with the child to the proper forum to present her allegations of abuse and seek a permanent modification of custody. *Id.*

In the present case, when Mrs. Tanner filed with the Arkansas court, she had custody of both children under the order of the Mississippi court. The Mississippi court had restricted Mr. Perez's visitation with the children to his sister's house. Mrs. Tanner presented us with no evidence that the daughter was in any danger from Mr. Perez's brother. If Mrs. Tanner felt that her daughter was in danger because Mr. Perez was not complying with the order, she could have sought temporary relief from an Arkansas court. However, she could only seek temporary relief for the purpose of giving her adequate time to petition for permanent relief from the Mississippi court because Mississippi was the only jurisdiction at that time with authority under the PKPA to permanently modify the order.

Because there was no evidence supporting a finding that the health or welfare of the child was in immediate danger, we conclude that Mrs. Tanner was merely shopping for a forum that would completely deny Mr. Perez's visitation rights. After trying a Mississippi court and an Alabama court, she finally found an Arkansas court that would grant her requested relief. Such forum shopping directly contravenes the express purposes of the UCCJA and PKPA.

The Arkansas court's actions in modifying the original Mississippi decree went beyond the reach of emergency jurisdiction under either the PKPA or UCCJA. We conclude that the Arkansas court erred in exercising emergency jurisdiction under these circumstances.

For his second point, Mr. Perez claims that the Arkansas court erred in refusing to accord the Mississippi court's orders full

faith and credit. The Arkansas court refused to recognize the Mississippi orders, reasoning that the Mississippi orders should not be accorded full faith and credit because they awarded custody, visitation, and support absent a judicial determination of paternity, which the court found to contravene Arkansas law.

The Arkansas court was obligated to determine whether the foreign court had jurisdiction, as well as testing the validity and effect of the foreign court's order, under the law of the foreign state, not Arkansas law. *See Hinchee v. Golden Oak Bank*, 540 So.2d 262 (Fla. Dist. Ct. App. 1989). In *enforcing* the Mississippi court's judgment, a finding that the Mississippi court erred in interpreting its own law or statutes or failed to apply the proper state law would still not be grounds for refusing to recognize the judgment. *Fauntleroy v. Lum*, 210 U.S. 230, 237 (1908); *see also* 1 RESTATEMENT OF CONFL. OF LAWS 2D § 106 (1969); *Corliss v. Corliss*, 89 N.M. 235, 549 P.2d 1070 (1976) (looking to Missouri law to determine whether to modify alimony and child support awarded in Missouri divorce decree). Of course, if the order was entered by a court that was wholly without jurisdiction or if the order was procured by fraud, the Arkansas court need not recognize the judgment because the order would be void in the rendering state itself and not entitled to full faith and credit. *Id.; see also Kricfalusi v. Brokers Securities, Inc.*, 305 Ark. 228, 806 S.W.2d 622 (1991).

The United States Congress clearly intended for the PKPA to extend full faith and credit to custody and visitation decrees entered in conformity with the UCCJA. In *Thompson v. Thompson*, 484 U.S. 174 (1988), the Supreme Court determined that Congress enacted the PKPA to make the requirements of full faith and credit apply to child-custody proceedings. *See also* Roger M. Baron, *Federal Preemption in the Resolution of Child Custody Jurisdiction Disputes*, 45 ARK. L. REV. 885 (1993). Additionally, Congress physically positioned the PKPA as an addendum to the Full Faith and Credit Clause, 28 U.S.C. § 1738, which demonstrates that Congress intended for the Act to have the same operative effect as the Full Faith and Credit Clause. *Thompson*, 484 U.S. at 183.

The United States Constitution directs that "Full Faith and Credit shall be given in each State to the [judicial proceedings] . . . of every other State." U.S. CONST. art. IV, § 1; *see also* 28 U.S.C. § 1738 (1994). Under the PKPA, our courts will accord full faith and credit to the custody determinations of a sister state that had jurisdiction over the parties and the subject matter. 28 U.S.C. § 1738A. Since we determined above that the Arkansas court lacked jurisdiction and was therefore required to give full faith and credit to the Mississippi orders under the PKPA, we likewise conclude that the Arkansas court erred in refusing to recognize the Mississippi orders under the Full Faith and Credit Clause of the United States Constitution.

For his fourth assignment of error, Mr. Perez asserts that the Arkansas court erred in assuming jurisdiction because Mississippi was the most convenient forum to determine the child-custody dispute.

The UCCJA and PKPA do not require a court that properly has jurisdiction to decline jurisdiction in favor of the most convenient forum. As touched on above, our UCCJA, as well as Mississippi's UCCJA, contains a provision allowing a court to decline to exercise jurisdiction where the court determines that another forum is more appropriate for any of several reasons. *See* Ark. Code Ann. § 9-13-207; Miss. Code Ann. § 93-23-13; *see also Blocker v. Blocker*, 57 Ark. App. 218, 944 S.W.2d 552 (1997). However, the Arkansas court was not in the position to consider whether the Mississippi court was a more appropriate forum because the PKPA preempted any claim to jurisdiction that the Arkansas court might have possessed in favor of the continuing jurisdiction of the Mississippi court. Because we have determined that the Arkansas court was without jurisdiction, we need not reach this issue.

Reversed and dismissed.

Antonio AYERS *v.* STATE of Arkansas

CR 97-368 960 S.W.2d 453

Supreme Court of Arkansas
Opinion delivered March 19, 1998

[redacted]

[redacted]

R.S. McCullough, for appellant.

No response.

PER CURIAM. Antonio Ayers was convicted of capital murder and sentenced to life imprisonment without parole. A notice of appeal was filed on his behalf. He is represented by Attorney R.S. McCullough who filed the appellate record with this Court on April 1, 1997. Mr. McCullough, after receiving three extensions of the deadline for filing his client's brief, filed a brief with this Court on September 11, 1997. The abstract of the record was deficient, and upon motion by the State, counsel was instructed to comply with the requirements of Ark. Sup. Ct. R. 4-3(h). The deadline for compliance was November 15, 1997. It was not met.

By letter of February 4, 1998, the Clerk of this Court inquired of counsel as to the status of the appeal. Counsel responded on February 17, 1998, with a motion for further extension until March 6, 1998. On March 6, 1998, counsel sought an extension to March 25, 1998, blaming the delay on a "young associate" who is "no longer employed by this firm."

[redacted] We grant the extension and caution that it is a final extension. A copy of this order will be sent to the Committee on Professional Conduct.

Jerry SCHALK *v.* STATE of Arkansas

CR 98-227 960 S.W.2d 452

Supreme Court of Arkansas
Opinion delivered March 19, 1998

Teri Swicegood, for appellant.

No response.

PER CURIAM. Jerry Schalk, by his attorney, Teri Swicegood, has filed a motion for rule on the clerk. His attorney admits that the transcript was tendered late due to an error on her 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.

Sandra S. VANDIVER *v.* Ronald BANKS

97-272 962 S.W.2d 349

Supreme Court of Arkansas
Opinion delivered March 19, 1998

Cearley Law Firm, P.A., by: *Robert M. Cearley*, for appellant.

Gruber Law firm, by: *Wayne A. Gruber*, for appellee.

PER CURIAM. Appellant petitions for rehearing and requests that we undertake to award attorney's fees, expenses, costs, and prejudgment interest in this cause. However, in her opening brief, appellant previously asked that we direct the chancery court to enter judgment against appellee, and to award a reasonable attorney's fee and the costs of this action beginning in April of 1990. Because this case is being remanded to the trial court for further proceedings consistent with our opinion, we believe the making of such awards should be decided and made by the trial court on remand. Thus, we issue this per curiam directing the trial court to decide and award appropriate prejudgment interest, attorney's fees, and costs in accordance with Arkansas law.

Michael WHITTEN *v.* STATE of Arkansas

CR 97-447 965 S.W.2d 124

Supreme Court of Arkansas
Opinion delivered March 19, 1998

Ronald C. Nichols, for appellant.

No response.

PER CURIAM. On January 14, 1997, appellant, Michael Whitten, by his attorney, Ronald C. Nichols, filed a petition for writ of certiorari, requesting that the trial court clerk be directed to complete the record on appeal. We granted a thirty-day extension to complete the record and issued a writ to the circuit clerk and court reporter on January 29, 1998, for the purpose of obtaining the transcript of testimony in this case. On February 17, 1998, Appellant filed for an additional sixty-day extension of time to complete the record, noting that the trial court reporter has been ill and that her workload is seriously backlogged. On February 27, 1998, we received a duplicate copy of the record already on file with the supreme court clerk, but we have yet to receive a record of the trial testimony.

We grant appellant's motion for a sixty-day extension of time to complete the record. We also grant a writ of certiorari and direct the court reporter to prepare a transcript of the trial for appeal and to file the record with the supreme court clerk within sixty days from the date of this per curiam order. An appropriate briefing schedule will then be set by the clerk of this court.

However, we are concerned that a serious backlog problem may be developing with respect to the court reporter for the Pulaski County Circuit Court, Seventh Division, that may impact cases currently on appeal or to be appealed from that court. A copy of this opinion will be forwarded to Judge John B. Plegge for a determination to be made by him as to (i) the nature and degree of the backlog problem, and (ii) the necessity or advisability of retaining additional help to alleviate the problem.

Nancy D. MARKS, a/k/a Ann Gable *v.* STATE of Arkansas

CR 97-1088 965 S.W.2d 764

Supreme Court of Arkansas
Opinion delivered March 26, 1998

Paul Petty, for appellant.

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

W.H. "DUB" ARNOLD, Chief Justice. Nancy D. Marks, a/k/a Ann Gable, seeks a writ of prohibition against the Poinsett County Circuit Court to prevent a trial on a theft-by-receiving charge. The trial court denied Marks's motion to dismiss the charge on speedy-trial grounds. She contends that this ruling was erroneous because she was not brought to trial within twelve months following the issuance of the warrant for her arrest. There is no merit to Marks's argument, and we deny her request for a writ of prohibition.

On March 31, 1994, a warrant for Marks's arrest was issued for the offense of theft by receiving, Class B felony, in violation of Ark. Code Ann. § 5-36-103 (Repl. 1997). The warrant was issued after the Harrisburg Municipal Court judge determined that probable cause existed. Marks was not arrested, however, until September 6, 1996. The felony information charging Marks with theft by receiving was filed on October 16, 1996. Following a hearing, the Poinsett County Circuit Court denied Marks's motion to dismiss, concluding that, because the delay between the issuance and service of the arrest warrant was attributable to Marks's unavailability, this time was excludable under Rule 28.3(e) of the Arkansas Rules of Criminal Procedure. Marks filed her petition for writ of prohibition on June 19, 1997.

The pertinent speedy-trial rules in this case are Rules 28.1(a) and 28.2(a) of the Arkansas Rules of Criminal Procedure. Rules 28.1(a) and 28.2(a) require the State to bring a defendant to trial within one year from the date a charge is filed in circuit court, unless prior to that time, the defendant has been arrested and is in custody or lawfully at liberty. In the latter case, the defendant must be brought to trial within one year from the date he or she was arrested. If a defendant is not brought to trial within the req-

uisite time, she will be discharged. Ark. R. Crim. P. 30.1. This discharge constitutes an absolute bar to prosecution of the same offense and for any other offenses required to be joined with that offense. *Id.*

As the State suggests in its brief, Marks's argument is premised on the incorrect assumption that the time for speedy trial began running on the date the arrest warrant was issued. The case of *Archer v. Benton County Circuit Court*, 316 Ark. 477, 872 S.W.2d 397 (1994) is dispositive of this point. In that case, a warrant for Archer's arrest was issued on April 16, 1992, following a finding of probable cause and a filing of an affidavit of probable cause on the same date. He was arrested pursuant to the warrant on December 25, 1992. The felony information against Archer accusing him of various drug offenses was filed on March 1, 1993. On appeal, Archer claimed that the twelve-month period for his trial began to run on April 16, 1992, the date the arrest warrant was issued. The State contended that charges were filed against Archer when the information was filed on March 1, 1993, after his arrest on December 25, 1992. Citing Rule 28.2(a), the State maintained that the time for Archer's trial began to run on the date of his arrest. This court agreed with the State, holding that, for purposes of his speedy-trial rights and Rule 28.2(a), "the date charges were filed" against Archer was the date the felony information was filed in circuit court, and thus, the date of Archer's arrest was the date the time for speedy trial began to run under Rule 28.2(a).

The same reasoning applies in the present case. The felony information was filed against Marks on October 16, 1996. This is "the date charges were filed" under Rule 28.2(a). Marks was arrested prior to the filing of the information, on September 6, 1996. The time for speedy trial began running on that date, and had not yet expired when Marks filed her petition in this matter on June 19, 1997. Thus, for purposes of Marks's speedy-trial argument, we need not decide whether the delay between the issuance and service of the arrest warrant was attributable to her unavailability. Based on the foregoing, we must conclude that the trial court did not err in denying Marks's motion to dismiss for lack of a speedy trial.

Writ denied.

Aaron Michael HODGE *v.* STATE of Arkansas

CR 97-406 965 S.W.2d 766

Supreme Court of Arkansas
Opinion delivered March 26, 1998

Alan Copelin and *David Copelin*, Public Defenders, for appellant.

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

DAVID NEWBERN, Justice. This is a capital-murder case in which Aaron Michael Hodge, who was seventeen years old at the time of the crime, was convicted of shooting to death his mother, Barbara Flick, his stepfather, David Flick, and his half-sister, Andria Flick in their home at Rector. Mr. Hodge was sentenced to life imprisonment without parole for each of the killings. He raises numerous points of appeal to be discussed below, but none of them presents reversible error; thus, we affirm the convictions.

In his testimony at the trial, Mr. Hodge admitted that he had taken Mr. Flick's pistol from Mr. Flick's place of business and returned to the home where he lived with the victims. His testimony was that Mr. Flick found him with the pistol and summoned him to their living room to talk. At that point, he informed Mr. Flick that Ms. Flick was leaving Mr. Flick and that he, Aaron Hodge, had won the long-standing battle between them for his mother's affection. He said that he then left the home and that, when he returned, he found Mr. Flick lying on the couch making a loud "snoring" noise. Mr. Hodge said that he went to check on his mother and sister and found them in their respective bedrooms shot to death. He said that he returned to the living room where Mr. Flick was and shot him twice with the pistol in retaliation for Mr. Flick's having presumably killed Mr. Hodge's mother and sister. The implication of that trial testimony was that Mr. Flick had committed suicide after killing his wife and daughter. A further implication is that Mr. Flick was already dead from a self-inflicted gunshot wound when Aaron Hodge shot him. The contrary evidence presented by the State is the subject of Mr. Hodge's first point of appeal, which raises the issue whether his motion for a directed verdict should have been granted on the ground that the evidence was not sufficient for presentation to the jury.

1. *Sufficiency of the evidence*

During the week prior to October 14, 1995, the interest of the Rector Police Department in the welfare of the Flick family was aroused by telephone calls, received initially from persons in Florida who were expecting some or all of the family to arrive for a visit, and later from local persons who had been alerted by the friends in Florida. A friend of Barbara Flick first alerted the police to the fact that the Flicks had not arrived in Florida and that she was concerned for their well being.

Officer Audrey Emberton testified that the police were aware that Mr. Hodge was driving Mr. Flick's pickup truck and was in Paragould. He was in Paragould attending Friday-night home-coming festivities on the evening of October 13. The Paragould Police were notified, and they located Mr. Hodge. Officer Emberton went to Paragould to interview him. When the officer arrived after 1:00 a.m. on Saturday, October 14, Mr. Hodge was at the Paragould police station. When asked about his family, he reported that he had heard from them, although not that day, and that they were to return later that day. The officer thanked him for the information and left.

Officers Pruett and Emberton knew that Mr. Hodge had returned to the home and was up at around 3:00 a.m. They knocked on the door to a garage room or apartment at the Flick home, and Mr. Hodge invited them in. He told them that he had not heard anything further from the Flicks. When asked if he lived in the main part of the house, he replied that it was locked and that he could not get in. Officer Pruett apparently had looked in a window of the main dwelling, and he mentioned that there seemed to be some sheets on the floor. To that, Mr. Hodge responded that there was some remodeling in progress.

Officers went to Mr. Flick's transmission shop to see if they could find any information that might lead to the family's whereabouts. They were accompanied by one of Mr. Flick's employees who had told them he could let them into the building for that purpose. The employee was able to enter the building by moving a metal panel at the rear. Once inside, he noticed that a tool box

appeared to have been forced open and that money and the pistol that had been there were missing.

Later that morning, around 10:00 a.m., Officer Glenn Leach drove past the Flick home and saw Mr. Hodge and Mr. Hodge's friend, David Gunn, standing by the front door. He pulled in the driveway and told the young men that the police needed to know something about the family, as they continued to receive calls expressing concern. Mr. Hodge replied that he would "tell [him] about it at City Hall." Mr. Hodge got in the police vehicle. Officer Leach asked if he could go in the main portion of the house to check on the family, and Mr. Hodge said, "No."

When Officer Leach and Mr. Hodge arrived at City Hall, Mr. Hodge asked to be taken to a room where they could speak privately. Officer Leach complied and reiterated that the calls were still coming in and that he had to know something about the family. Mr. Hodge replied that they were in the house. When asked if they were alright, Mr. Hodge replied, "They're dead." He said he had found them in that condition earlier in the week. When asked why he had not told anyone, Mr. Hodge replied, "I was waiting to hear." The officer informed Mr. Hodge that he had to go and check the house, and Mr. Hodge told him that the outer door was unlocked but that the inner door to the main house was locked.

Officer Leach left Mr. Hodge with the police dispatcher and went immediately to the Flick home where he forced open the inner door, after entering through the garage-apartment area, and found the bodies in advanced stages of decomposition. There were sheets, blankets, and pillows arrayed about the floor and the couch area in the living room. He pulled back a cover on the couch and found blood. Moving through a hallway back to the bedroom area, he saw more stains that appeared to be blood. It appeared to him that a body had been dragged from the couch area back into the bedroom area. He also found one spent .38-caliber cartridge on the floor near a waste basket and four additional cartridges in an open desk drawer in a bedroom obviously occupied by Mr. Hodge.

David Gunn testified that Mr. Hodge came to him and asked him to drive Mr. Hodge to Mr. Flick's transmission shop at 11:00 p.m. on Sunday, October 8, 1995. Keys in Mr. Hodge's possession did not unlock the door, so he "broke in" and broke open a tool box, finding $30, which he took. He had expected to find more money. He also took a pistol, holster, and shells from the tool box. He loaded five of the shells in the pistol. Mr. Hodge and Mr. Gunn then drove to a cemetery, and Mr. Hodge got out of the vehicle there and said he needed to "think." Shortly thereafter, he returned to the car, and they returned to Mr. Gunn's home. Mr. Hodge walked to his home, carrying the pistol. The next time Mr. Gunn saw Mr. Hodge was when the latter showed up at school on the following Monday, driving Mr. Flick's truck.

More than one witness testified that it was understood that Mr. Hodge did not have permission to drive the truck and that it was unusual for him to be driving it. Mr. Hodge drove the truck during the ensuing week and took his friends to the movies and rode around Rector, Paragould, and Jonesboro in the truck. The succeeding week saw a good deal of partying in the garage apartment at the Flick home with Mr. Hodge. There was testimony about smoking marijuana and drinking alcohol by a number of young people in the apartment. One young woman testified to sleeping with and having sexual relations with Mr. Hodge during that time. Testimony showed that Mr. Hodge used Mr. Flick's credit card and business checks to obtain cash and make purchases during the week. There was testimony that Mr. Hodge appeared calm and "normal" during that time and that he remarked it was "the best week of [his] life" because he had plenty of money to spend and a nice vehicle to drive about. He made more than one such remark during that week.

After the corpses were found, Mr. Flick's truck, which was parked in the driveway of the Flick home, was searched. Bloody clothing was found in the truck along with a pillow that appeared to have a gunshot hole in it.

A State Police investigator interviewed Mr. Hodge. He did not admit to having killed his family but equivocated about

remembering what had happened and whether he "could have" done it.

In addition to Mr. Hodge's testimony that he hated his stepfather and was "out of control," in the sense that he had begun walking away from the domestic situation rather than be a part of the continuous conflict among himself, his mother, and his stepfather, there was testimony that Barbara and David Flick were afraid of Mr. Hodge. Darlene Bowlin, a friend of Barbara Flick who visited in the home, testified that David Flick had expressed to her his fear of Mr. Hodge and "what was going to happen" and that Barbara Flick had expressed her fear earlier.

David Gunn testified that Mr. Hodge had told him some six months earlier of a plan to kill Mr. Flick by striking him on the head with a wrench and burying the body. Mr. Hodge said he would then drive the pickup truck and report later that Mr. Flick was "missing."

There was testimony that David Flick was right-handed. Lisa Sacevicius of the State Crime Laboratory testified that his left hand tested positive for gunshot residue and that his right hand tested negative but had some residue on it. She also found gunshot powder residue on two pillows submitted for examination. She said Mr. Flick could have fired a weapon or the residue could have been rubbed off on him if his body were dragged away by some person who had it on him.

The defense theory of the case was that David Flick killed Barbara and Andria Flick and then himself. It is argued that the testimony by crime laboratory personnel about the gunshot residue found on the hands of Mr. Flick supports the suicide theory because he could have cradled the pistol in his left hand and fired it with his right after using the pillows to muffle the sound when he shot the two females.

Our standard of review of an allegation that a directed verdict should have been granted is that we consider the evidence in the light most favorable to the appellee and affirm if there is substantial evidence in support of the verdict. *Kemp v. State,* 324 Ark. 178, 919 S.W.2d 943 (1996); *Misskelley v. State,* 323 Ark.

449, 915 S.W.2d 702 (1996). Circumstantial evidence may constitute sufficient evidence to sustain the conviction,

> [b]ut it must give rise to more than suspicion and the fact finder must not be left to speculation and conjecture in arriving at its conclusions on the question. *Upton v. State,* 257 Ark. 424, 516 S.W.2d 904 [1974]. It is the duty of this court to set aside a judgment based upon evidence that did not meet the required standards and left the fact finder only to speculation and conjecture in choosing between two equally reasonable conclusions, and merely gave rise to a suspicion of guilt. *Jones v. State,* 246 Ark. 1057, 441 S.W.2d 458 [1969].

Smith v. State, 264 Ark. 874, 880, 575 S.W.2d 677, 681 (1979).

Mr. Hodge's argument is that there is no evidence of premeditation on his part and that the evidence does not exclude his hypothesis of Mr. Flick committing suicide after shooting Barbara and Andria Flick.

As to Mr. Hodge's hypothesis, we agree with the State's argument that it is "preposterous" to consider that Mr. Hodge was so distraught over the shooting deaths of his mother and sister, of whom he purported to be very fond, that he shot Mr. Flick twice in the head after perceiving him to be dead and then, after trying to cover up the bodies and the blood, engaged in a week of partying without reporting to the authorities what had happened. We also agree with the proposition that the jury was not required to believe the testimony of Mr. Hodge but was free to find his testimony incredible. *Allen v. State,* 327 Ark. 350, 939 S.W.2d 270 (1997); *Jones v. State,* 326 Ark. 61, 931 S.W.2d 83 (1996).

The definition of capital murder, as charged in this case, is found in Ark. Code Ann. § 5-10-101(a)(4) (Repl. 1997). It provides that one is guilty of capital murder if, "[w]ith the premeditated and deliberate purpose of causing the death of another person, he causes the death of any person." With respect to the evidence of premeditation and deliberation, we have held that the nature of the weapon used, and the nature, extent, and location of the wounds inflicted, may supply the required evidence. *Kemp v. State, supra.* Given the jury's apparent conclusion that Mr. Hodge

shot the victims in their heads with a firearm, causing their deaths, the evidence of premeditation and deliberation was sufficient.

2. *Suppression of physical evidence*

a. *The house*

Mr. Hodge moved to suppress evidence seized from the Flick home, from Mr. Flick's transmission shop, and from Mr. Flick's truck, and to suppress still and video photographs taken in the home and the shop. Although there is a suggestion that Mr. Hodge ultimately consented to Officer Leach's entry into the home by explaining to him the manner in which he would have to gain entrance to the home, we need not consider the consent issue. Rather, we agree with the State's position that the officer was allowed to enter and to seize that which was in plain view because of exigent circumstances. Such an entry is permitted in accordance with Ark. R. Crim. P. 14.3, but any subsequent search and seizure is limited to that which is in plain view and observed incident to the entry in response to the emergency. *Mincey v. Arizona,* 437 U.S. 385 (1978).

In *Wofford v. State,* 330 Ark. 8, 952 S.W.2d 646 (1997), the evidence showed that officers entered Ms. Wofford's home without a search warrant because of information that she was injured, bleeding, and in danger. A relative of Ms. Wofford had previously been in the home and had informed the officers that Ms. Wofford's son was in Ms. Wofford's bedroom and that she believed the son to be dead. After attending to Ms. Wofford, of whose condition they had been made aware, one of the officers went through the rest of the residence and found Ms. Wofford's son's corpse. Ms. Wofford was convicted of first-degree murder, and on appeal she argued that the exigent circumstances did not justify the entry into her bedroom because the exigency no longer existed, *i.e.*, that there was no justification to enter the bedroom because the officer had been informed that the son was dead.

In affirming the conviction, we held that the entry into Ms. Wofford's bedroom was justified because, quoting *Patrick v. State,* 227 A.2d 486 (Del. 1967), "[f]requently, the report of a death proves inaccurate and a spark of life remains, sufficient to

respond to emergency police aid." *Wofford v. State,* 330 Ark. at 19, 952 S.W.2d at 651. We reach the same conclusion here. Mr. Hodge's report that the members of his family were dead, and his cryptic statement that he had not reported it because he was "waiting to hear," surely made it incumbent upon Officer Leach to go immediately to the scene to ascertain the situation and whether there might be some hope that one or more of the victims might still be alive.

In *Mitchell v. State,* 294 Ark. 264, 742 S.W.2d 895 (1988), we reached the opposite conclusion, but the facts were different. There the police had received an anonymous telephone call about a dead body inside a house. They went to the house, and a neighbor was asked if he had heard any gunshots. He replied he had not. The police entered and found a body. We held that the entry was not justified by exigent circumstances and implied that the anonymous telephone call and the lack of any other evidence that there was a body in the house was not sufficient to suggest anyone in the house was in need of aid.

In this instance, however, we have substantial evidence that three members of Mr. Hodge's family were missing; his statement that they were dead and had been in the house several days; his initial refusal to allow anyone to enter; and his cryptic statement that he had not reported it because he was waiting to hear.

Mr. Hodge argues that a factor in the exigent-circumstances review is the overpowering smell of the decaying corpses that Officer Leach encountered progressively as he entered the house, indicating that those inside were dead. The fact that the officer might thus have suspected that he would encounter at least one or two corpses did not make it inconceivable that one or two of the victims might have been alive.

b. The shop and the truck

Mr. Hodge also challenges the search of Mr. Flick's transmission shop and of the pickup truck because it was parked in the curtilage of the house and thus, he claims, was protected against a warrantless intrusion. Mr. Hodge was not the owner of the shop or the truck and thus had no standing to challenge the

search on the basis of a proprietary interest in either. He had no reasonable expectation of privacy in either the shop or the truck. *Rawlings v. Kentucky,* 448 U.S. 98 (1980). *See Davasher v. State,* 308 Ark. 154, 823 S.W.2d 863 (1992).

As to the argument that he could expect privacy in the truck because it was situated on the curtilage of his home, he cites only authority to the effect that a building or structure or a garden in the curtilage falls within that protection, not a vehicle belonging to some other person.

3. Suppression of the October 14 statements

Mr. Hodge argues that he was "seized" when Officer Emberton spoke with him in Paragould, when Officers Pruett and Emberton spoke with him at his residence some two hours later, and when he spoke with Officer Leach and volunteered to speak further with him at City Hall. His contention is that his statements made on those occasions, and any evidence obtained as a result of them, were inadmissible because he was given no *Miranda* warnings. There simply is no evidence that Mr. Hodge was a suspect on any of those occasions or that he was involuntarily present when any of those conversations occurred.

The only instance that might be questionable is Officer Emberton's encounter with Mr. Hodge at the Paragould police station. She testified that she assumed he had been "asked" to be there in response to the Rector police request. There is no evidence that the Paragould police had forced Mr. Hodge to accompany them to the station. He was not in handcuffs and was standing by himself with no officers in his presence. Mr. Hodge's abstract of the record reveals nothing about how he came to be present at the Paragould police station, and we are unwilling to speculate on what the facts may have been.

We view the issue of whether one has been seized by considering the totality of the circumstances. *State v. Bell,* 329 Ark. 422, 948 S.W.2d 557 (1997). None of the instances complained of here have been shown to have constituted a seizure; thus the evidence of the statements given by Mr. Hodge on those occasions was admissible.

4. Suppression of October 27 statement

Rector Chief of Police Tommy Baker drove Mr. Hodge from Rector to Corning for a hearing on October 27, 1995. There is no evidence that Chief Baker initiated any conversation with Mr. Hodge by asking a question of him. To the contrary, Chief Baker testified that Mr. Hodge insisted on speaking to him even though he told Mr. Hodge that his lawyers would not want him to do so.

During the trip, Mr. Hodge asked if the gun had been found. The Chief replied that it had not. Mr. Hodge indicated he could show the police the location of the holster he had discarded from the car driven by David Gunn shortly after the pistol was stolen from Mr. Flick's shop. He said it was "across from the cemetery." Chief Baker asked, "Across where," and Mr. Hodge explained further. The Chief and a State Police officer went to the cemetery and found the holster where Mr. Hodge said it would be.

Mr. Hodge contends that the statement and the holster should have been suppressed because the Chief initiated the conversation without giving any warning and "steered the conversation" and "interrogated" Mr. Hodge. The evidence is simply to the contrary. In addition, Mr. Hodge testified at his trial that he had David Gunn throw the holster out of the car in which they were riding because it made the gun too bulky. There clearly was no unfair prejudice resulting from the introduction of the holster into evidence.

5. Suppression of photographs and videotape

Mr. Hodge contends it was error to allow introduction of photographs showing the decomposing bodies of the victims as they were found by the police as well as the photographs of the blood found on the couch where Mr. Flick apparently lay when he was shot, the bloody pillows apparently used to muffle the gunshot sounds, and the blood trail down the hallway of the house. The photographs of the bodies are, no doubt, gruesome, but that does not automatically require their exclusion from evidence. *Jones v. State,* 329 Ark. 62, 947 S.W.2d 339 (1997).

In support of his argument, Mr. Hodge cites *Berry v. State,* 290 Ark. 223, 718 S.W.2d 447 (1986), a decision in which we held that autopsy photographs of a murder victim should have been suppressed because their prejudicial effect outweighed their probative value. The distinction here is that the photographs in the *Berry* case had very little if any probative value, but the photographs in this case showed the positions of the bodies as they were found and depicted the efforts of the killer to cover up the bodies and the blood.

[redacted] The still photographs were not cumulative to each other. While the videotape showed some of the same scenes as those depicted in the still photographs, it gave different perspectives. The Trial Court refused to allow the jury to see that part of the video tape showing the removal of the bodies from the house. He also excluded the autopsy photographs. There was no need, as contended by Mr. Hodge, for the Trial Court to require alternative pictures, such as drawings or black-and-white photographs instead of the color ones, because the photographs and the videotape were relevant. We cannot say their prejudicial effect outweighed their probative value. Ark. R. Evid. 403.

6. Closure of pretrial hearing

Mr. Hodge's counsel asked that a pretrial hearing be closed to the public on the ground that motions concerning the admissibility of evidence were to be considered and that the resulting publicity would be prejudicial to Mr. Hodge's case. The Trial Court denied the motion, citing *Memphis Publishing Co. v. Burnett,* 316 Ark. 176, 871 S.W.2d 359 (1994), a case over which he had presided and which resulted in a reversal due to a closed pretrial hearing.

[redacted] Mr. Hodge does not contend that the Trial Court lacked the authority, within his discretion, to hold the hearing open to the public. The decision is indeed within the discretion of a judge, and a hearing may be closed if it will result in irreparable damage to a party. *Arkansas Television Co. v. Tedder,* 281 Ark. 152, 662 S.W.2d 174 (1983). The argument here is that the deci-

sion was only a reaction to the *Memphis Publishing Co.* case and that no discretion was exercised.

To the contrary, the Trial Court invited proof of the prospect of irreparable harm to Mr. Hodge and stated that he would reconsider the matter if it appeared at the hearing in question that it should be closed. No error occurred on this point.

7. *Ms. Bowlin's testimony*

There was a motion *in limine* to suppress the testimony of Darlene Bowlin that Mr. and Ms. Flick had told her that they were afraid of Mr. Hodge. The motion was denied. It is contended that the statements were irrelevant, too remote in time, and unfairly prejudicial. The State argues the statements are particularly important and relevant in view of its right to prove Mr. Hodge had a motive or plan for killing his mother and stepfather and in view of the fact that the other evidence was circumstantial.

The statement made to Ms. Bowlin by Mr. Flick was hardly remote in time, as it was made some three weeks before the deaths occurred. The statement by Ms. Flick had occurred some two months prior to that time. They were not hearsay evidence because they were statements by declarants of their present states of mind and thus fell within an exception to the hearsay rule. Ark. R. Evid. 803(3).

With respect to the relevancy of the statements, Mr. Hodge's counsel cite a passage from a motion for rehearing quoted in a supplemental opinion accompanying the denial of rehearing in *Vasquez v. State,* 287 Ark. 468, 473A-474, 702 S.W.2d 411 (1986). The quoted passage was itself a quotation from McCormick on Evidence, § 296, pp. 853-854 (3d ed. 1984), in which it was recognized that an expression of fear falls within the hearsay exception of Rule 803(3). It continues to point out that statements such as "I am afraid of D" are rare and that the usual case is "D had threatened me." The treatise condemns the latter because it would probably be used by the jury to punish the defendant for a specific act. The instant case is the "rare case" of which the passage speaks. What we have here are mere statements of the declarants' fear of Mr. Hodge, and neither the *Vasquez* case nor

the passage from McCormick can be said to require that we exclude the statements on the basis of their irrelevancy.

Relevancy-of-evidence decisions are within the discretion of the Trial Court, *Dixon v. State,* 311 Ark. 613, 846 S.W.2d 170 (1993), and we cannot say that discretion was abused in this instance.

8. Rule 404(b)

Mr. Hodge argues that the introduction of evidence of his party behavior, including the use of alcohol and marijuana, his engaging in sexual relations with a teenaged girl, and his unauthorized use of his stepfather's credit card and business checks to obtain cash and goods was error in violation of Ark. R. Evid. 404(b).

The evidence was admitted by the Trial Court who quoted from the rule to the effect that a defendant's bad acts may be introduced if they tend to prove the defendant's motive for the crime at hand. The State contends that at least a part of Mr. Hodge's motive in killing his victims was his desire to engage in a "hedonistic lifestyle." Again, we cannot say that the Trial Court's application of Rule 404(b) was an abuse of discretion. That is the standard we apply in reviewing decisions made pursuant to Rule 404(b). *Bragg v. State,* 328 Ark. 613, 946 S.W.2d 654 (1997).

9. Admissibility of audio-tape statement

The jury was permitted to listen to an audio tape of Mr. Hodge's statement made to the State Police investigator. There were a number of inaudible portions of the tape, some of which were apparently caused by the fact that Mr. Hodge was crying and placing the sleeve of his shirt in or over his mouth while the recording was being made. Mr. Hodge contends the inaudible parts may have been of exculpatory answers he was giving to the questions being asked.

There was no abuse of discretion, and, again, that is the standard we apply. *Hamm v. State,* 301 Ark. 154, 782 S.W.2d 577 (1990). As mentioned above, the statement was not *per se* inculpa-

tory. Mr. Hodge said, through his tears, that he could not remember what happened and felt he could not have committed the crimes. It was hardly as inculpatory or prejudicial as his testimony at the trial.

The Trial Court permitted the jurors to see a transcript of the tape as it was being played for them, but he did not allow them to take the transcript to the jury room during their deliberations. In addition, he admonished the jurors that they were to determine what they heard, and if the transcript varied from the audio tape, they were to follow the tape. Thus, to the extent the transcript may have varied from the tape recording, as Mr. Hodge contends, there was no prejudice.

10. The threat

When David Gunn was asked to testify about Mr. Hodge's statement that he had a plan to kill Mr. Flick, counsel for Mr. Hodge objected on the basis of irrelevancy and questioned the prosecutor as to when Mr. Hodge was supposed to have made the statement. The prosecutor replied he thought "within the last 2 or 3 months before this." The Trial Court announced he would allow the evidence if the statement was made within the previous two or three months. Defense counsel then stated his position that the evidence was irrelevant. Upon further examination, Mr. Gunn stated that Mr. Hodge told him of the plan some six months earlier. The objection was renewed.

On appeal, Mr. Hodge argues that it was error for the Trial Court to allow the evidence of the statement made six months ago after having ruled that he would admit it if the statement had occurred within the last two or three months. The State responds that there was no abuse of discretion in that the statement was relevant to the elements of premeditation and deliberation, *see Shankle v. State,* 309 Ark. 40, 827 S.W.2d 642 (1992), and cites a case in which a threat a year and a half before the event was held admissible. *Lang v. State,* 258 Ark. 504, 527 S.W.2d 900 (1975).

We do not see how it can be said that the evidence is irrelevant, and, in view of the *Lang* opinion, we are not troubled by the remoteness argument, assuming it was preserved at the trial.

11. Refusal of sex-paraphernalia evidence

When the police entered Mr. Flick's shop, they found and photographed certain sex paraphernalia. One of the photographs was introduced by the defense in connection with its proof that David and Barbara Flick slept separately; that she was having an affair with another man; and that Mr. Hodge was incensed over discovering the paraphernalia, which led to the argument to which he testified as having occurred on the evening of October 8.

The Trial Court excluded a second photograph of the paraphernalia because it was cumulative. Mr. Hodge simply states in his argument that the photograph was not cumulative without any description of the differences and the prejudice resulting from the photograph being held inadmissible. There was no abuse of discretion.

12. Exclusion of David Flick's criminal record

Mr. Hodge presented evidence that David Flick had been convicted of a felony in California. The conviction resulted from an automobile collision in which a woman was injured and Mr. Flick was found to have been driving under the influence of alcohol. There was also some evidence that Mr. Flick's probationary sentence was revoked and that he was incarcerated for 45 days in 1981.

The Trial Court correctly excluded the evidence because the conviction and Mr. Flick's last release from incarceration occurred more than ten years before the trial in this case. Ark. R. Evid. 609(b).

13. Testimony of Pam Suitt

Over Mr. Hodge's hearsay objection, the Trial Court allowed Pam Suitt to testify that David Flick and Mr. Hodge would not be making the trip to Florida to visit with Ms. Suitt because they could not get along. The Trial Court overruled the objection, citing Ark. R. Evid. 803(3), apparently because it was a statement of Ms. Flick's plan to visit.

In view of Mr. Hodge's testimony about his relationship with Mr. Flick, and how he hated him, we can hardly say that the testimony was prejudicial.

14. Testimony of Courtney Simpson

Courtney Simpson, a friend of Mr. Hodge who rode in Mr. Flick's truck with Mr. Hodge on Thursday, October 12, testified that Mr. Hodge pulled a pistol out of the truck console and told him that he had the pistol in the truck in case someone tried to "fuck with" them. Mr. Hodge contends it was error to have allowed that testimony because it was irrelevant and improper character evidence, excludable pursuant to Rules 403 and 404(b). The only trial objection abstracted mentioned Rule 403. Thus, the only question we consider is whether the evidence was so unfairly prejudicial as to outweigh its probative value.

Again, we hold there was no abuse of discretion. The evidence showed Mr. Hodge remained in possession of the pistol for several days after the killings occurred before disposing of it. The vulgarity of the statement did not make it unduly prejudicial.

15. Rule 4-3(h)

The record in this case has been examined for errors prejudicial to the defendant in accordance with Ark. Sup. Ct. R. 4-3(h), and none has been found.

Affirmed.

Evote HUMPHREY *v.* STATE of Arkansas

CR 97-525 966 S.W.2d 213

Supreme Court of Arkansas
Opinion delivered March 26, 1998
[Petition for rehearing denied April 30, 1998.*]

* ARNOLD, C.J., and GLAZE, J., would grant.

Edwin A. Keaton, for appellant.

Winston Bryant, Att'y Gen., by: *Sandy Moll*, Asst. Att'y Gen., for appellee.

DAVID NEWBERN, Justice. Evote Humphrey was convicted of capital murder for shooting Tyrone Cook. He was sentenced to life imprisonment without parole. Mr. Humphrey's sole point on appeal is that the Trial Court erred in refusing to instruct the jury on justification. We agree with Mr. Humphrey that the Trial Court's failure to give that instruction was error; thus we reverse and remand.

Mr. Humphrey gave the following testimony. He met Tyrone Cook in 1993, and they occasionally engaged in recreational activities together in Stamps, which was their home town. In 1994, Mr. Cook had an altercation with Meiko McKenzie while others, including Mr. Humphrey, were present. Mr. Cook was shot in the thigh, and he thought that Mr. Humphrey had shot him. Shortly thereafter, Mr. Humphrey, who was with Vernis Mitchell, saw Mr. Cook, who was with Dyran Easter, using a crutch and holding a pistol. They walked past each other. Mr. Cook turned around and accused Mr. Humphrey of shooting him. Mr. Cook then began shooting at Mr. Humphrey who began running away from him down the street. Horace Lowe,

Lacedra Featherston, and two others saw Mr. Humphrey and Mr. Mitchell as they ran.

Mr. Humphrey moved from Stamps to Detroit, Michigan, for a time but returned to Stamps in early April 1995. He observed Mr. Cook drive past his house. He again saw Mr. Cook approximately a week before the April 21, 1995 shooting. Mr. Humphrey and Corey Cheatam were walking down the street when they saw Mr. Cook driving his mother's car. As they passed by the car, Mr. Cook glanced at them and then he quickly drove off and turned the corner. As Mr. Cook's car turned the corner, the trunk opened, and Mr. Cook jumped out. Because Mr. Humphrey believed that Mr. Cook was about to retrieve a gun from the trunk and shoot him, he and Mr. Cheatam ran away. On that day, Mr. Humphrey had with him a pistol he had obtained in Detroit for his protection.

Days later, Mr. Humphrey was standing with several other people, including Dyran Easter, when Mr. Cook drove up in Mr. Cook's mother's car. Mr. Cook asked Mr. Easter if he had seen "him" several times and then he drove off. Mr. Humphrey assumed that Mr. Cook had seen him because he was standing near the car, and Mr. Cook looked in his direction. Mr. Humphrey also had his pistol with him that day.

On April 21, 1995, Mr. Humphrey was at his mother's house with Patrick Stevens and Lamont Reynolds. Mr. Humphrey decided to go to the "dairy" to get something to eat. As they walked, the subject of Mr. Cook did not arise. At some point along the way, Mr. Humphrey saw Mr. Cook who was with James "Bo" Mack on the opposite side of the street. Mr. Cook was wearing a "big" coat even though it was warm outside. When Mr. Humphrey saw Mr. Cook, he became nervous and worried that Mr. Cook was going to shoot him because of the previous encounters, including the one in which Mr. Cook had shot at him. Mr. Humphrey did not see Mr. Cook with a gun, but he thought that he was armed. Mr. Humphrey did not turn around and walk away, as he was afraid to turn his back to Mr. Cook because of the incident in which Mr. Cook shot at him. As Mr. Humphrey walked past Mr. Cook, he watched him to be certain

that Mr. Cook did not pull out a gun. Mr. Cook was also watching Mr. Humphrey. As they passed each other, Mr. Cook asked Mr. Humphrey if he had a problem with him.

Each turned around to face the other. Mr. Cook became angry and asked Mr. Humphrey why he was looking at him. When Mr. Cook reached for something which Mr. Humphrey believed to be a gun, Mr. Humphrey began shooting at him. Mr. Humphrey continued firing his gun, he testified, because Mr. Cook seemed to continue to come at him while reaching for something. He had fourteen rounds in the clip and one round in the chamber. Mr. Humphrey was afraid of Mr. Cook and believed that if he had not shot Mr. Cook, Mr. Cook would have shot him.

Mr. Humphrey's testimony regarding the incidents with Mr. Cook prior to the shooting were corroborated by the testimony of several witnesses. Two witnesses testified as to the incident in which Mr. Cook shot at Mr. Humphrey. Horace Lowe testified that, in the fall of 1994, he walked outside his house and heard a gun shot. He then saw Mr. Humphrey and another young man running. He assumed that the shooter was going to shoot at them again because they were ducking and swerving as they ran. He testified that neither of the two men that ran past his house was carrying a gun.

Lacedra Featherston testified that she saw Mr. Cook, who was using crutches and carrying a pistol, and Dyran Easter walking in front of her home in 1994. Mr. Humphrey and Vernis Mitchell were walking from Mr. Humphrey's home and were further down the street. Mr. Cook, who was standing in front of her house, asked Mr. Humphrey, who was standing down the street, why he shot him. She further testified that she could not hear Mr. Humphrey's response, but that Mr. Cook then pointed his gun at him and said that he was going to kill him. She stated that Mr. Cook then began shooting at Mr. Humphrey, and Mr. Humphrey ran away. She testified that several shots hit a stop sign as Mr. Humphrey ran down the road, that a shot hit the side of a building when Mr. Humphrey ran behind the building, and that Mr. Cook

fired at least five or six shots. She stated that Mr. Mitchell did not run away because Mr. Cook was only shooting at Mr. Humphrey.

Corey Cheatham corroborated Mr. Humphrey's testimony regarding the incident in which Mr. Cook allegedly opened his trunk to get what Mr. Humphrey believed was a gun. He testified that Mr. Cook shut the trunk and got back in the car when they ran away.

Zenolia Hilliard, a rebuttal witness for the State, testified that Mr. Cook was her nephew. She stated that she did not remember him getting shot in 1994 or being on crutches, and she would have known if he had gotten shot. Ms. Hilliard, who lives in Pine Bluff, also stated that if Mr. Cook had seen a doctor or stayed in the hospital, she would have been the one to pay the bill.

Several witnesses of the April 21 shooting testified for the State. There is testimony that Mr. Cook had a gun in his possession several minutes before the confrontation began between him and Mr. Humphrey. There is also testimony that Mr. Cook seemed to be reaching for a gun before Mr. Humphrey shot him and that he did not fall after Mr. Humphrey fired the first shot at him.

Monroe Moore testified that on the night of April 21, as he stopped his van at his brother-in-law's house, he saw Mr. Cook and another person shoving each other. He did not see Mr. Cook with a gun, and Mr. Humphrey was the only person that he saw holding a gun. He did not see whether Mr. Cook reached to his pockets or his pants for a gun, and he did not see Mr. Humphrey reach for his gun. He stated that after Mr. Humphrey shot Mr. Cook one time, Mr. Cook fell to the ground and Mr. Humphrey kept shooting. After the first shot, Mr. Cook attempted to get up and was holding his stomach but that after Mr. Humphrey shot at him four or five times, Mr. Cook stopped moving. Mr. Moore testified that Mr. Humphrey hesitated after the fourth shot and then started shooting again so that Mr. Moore believed that Mr. Humphrey was putting another clip in the gun. Mr. Moore read from an earlier statement that he gave in which he said that after the first shot, Mr. Humphrey said, "I told you mother fucker, I

was not playing this time." Mr. Moore stated that after the shooting, Mr. Humphrey ran away.

Lamont Reynolds testified that on April 21, he and Patrick Stevens were walking with Mr. Humphrey to get something to eat when they saw Mr. Cook. James "Bo" Mack and Dyran Easter were with Mr. Cook. It was a hot day, and Mr. Cook was wearing a coat. He testified that Mr. Cook asked Mr. Humphrey if he had "some beef" with him, and that they began arguing. Mr. Cook began pushing Mr. Humphrey. Mr. Cook then reached for something at his waist under his coat as if he had a gun, but he never saw anything that resembled a gun. He testified that then Mr. Humphrey shot at Mr. Cook fifteen or sixteen times from five to ten feet away, and that he did not remember Mr. Humphrey stopping shooting and then beginning again. He stated that Mr. Humphrey was the only person doing the shooting. Mr. Cook fell after about the fourth shot, and Mr. Humphrey kept shooting after Mr. Cook was lying on the pavement. He testified that Mr. Humphrey was never in close proximity to the body while he was shooting, and that he did not walk around Mr. Cook as he shot at him. After the shooting was over, he saw Mr. Mack walk up to Mr. Cook's body, take something from the body, and put it in his pants. He left the area after the shooting.

Patrick Stevens, Mr. Humphrey's uncle, testified that he was visiting Mr. Humphrey at his house when Mr. Reynolds came over. He stated that he told them that he was going to take a walk across the tracks, and that Mr. Humphrey and Mr. Reynolds went with him. They were walking down the street when they saw Mr. Cook, Dyran Easter, and James "Bo" Mack walking toward them on the opposite side of the street. While Mr. Cook was walking down the street in their direction, Mr. Cook's mother stopped her car to talk to Mr. Cook. She seemed to ask him something, and he pulled his shirt up. She then drove off.

Mr. Stevens stated that about twenty to thirty seconds later, the confrontation between Mr. Cook and Mr. Humphrey began. His testimony as to the subsequent events, which is somewhat confusing, was abstracted as follows:

> [Tyrone] asked Evote did he have a problem with him and Evote told him no, he reached down there and by that time there just heard some shooting going on. When I say reach down there I'm talking about Tyrone. He was like walking down the street then him and Evote he like flinched right here, (Indicating and demonstrating to the jury) he put his hands inside his pants like something like right there (Indicating) but he had on like a coat. I could see his hand his hand went inside his pants like something like something like that. You know I couldn't you know as he was walking down the street hollering. After he said something to him Evote started shooting.

He stated that he did not see Mr. Humphrey walking around Mr. Cook as he shot at him. Once Mr. Humphrey began shooting, he did not stop and he did not change clips. He testified that after the shooting, Mr. Mack took something from the body of Mr. Cook and told him that it was a pager; however, he did not see what the item was.

Alicia Rodgers, a student nurse, testified that after the shooting, she checked Mr. Cook's pulse and raised his shirt to see if he had a heartbeat. She stated that she did not see a pager or a gun.

James "Bo" Mack testified that on April 21, Mr. Cook gave him a gun a couple of minutes before Mr. Cook's mother, who was driving down the street, stopped and asked him if he had a gun with him; however, Mr. Mack admitted that he told the police that he had never seen Mr. Cook with a gun. He testified that Mr. Cook opened up his jacket to show his mother that he did not have a gun. He stated that several minutes after Mr. Cook's mother asked him about the gun, the confrontation between Mr. Cook and Mr. Humphrey occurred. He testified that Mr. Cook did not have the pistol with him at the time that he was shot.

Mr. Mack testified that he and Mr. Cook met Mr. Humphrey and his friends on the street. He stated that Dyran Easter was not with him and Mr. Cook, but that he was standing nearby. He heard the first gunshot before he saw anyone with a gun, and that he then saw Mr. Humphrey as he was shooting at Mr. Cook. He stated that he saw Mr. Humphrey shooting Mr. Cook after he fell to the ground. He stated that the shots were

fired quickly and that he was not certain if the shots stopped before fourteen rounds had been discharged. He testified that they did not say anything to each other or push each other prior to the shooting. Mr. Mack testified that after the shooting, he went to his sister's house, and then he came back to the scene. He testified that he removed the pager from the side of Mr. Cook's jeans pocket after the shooting because it was his. He offered contradicting testimony as to whether he took the pager from Mr. Cook's body before or after he went to his sister's house. He stated that he did not take a gun from Mr. Cook's body after the shooting. He stated that after the shooting, Dyran Easter asked him for the gun that Mr. Cook had given him prior to the shooting, and that he gave it to Mr. Easter.

Several police officers also testified. There was some evidence that Mr. Humphrey may have walked around Mr. Cook's body as he fired some of the shots. There was also some evidence that at least three shots were fired at close range which can be from one foot to ten feet. There was evidence that Mr. Cook was shot five times in the head and neck from above while he was lying in the street. One police officer testified that fourteen nine millimeter spent cartridges were found at the scene.

Peter Briggs, Chief Deputy and Criminal Investigator in Lafayette County, testified that Mr. Humphrey took investigators to a location where they found the nine-millimeter Smith and Wesson pistol that was used in the shooting. He stated that Mr. Humphrey told the investigators that he used the gun in the shooting. There was a fifteen round clip in the weapon and one live round in the barrel. He also stated that none of the evidence supports Mr. Moore's statement that there was a second clip.

Deputy Briggs testified that when he interviewed Lamont Reynolds and Patrick Stevens on either April 21 or 22, 1995, neither of them said that Mr. Cook tried to reach in his waist band for a weapon, and only one of them said that it looked as if Mr. Cook were reaching for something. He also testified, however, that several people told him that it looked as if Tyrone Cook had a gun. He also testified that the witnesses did not see anything that resembled a gun, and that nothing had surfaced in the investiga-

tion that led him to believe that Tyrone Cook had a gun in his possession at the time of the shooting.

Gary Lawrence, an employee at the State Crime Lab in the trace evidence section, testified as an expert on gunshot residue. Based on testing of Mr. Cook's hands, Mr. Lawrence testified that Mr. Cook either fired a gun or his hands were in close proximity of the firearm. He stated that, based on the extraordinary high levels of gunshot residue on the hands, he concluded that the residues were more consistent with the hands being in front of the muzzle end of the firearm than from having discharged a firearm. He also stated that Mr. Cook's hands had to be exposed to have that level of residue.

Dr. Frank Peretti, a forensic pathologist and medical examiner for the State of Arkansas, did an autopsy on the body of Tyrone Cook. He testified that Mr. Cook sustained fourteen gunshot wounds. Seven gunshot wounds were to the right side of the head, and two gunshot wounds were to the right side of the neck. He stated that any one of the seven gunshot wounds to the head would have been fatal, and any one of the two gunshot wounds to the neck would have been fatal. There were two gunshot wounds to the chest, one of which was situated on top of the right shoulder. The shoulder wound was superficial, but the other chest wound would have been fatal. There was a gunshot wound to the abdomen on the left lower quadrant which only involved fatty tissue. There was also a fatal gunshot wound on the left side of the abdomen. There was a wound in the right buttock that would not have been fatal. He testified that, all wounds, even the superficial ones, contributed to death by blood loss. Mr. Cook died of the injuries to the skull and brain and the left side of the chest. He also stated that Mr. Cook bled to death in his chest and abdominal cavities. The only entrance wound to the back of Mr. Cook's body was the wound on his right buttock. He stated that it is very difficult to determine a sequence of shots in a case like this, and that he was unable to determine where a person receiving such wounds was shot first. The superficial wounds are not incapacitating, and one could probably get up and move around. The head wounds could result in some twitching and jerking of the extremities, but the recipient could not get up and walk around. The

neck wound resulted in incapacity, but not immediately. The chest wound would cause rapid bleeding so that "you wouldn't be able to do much with that injury either." He stated that Mr. Cook might have been able to get up and walk around with the abdominal injury alone.

This extensive recitation of the testimony given in this case shows that the primary, if not the only, issue addressed by both the defendant's and the State's evidence was whether Mr. Humphrey shot Mr. Cook with justification. At the close of the evidence, defense counsel proffered a written instruction on justification to be given to the jury. The Trial Court refused to give the instruction.

Arkansas Code Ann. § 5-2-607 (Repl. 1997) provides, in part, as follows:

> (a) A person is justified in using deadly physical force upon another person if he reasonably believes that the other person is:
>
> (1) Committing or about to commit a felony involving force or violence;
>
> (2) Using or about to use unlawful deadly physical force; or
>
> (3) [Added in 1997, and thus not included here.] . . .
>
> (b) A person may not use deadly physical force in self-defense *if he knows that he can avoid the necessity of using that force with complete safety:*
>
> (1) By retreating, except that a person is not required to retreat if he is in his dwelling and was not the original aggressor, or if he is a law enforcement officer or a person assisting at the direction of a law enforcement officer; or
>
> (2) By surrendering possession of property to a person claiming a lawful right thereto. [Emphasis supplied.]

We have held that a condition precedent to a plea of self-defense is an assault upon the defendant "of such a character that it is with murderous intent, or places the defendant in fear of his life, or great bodily harm." *Heinze v. State*, 309 Ark. 162, 827 S.W.2d 658 (1992) (citing *Girtman v. State*, 285 Ark. 13, 684 S.W.2d 806 (1985)). A critical issue is the reasonableness of the appellant's apprehension that he was in danger of losing his life or

receiving great bodily injury. *Turner v. State*, 258 Ark. 425, 527 S.W.2d 580 (1975). To justify the assault, it must have appeared that the circumstances were such as to excite the fears of a reasonable person. *Id.* A person is not entitled to act upon his belief that he was in danger, unless it is an honest belief, arrived at without fault or carelessness, and acted upon with due circumspection. *Id.*

Because justification is not an affirmative defense, the State has the burden of negating the defense once it is put in issue. *Peals v. State*, 266 Ark. 410, 584 S.W.2d 1 (1979). The defense of justification is a matter of intent and a question of fact for the jury. *Johnison v. State*, 317 Ark. 431, 878 S.W.2d 727 (1994). One who claims self-defense must show not only that the person killed was the aggressor, but that the accused used all reasonable means within his power and consistent with his safety to avoid the killing. *Ricketts v. State*, 292 Ark. 256, 729 S.W.2d 400 (1987). Evidence of specific acts of violence that were directed at an accused or were within his knowledge are probative of what the accused reasonably believed at the time and thus relevant to his plea of self-defense. *Simpkins v. State*, 48 Ark. App. 14, 889 S.W.2d 37 (1994).

The law is clear that a party is entitled to an instruction on a defense if there is sufficient evidence to raise a question of fact or if there is any supporting evidence for the instruction. *Yocum v. State*, 325 Ark. 180, 925 S.W.2d 385 (1996). Where the defendant has offered sufficient evidence to raise a question of fact concerning a defense, the instructions must fully and fairly declare the law applicable to that defense; however, there is no error in refusing to give a jury instruction where there is no basis in evidence to support the giving of the instruction. *Id. See Doles v. State*, 275 Ark. 448, 631 S.W.2d 281 (1982) ("Justification is not an affirmative defense which must be pled, but becomes a defense when *any evidence* tending to support its existence is offered to support it. [Emphasis supplied.]").

The dissent's description of Mr. Cook as an "unarmed man" is a factual determination that must be made by a jury. That description, as well as the dissent's reference to evidence that Mr. Cook was not reaching for his gun and that Mr. Humphrey did not use all reasonable means within his power and consistent with

his safety to avoid killing Mr. Cook, strongly suggests that the dissenters have overlooked the standard for determining when a justification instruction must be given. Our role is not to weigh the evidence to determine if the justification instruction should have been given. Instead, the standard requires that we limit our consideration to whether there is any evidence tending to support the existence of a defense. If there is such evidence, then the justification instruction must be submitted to the jury so that it can make a factual determination as to whether the charged conduct was committed in self-defense.

Based on the testimony of Mr. Humphrey as well as the testimony of eyewitnesses, there is clearly some evidence that Mr. Humphrey reasonably believed that Mr. Cook was about to shoot him when he fired at Mr. Cook. There is evidence to support a finding that Mr. Cook shot at Mr. Humphrey on a prior occasion and had acted menacingly toward him on other occasions. There is also evidence that Mr. Cook had a gun in his possession minutes before he encountered Mr. Humphrey. Mr. Cook was wearing a large, black coat on a warm day. Mr. Humphrey as well as other witnesses testified that prior to the shooting, Mr. Cook looked as if he were reaching for a gun in his waistband. Additionally, the investigator testified that other witnesses to the charged crime told him that Mr. Cook looked as if he were reaching for a gun. We recognize that a gun was not found on Mr. Cook's body after the shooting. It is, however, undisputed that Mr. Mack removed something from Mr. Cook's waistband after the shooting and that he was in possession of Mr. Cook's gun after the shooting. Mr. Mack testified that Mr. Cook gave him the gun prior to the shooting and that the item that he retrieved from Mr. Cook's body was a beeper; however, Mr. Mack initially told police that he had never seen Mr. Cook with a gun, and other witnesses testified that they did not see what the retrieved item was. Therefore, there is at least some evidence that Mr. Cook was reaching for a gun in his waistband when Mr. Humphrey shot him, and that Mr. Mack retrieved the gun from Mr. Cook's body after the shooting.

The State argues that the Trial Court correctly withheld the instruction because Mr. Humphrey did not use all reasonable means within his power and consistent with his safety to avoid

killing Mr. Cook because Mr. Humphrey could have turned around when he saw Mr. Cook walking down the street toward him. To the contrary, Mr. Humphrey testified that he was afraid to turn his back to Mr. Cook and walk away because he believed that Mr. Cook would have shot him if he had done so based on the prior incident in which Mr. Cook fired at Mr. Humphrey as he ran from Mr. Cook. There clearly was evidence tending to show that, after the confrontation began, Mr. Humphrey did not know that he could retreat with complete safety because he believed that Mr. Cook was reaching for his gun and was going to shoot at him as he had done in the past. The reasonableness of Mr. Humphrey's belief is supported by the testimony of eyewitnesses who stated that it looked as if Mr. Cook were reaching for a gun as well as the testimony of Mr. Cook's friend, James Mack, that several minutes before the confrontation began, Mr. Cook was in possession of a gun.

Arkansas Code Ann. § 5-2-607(b) only requires retreat if a person knows that avoidance of the use of deadly physical force can be accomplished with "complete safety." Clearly, based on Mr. Humphrey's experience with Mr. Cook, there is some evidence that Mr. Humphrey did not know that he could retreat with complete safety either when he initially saw Mr. Cook or when the confrontation began.

The State also argues that there was no evidence of self-defense because the force was excessive. In *McCarley v. State*, 257 Ark. 119, 514 S.W.2d 391 (1974), we held that the Trial Court erred in admitting evidence of specific wrongful acts allegedly done by the appellant prior to the incident for which he was tried. In determining whether the error was prejudicial we considered whether other, uncontroverted testimony proved McCarley guilty. One of the issues was self-defense.

Mr. McCarley had testified that the victim was reputed to be a bully and always armed. The State asserted that the theory of self-defense was "merely colorable" because the appellant never saw a gun during the encounter and because any defense of his own person was abandoned when, after having fired at and shot the deceased, the appellant struck him twice with the butt of a

rifle and twice again fired at deceased from behind a tree at the scene. We held that we could not "say with absolute assurance, when all inferences were drawn in favor of McCarley and the situation viewed as it appeared to [him], acting as a reasonable person, his plea of self-defense was totally foreclosed as a matter of law." *McCarley v. State*, 257 Ark. at 124, 514 S.W.2d at 393.

In *People v. Hill*, 642 N.Y.S.2d 222 (A.D. 1 Dept. 1996), the issue was whether a trial court's refusal to instruct the jury as to justifiable homicide was manifest when the People argued that the autopsy testimony of the medical examiner noted six shots to the decedent's head. The court, rejecting the People's argument, stated:

> This contention ignores controlling precedent that when evidence is proffered in support of the defense, "the defendant is entitled to the most favorable view of [that] evidence, a standard which was met in the record before us. Even if the jury were to find that defendant employed excessive force after gaining some control of the gun and repelling the decedent's attack, the People still had the burden of establishing that it was the excessive portion of the force that caused the death. No such showing was made here.

People v. Hill, 642 N.Y.S.2d at 223 (citations omitted).

The State has the burden of establishing that any excessive portion of the force used by Mr. Humphrey, as opposed to the alleged initial self-defense response, caused Mr. Cook's death. Although there is evidence that Mr. Humphrey continued to fire at Mr. Cook when arguably any danger to Mr. Humphrey had passed, there is also evidence that Mr. Cook sustained at least one fatal shot prior to the alleged use of excessive force such that any use of excessive force would not be relevant.

The State quotes *Hughes v. State*, 260 Ark. 399-A, 540 S.W.2d 592 (1976) in which we said: "Needless to say, one who engages in an argument with another person is not entitled to kill his adversary merely because he thinks him to have a gun." The testimony in the *Hughes* case was only that the appellant, in an out-of-court statement, told witnesses that "he thought [the victim] had a gun." There is no indication in the *Hughes* case that

there was any testimony that the appellant believed that the victim was reaching for a weapon when he shot him. That contrasts markedly with the testimony given here by Mr. Humphrey and others that it looked like Mr. Cook was reaching for a weapon. Additionally, unlike the evidence in this case, there is no reference to a prior history of life-threatening violence on the part of the victim toward the appellant in the Hughes case.

The State also compares the facts in this case to those in *Burton v. State*, 254 Ark. 673, 495 S.W.2d 841 (1973). In the *Burton* case, this Court, affirming the voluntary manslaughter conviction, stated that if the jury believed that the appellant armed himself and went to a bar in anticipation that the victim would be there and would attack him, or by acts and demonstrations provoked an attack upon himself by the victim, with the intent of killing the victim, or that the appellant voluntarily entered into a contest or duel with the victim, the appellant would be guilty of first degree murder. *Burton v. State*, 254 Ark. at 678, 495 S.W.2d at 844. We said that if those were the circumstances, the homicide would not be justified in self-defense unless the appellant had done everything within his power consistent with his safety to avoid the danger and avert the necessity of the killing. *Id.*

The State argues that the facts in the *Burton* case are similar to the facts in this case because Mr. Humphrey did not report the alleged prior incidents of violence by Mr. Cook. He instead carried a loaded gun when he did not believe that anyone, other than the victim, posed a threat to him. Mr. Humphrey also testified that he was carrying the gun for his protection "against no particular person." This case is distinguishable from the *Burton* case because there is no evidence that Mr. Humphrey walked down the streets of Stamps in anticipation that he would see Mr. Cook so that he could kill him. Even after having been fired upon by Mr. Cook, Mr. Humphrey had foregone several opportunities to shoot Mr. Cook prior to the ultimate confrontation.

Given the conflicting evidence on justification and the fact that the State had the burden of showing that it was the alleged excessive force, rather than the initial response, that

resulted in the death of the victim, we hold it was prejudicial error to have refused the instruction on justification.

Reversed and remanded.

ARNOLD, C.J., and GLAZE and THORNTON, JJ., dissent.

W.H. "DUB" ARNOLD, Chief Justice, dissenting. Evote Humphrey shot an unarmed man to death on a city street, shooting him fourteen times in the head, neck, chest, abdomen, and buttocks, and the majority believes he is entitled to a jury instruction on justification as a defense. Humphrey was charged with and convicted of the capital murder of Tyrone Cook and sentenced by a jury to life imprisonment without parole.

Most importantly, the forensic pathology and trace evidence dictate against a justification instruction. Dr. Frank Peretti, the forensic pathologist and medical examiner for the State of Arkansas, testified that Cook sustained a total of fourteen gunshot wounds: seven right-side head wounds; two right-side neck wounds; two chest wounds; one abdominal wound involving fatty tissue; one left-side abdominal wound; and one right buttock wound. Any one of the seven head wounds was fatal. Any one of the two neck wounds was fatal. One of the two chest wounds was fatal. One of the two abdominal wounds was fatal. Moreover, all the wounds, even the superficial wounds, contributed to Cook's death by blood loss. In all, standing alone, eleven of the fourteen gunshot wounds would have been fatal.

Gary Lawrence, an employee of the State Crime Lab Trace Evidence Section, offers the most compelling testimony mandating against the justification instruction. Mr. Lawrence testified that according to the extraordinarily high levels of gunshot residue on the victim's hands and the fact that the residues were more consistent with Cook's hands being in front of the muzzle end of a firearm — Cook's hands had to have been exposed to have that level of residue. Consequently, the physical evidence demonstrates that Humphrey could see Cook's hands directly in front of him and not, as Humphrey suggests, reaching for a gun. Recall that Cook was unarmed at the time of the shooting but that Humphrey alleges that Cook was continuing to come at him

while reaching for something. The forensic evidence suggests a conclusion to the contrary, that Cook's hands were exposed and visible to Humphrey, negating the basis for a self-defense instruction.

The majority also places great weight on the prior history of Humphrey and his victim, specifically on an incident where Cook shot at Humphrey and Humphrey fled to safety. Again, on the day of the killing, the majority suggests that these two men's paths somehow unavoidably crossed and resulted in Cook's death. However, this meeting was not inevitable. In fact, the victim was walking on the opposite side of the city street with "Bo" Mack, while Humphrey walked with friends on the other side of the street. If the prior incident proves anything, it demonstrates Humphrey's knowledge of the necessity of retreat.

Moreover, during a second encounter with Cook, Cook allegedly drove past Humphrey on the street, stopped his car, and Humphrey believed that Cook was going to retrieve a weapon from his trunk. Humphrey ran away in retreat. I fail to see what distinguishes the fatal incident on April 21, 1995, from either of these prior encounters where Humphrey retreated to safety. In fact, with respect to the first incident, Cook actually had a gun whereas on the day of the fatal shooting Cook was unarmed.

Although Ark. Code Ann. § 5-2-607(a)(3) would permit Humphrey to use deadly physical force upon Cook if Humphrey reasonably believed that Cook was about to use unlawful deadly physical force, Humphrey was prohibited, pursuant to section 607(b), from using deadly physical force in self-defense if he knew that he could avoid the necessity of using that force with complete safety. Humphrey's prior encounters with Cook only strengthen Humphrey's awareness of the advisability and duty to retreat from another meeting.

Additionally, Humphrey was armed in anticipation of a possible conflict, and he voluntarily crossed paths with Cook, rejecting the alternative of retreating from the fatal encounter. *See Burton v. State*, 254 Ark. 673, 495 S.W.2d 841 (1973). Even after the two men met on the street, Humphrey's duty to retreat did not diminish. As the majority concedes, Humphrey was bound to

do everything in his power, consistent with his safety, to avoid danger and avert the necessity of killing. Moreover, to assert a claim of self-defense, Humphrey must prove that (1) Cook was the aggressor, and (2) Humphrey used all reasonable means within his power and consistent with his safety to avoid the killing, including retreat, where retreat can safely be effected. *Martin v. State*, 290 Ark. 293, 718 S.W.2d 938 (1986). Further, there must be some rational basis for submitting a justification instruction to the jury. Where the use of force was avoidable with complete safety, Humphrey is not entitled to a justification instruction. *See id.* at 296-97.

Moreover, the eyewitness testimony of Monroe Moore confirms that Humphrey kept shooting at Cook, even after Cook was on the ground. Humphrey shot Cook fourteen times, and no witnesses testified that they saw Cook with a gun during the shooting, and police investigation revealed no such gun. Although the medical examiner could not conclude which gunshot wound Cook first received, eyewitness testimony indicates that it may have been an abdominal wound. Monroe Moore testified that after the first shot, Cook fell to the ground, holding his stomach. In any event, Humphrey's duty to retreat endured, even after he fired the first gunshot into Cook. Rather than retreat, Humphrey fired again, again, again, again, again, again, again, again, again, again, again, again, and again. The trial court correctly held that there was no rational basis in evidence supporting a justification instruction, and I respectfully dissent.

GLAZE and THORNTON, JJ., join this dissent.

Russ STOCKTON and Stephanie Stockton *v.* SENTRY INSURANCE, a Mutual Company, and Curt L. McDuff, Jr.

97-720 965 S.W.2d 762

Supreme Court of Arkansas
Opinion delivered March 26, 1998

Matthew Horan, for appellants.

Cross, Gunter, Witherspoon & Galchus, P.C., by: *M. Stephen Bingham*, for appellees.

TOM GLAZE, Justice. Appellants Russ and Stephanie Stockton filed suit against appellee Sentry Insurance and its agent, Curt

L. McDuff, Jr. The Stocktons alleged that Sentry had recruited Russ to be a franchisee to sell and distribute Sentry's insurance services in Benton County, and in return, he was to receive an income of $50,000.00, an office, a company car, a sales coordinator, and a telephone service. The Stocktons further charged that McDuff had intimidated and harassed them during a three-year period and had reneged on Sentry's promise of an office, forcing Stephanie Stockton to serve as Russ's unpaid secretary. Russ Stockton also asserted that Sentry's and McDuff's actions forced him to resign, and although he had prearranged with Sentry to have his dental work done, Sentry called the dentist's office and improperly withheld its approval when Russ was actually in the dental chair having his teeth drilled. In their complaint, the Stocktons alleged the following seven separate causes of action against Sentry and McDuff:

(1) fraud in the offer of a franchise to Russ Stockton;

(2) tort of outrage towards both Russ and Stephanie Stockton;

(3) violation of the wage and hour laws as related to Stephanie;

(4) negligence against Russ Stockton;

(5) breach of Russ Stockton's contract;

(6) tortious interference with Russ Stockton's contract;

(7) battery in Russ Stockton's favor as a result of Sentry's acts in cancelling his dental insurance in "mid-procedure."

Sentry and McDuff moved to dismiss the Stocktons' complaint under Ark. R. Civ. P. 12(b)(6), stating the complaint failed to state facts upon which relief could be granted.[1] The Stocktons responded, stating their complaint was sufficient, and the motion to dismiss should be denied. After the respective parties submitted briefs, the trial court entered its order dismissing all of the

[1] A number of additional pleadings were filed related to this cause being temporarily removed to a federal district court, but we need not reference them, since they are not relevant to our decision.

Stocktons' complaint, except Stephanie Stockton's claim for unpaid wages.[2]

After the trial court's order, dismissing most of the Stocktons' claims, was entered on January 30, 1997, Sentry and McDuff, a week later, filed an answer and counterclaim. In their answer, Sentry and McDuff primarily denied Stephanie's remaining claim, but their counterclaim asserted entitlement to contribution and indemnity against Russ Stockton, if they were adjudged liable to Stephanie. The Stocktons then moved for the trial court to reconsider its granting of Sentry's and McDuff's summary-judgment motion. When the trial court failed to rule on their motion, the Stocktons filed their reply to Sentry's and McDuff's counterclaim, and then filed what they captioned as a "Notice of Dismissal." No further action was taken by the trial court, Sentry or McDuff, and the Stocktons filed their notice of appeal from the trial court's January 30, 1997 order. Sentry and McDuff countered, arguing that, because the Stocktons had not complied with Ark. R. Civ. P. 54(b), no final order had been entered from which the Stocktons can appeal. In addition, they submit that, even if there was a final order, the Stocktons' appeal was filed untimely.

The Stocktons' appeal is obviously premature, and must be dismissed, since they failed to comply with Rule 54(b). We have repeatedly held that, to be appealable, an order must be final, Ark. R. App. P.—Civil 2, and the finality of a trial court's order is governed by Rule 54(b), which provides that a trial court may direct entry of a final order or judgment as to fewer than all the parties to a multiparty suit, as long as the court expressly determines, with factual findings, that there is no just reason to delay the appeal. *See Dean v. Tallman*, 331 Ark. 127, 959 S.W.2d 41 (1998). In the absence of this determination and findings, an order is not final when it adjudicates fewer than all the claims or

[2] The trial court granted Sentry and McDuff summary judgment in dismissing six of the Stocktons' claims, and in doing so relied on several exhibits contained in Sentry's brief. While the Stocktons offer convincing argument that such exhibits should not have been used by the trial court, we do not reach the merits of the issue, since the case is dismissed because of a lack of jurisdiction.

the rights and liabilities of fewer than all the parties. *Id.* The underlying policy of this rule is to avoid piecemeal appeals. *Id.*

In this case, the trial court's order never mentioned Sentry's and McDuff's counterclaim, *see Williamson v. Misemer*, 316 Ark. 192, 871 S.W.2d 396 (1994), but most significant, the Stocktons never properly dismissed Stephanie Stockton's remaining wage-loss claim, which is still pending. As we previously mentioned, Stephanie Stockton filed a "notice of dismissal," which she now argues dismissed her remaining claim. However, we have held that a court order is necessary to grant a nonsuit and that the order (judgment or decree) must be entered to be effective. *Blaylock v. Shearson Lehman Bros., Inc.*, 330 Ark. 620, 954 S.W.2d 939 (1997). Here, the record reflects the Stocktons never filed an actual motion to dismiss Stephanie's claim, nor did they request the trial court to rule on their dismissal request.

In sum, Stephanie Stockton's wage-loss claim remains pending below, as does the counterclaim of Sentry and McDuff. Because the Stocktons failed to comply with the directives of Rule 54(b) before filing their notice of appeal, we must dismiss without prejudice on jurisdictional grounds.

CITY OF WEST MEMPHIS and Lindsey Fairley, Nolan Dawson, and Tom Graham, In Their Official Capacities as the Crittenden County Board of Election Commissioners *v.* CITY OF MARION

97-742 965 S.W.2d 776

Supreme Court of Arkansas
Opinion delivered March 26, 1998

David C. Peeples, for appellant.

James C. Hale, III; and *Timothy Davis Fox*, for appellee/cross-appellant.

DONALD L. CORBIN, Justice. Appellant City of West Memphis raises three issues in this appeal arising out of the Crittenden County Circuit Court against Appellee City of Marion. Our jurisdiction of this appeal is pursuant to Ark. Sup. Ct. R. 1-2(a)(6), as it concerns an election and election procedures involving both a voluntary annexation as set forth in Ark. Code Ann. §§ 14-40-601—606 (1987), and an involuntary annexation pursuant to Ark. Code Ann. §§ 14-40-301—304 (1987). Marion raises one issue on cross-appeal. Due to a flagrantly deficient abstract, we summarily affirm the direct appeal. We further affirm the cross-appeal.

The facts culminating in this appeal began on December 23, 1996, when West Memphis passed Ordinance No. 1760, providing for a special election on February 24, 1997. The purpose of the election was to vote for annexation of 5,700 acres to West Memphis. On December 30, 1996, seven property owners of 2,340 acres within the same 5,700 acres, petitioned the Crittenden County Court for voluntary annexation to Marion. The Crittenden County Court granted the petition for annexation to Marion in an order entered on February 4, 1997. On February 11, 1997, Marion passed Ordinance No. 328, accepting the 2,340 acres. Ordinance No. 328 contained an emergency clause which rendered the Marion annexation effective immediately.

On February 18, 1997, Marion filed a complaint in the Crittenden County Circuit Court, seeking a writ of mandamus against West Memphis and the Crittenden County Board of Election Commissioners to remove the 2,340 acres from the legal description on the special-election ballot. The complaint further sought a declaratory judgment and an injunction to restrain the February 24, 1997 special election. The circuit court conducted a hearing on February 20, 1997, and ultimately denied the writ of mandamus and injunction. The circuit court, however, issued a declaratory judgment, in an order entered on February 20, 1997, and filed on March 14, 1997. Specifically, the circuit court found that the 2,340 acres belonged to Marion, as Ordinance No. 328 became effective on the date it was passed. The circuit court also ruled that the order could only be challenged by an interested party filing a complaint in the circuit court to prevent the annexa-

tion. The circuit court determined that the ballots for the February 24, 1997 special election had been printed, and seven voters had already voted. The circuit court further determined that should the election result in a favorable vote for annexation of the 5,700 acres, the 2,340 acres annexed to Marion would not become part of West Memphis. The trial court relied on section 14-40-301, which provides that "[t]he provisions of this subchapter shall not be construed to give any municipality the authority to annex any portion of another city or incorporated town." West Memphis then filed notice of this appeal on April 9, 1997. Marion filed notice of cross-appeal on April 21, 1997.

The standard of review for annexation cases is substantial evidence. *Lewis v. City of Bryant*, 291 Ark. 566, 726 S.W.2d 672 (1987). Our sole responsibility is to decide whether the circuit court's findings of fact are clearly erroneous. *Id.* (citing *Holmes v. City of Little Rock*, 285 Ark. 296, 686 S.W.2d 425 (1985)). When the appellate court has a firm and definite belief that the trial court made a mistake, it will hold the trial court's finding as clearly erroneous even if there is evidence to support it. *Henry, Walden & Davis v. Goodman*, 294 Ark. 25, 741 S.W.2d 233 (1987).

West Memphis raises three points for reversal: (1) the trial court erred in ruling on the action for declaratory judgment after denying the writ of mandamus and injunction; (2) the trial court erred in ruling that the 2,340 acres were annexed to Marion and that West Memphis thus had no authority to annex that property upon approval of the voters; and (3) the trial court erred in determining that the emergency clause to Ordinance No. 328 made the ordinance effective on February 11, 1997, the date of its passage. We do not reach the merits of any of these arguments, as Appellants' abstract, consisting of only six pages, is flagrantly deficient.

We addressed a similar abstract deficiency in *Porter v. Porter*, 329 Ark. 42, 945 S.W.2d 376 (1997), commenting:

> It is well established that the abstract is the record for purposes of appeal. *Allen v. Routon*, 57 Ark. App. 137, 943 S.W.2d 605 (1997). We have recently held that section [4-2](a)(6) of the Arkansas Supreme Court Rules is violated when there are no ref-

> erences to the pages of an abstract and only transcript citations were supplied to the court. *Sanders v. State*, 317 Ark. 328, 878 S.W.2d 391 (1994). A transcript will not be examined to reverse a lower court. *Oliver v. Washington County Arkansas*, 328 Ark. 61, 940 S.W.2d 884 (1997). The burden is clearly placed on the appealing party to provide both a record and an abstract sufficient for appellate review. *Cosgrove v. City of West Memphis*, 327 Ark. 324, 938 S.W.2d 827 (1997); *Lee v. Villines*, 328 Ark. 189, 942 S.W.2d 844 (1997) . . . . This court will not entertain an argument when it cannot be determined from the abstract what arguments were made to the lower court. *Cosgrove*, 327 Ark. at 328, 938 S.W.2d at 830. When previously confronted with an extensive record and numerous volumes, and where the abstract was nine pages and left out relevant information and was hard to understand, this court has refused review. *Jewell v. Miller Co. Elec. Comm.*, 327 Ark. 153, 936 S.W.2d 754 (1997).
>
> Rule 4-2(a)(6) of the Arkansas Supreme Court clearly requires that the abstract should contain "pleadings, proceedings, facts, documents, and other matters in the record as are necessary to an understanding of all questions presented to the Court for decision." The purpose of an abstract is to give us an understanding of the issues on appeal. *McAdams v. Automotive Rentals, Inc.*, 325 Ark. 332, 924 S.W.2d 464 (1996). We may affirm for noncompliance with the Rule when there is a flagrantly deficient abstract.

Id. at 44-45, 945 S.W.2d at 377. The inherent logic of this rule is that there are seven justices on our court, but only one record. *Cosgrove*, 327 Ark. 324, 938 S.W.2d 827. Mere references to the transcript scattered in the brief are insufficient. *Adams v. State*, 276 Ark. 18, 631 S.W.2d 828 (1982).

■ Here, West Memphis failed to meet its burden of producing a sufficient abstract. West Memphis did not abstract any of the arguments made or testimony given to the trial court. The record in this case consists of two volumes, having a total of 124 pages, and includes six exhibits. The six-page abstract does not give us adequate information with which to decide the complicated issues presented in this appeal. Moreover, the only exhibit abstracted is Ordinance No. 328. The flagrantly deficient abstract bars review on appeal for failure to comply with Ark. Sup. Ct. R. 4-2(a)(6). Selected pleadings occupy most of this minimal

abstract. West Memphis made little effort to comply with Rule 4-2(a)(6), which requires a reference to the record with every two pages abstracted. We note that Marion supplemented the abstract of the record in support of its cross-appeal; however, this did not cure the above-noted deficiencies. Accordingly, we summarily affirm all three issues raised on direct appeal.

Cross-Appeal

The sole issue on cross-appeal concerns whether the trial court erred by denying Marion's requested relief of mandamus to the extent that the special election involved the disputed 2,340 acres. Marion, therefore, would have this court set aside the February 24, 1997 special election.

We recently addressed another election issue in *Doty v. Bettis*, 329 Ark. 120, 947 S.W.2d 743 (1997):

> [I]f the appeal reaches this court *after the election* has occurred, the only remedy we can provide is to set aside the election results . . . . In other words, once the votes have been cast, we will not set aside the election unless the procedural errors rendered the result doubtful or prevented the electorate from casting free and intelligent votes.

Id. at 123, 947 S.W.2d at 744 (citations omitted).

Mandamus is properly ordered when there is an established right, *and* the law does not have a specific remedy with which to enforce that right. *Gregg v. Hartwick*, 292 Ark. 528, 731 S.W.2d 766 (1987). Although this court has frequently recognized the writ of mandamus as a remedy to remove ineligible candidates on ballot titles, *see, e.g., Ivy v. Republican Party*, 318 Ark. 50, 883 S.W.2d 805 (1994), we construe the issue raised on cross-appeal as an alternative argument to reversal on direct appeal. Setting the election aside now would not benefit Marion. The circuit court considered that seven voters had already cast ballots at the time of the February 20, 1997 hearing and prudently declined to issue the writ of mandamus. The declaratory judgment effectively removed the disputed 2,340 acres from the West Memphis ballot, thus Marion has already received the relief it now requests on cross-appeal. Marion does not allege that the failure to issue

the writ made the result of the election doubtful or prevented the voters from free and intelligent votes.

For the reasons above, we affirm the circuit court's judgment in its entirety.

Affirmed.

WESTERN WORLD INSURANCE COMPANY, Inc. *v.*
Charles BRANCH and East Arkansas
Youth Services, Inc.

97-747 965 S.W.2d 760

Supreme Court of Arkansas
Opinion delivered March 26, 1998

Wright, Lindsey & Jennings, by: *Patricia A. Sievers* and *J. Charles Dougherty*, for appellant.

Bill W. Bristow, for appellee Charles Branch.

William P. Rainey, for appellee East Arkansas Youth Services, Inc.

ANNABELLE CLINTON IMBER, Justice. The issue in this case is whether a sexual attack that occurred at East Arkansas Youth Services, Incorporated ("Youth Services"), is covered by an insurance policy issued by Western World Insurance Company ("Western World"). The trial court entered a declaratory judgment in favor of Youth Services, and Western World appeals. We reverse.

Youth Services is a temporary residential facility for nonviolent adolescents. Jacqueline Branch Daves was a resident of Youth Services at their facility in Crittenden County when she was allegedly raped by another resident. Ms. Daves and her father, Charles Branch, subsequently filed a lawsuit against Youth Services and its insurance carrier, Western World, alleging that Youth Services' negligent supervision and deficient safety measures were the proximate cause of the rape.

Youth Services filed a cross-claim asking for a declaratory judgment that Western World was obligated to provide liability coverage and to defend the negligence action pursuant to a general and professional liability insurance policy which was in effect at the time of the alleged rape. In response, Western World claimed that it was exempt from both obligations pursuant to a "Sexual Action Exclusion" provision which provided that:

> It is agreed that no coverage exists (and therefore no duty to defend exists) for claims or suits brought against any insured for damages arising from sexual action. Sexual action includes, but is not limited to, any behavior with sexual connotation or purpose — whether performed for sexual gratification, discrimination, intimidation, coercion or other reason.
>
> It is further agreed this exclusion applies even if an alleged cause of the damages was the insured's negligent hiring, placement, training, supervision, act, error or omission.

On April 15, 1997, the trial court entered declaratory judgment in favor of Youth Services. In its order, the trial court found that the exclusion applied only to sexual acts committed by Youth Services' employees, and not to sexual acts committed by its residents. Accordingly, the trial court declared that Western World was required to provide liability coverage and defend the negli-

gence action filed by Daves and Branch. From this order, Western World filed a timely notice of appeal.

I. Interpretation of the Exclusion

For its first argument on appeal, Western World contends that the trial court erred when it construed the language of the sexual-action exclusion provision to exclude coverage for sexual acts committed by Youth Services' employees, but not to exclude coverage for sexual acts committed by its residents. Our law regarding the construction of an insurance contract is well settled. In *Southern Farm Bureau Cas. Ins. Co. v. Williams*, 260 Ark. 659, 543 S.W.2d 467 (1976), we said that:

> The terms of an insurance contract are not to be rewritten under the rule of strict construction against the company issuing it so as to bind the insurer to a risk which is plainly excluded and for which it was not paid.

Thus, if the provision is unambiguous, and only one reasonable interpretation is possible, we will give effect to the plain language of the policy without resorting to the rules of construction. *See Unigard Sec. Ins. Co. v. Murphy Oil U.S.A., Inc.*, 331 Ark. 211, 962 S.W.2d 735 (1998); *Smith v. Shelter Mut. Ins. Co.*, 327 Ark. 208, 937 S.W.2d 180 (1997). If, however, the policy language is ambiguous, and thus susceptible to more than one reasonable interpretation, we will construe the policy liberally in favor of the insured and strictly against the insurer. *Unigard, supra*; *State Farm Fire & Cas. Co. v. Midgett*, 319 Ark. 435, 892 S.W.2d 469 (1995); *Keller v. Safeco Ins. Co.*, 317 Ark. 308, 877 S.W.2d 90 (1994). Finally, whether the language of the policy is ambiguous is a question of law to be resolved by the court. *Unigard, supra.*

We hold that the language of the sexual-action exclusion is unambiguous, and thus we must give effect to its plain meaning without resorting to the rules of construction. The definition of "sexual action" contained in the exclusion is written very broadly to include "any behavior with sexual connotation or purpose." The exclusion then provides several examples of why this conduct may occur, but specifically says "not limited to" and refers to "other reason[s]," thus indicating that the improper sex-

ual acts may occur for reasons other than those listed in the definition. Moreover, the last sentence broadens the exclusion by clarifying that Western World will also not be liable if Youth Services is sued in a direct action for negligence, or under a theory of imputed negligence such as respondeat superior. For these reasons, we hold that the sexual-action exclusion unambiguously excludes from coverage liability that results from sexual acts committed by Youth Services' employees or residents. Accordingly, we reverse the trial court's order of declaratory judgment.

In reaching this conclusion, we are not unmindful of Youth Services' argument that the exclusion is in conflict with two provisions in the insurance policy. This argument, however, was not raised below nor was it ruled upon by the trial court. Hence, the argument is procedurally barred as it is raised for the first time on appeal. *Wilson v. Rebsamen Ins., Inc.*, 330 Ark. 687, 957 S.W.2d 678 (1997); *Slaton v. Slaton*, 330 Ark. 287, 956 S.W.2d 150 (1997).

II. Public Policy

The next issue is whether the exclusion is void as a matter of public policy because the phrase "sexual action" is vague and overbroad. It is well settled that an insurer may contract with its insured upon whatever terms the parties agree so long as the terms are not contrary to a statute or public policy. *Pardon v. Southern Farm Bureau Cas. Ins.*, 315 Ark. 537, 868 S.W.2d 468 (1994); *Shelter v. Gen. Ins. Co. v. Williams*, 315 Ark. 409, 867 S.W.2d 457 (1993); *Guaranty Nat'l Ins. v. Denver Roller Inc.*, 313 Ark. 128, 854 S.W.2d 312 (1993). To determine the public policy of this state, we look to our statutes and constitution, *Guaranty Nat'l Ins., supra*; *Sterling Drug, Inc. v. Oxford*, 294 Ark. 239, 743 S.W.2d 380 (1988), because public policy is declared by the General Assembly, and not this court. *Davis v. Ross Prod. Co.*, 322 Ark. 532, 910 S.W.2d 209 (1995); *Nabholtz Const. Corp. v. Graham*, 319 Ark. 396, 892 S.W.2d 456 (1995).

On appeal, Youth Services has failed to draw our attention to a single statutory or constitutional provision that establishes a public policy prohibiting sexual-action exclusion provisions.

Instead, Western World has cited cases from other jurisdictions that purportedly stand for the proposition that such exclusions do not violate public policy. In *Smith v. Shelter Mutual Insurance Co.*, 327 Ark. 208, 937 S.W.2d 180 (1997), we refused to consider cases from other jurisdictions once we concluded that the insurance provision in question did not violate the public policy of this state. Youth Services has simply failed to demonstrate how the sexual-action provision violates Arkansas public policy. Accordingly, we find no merit to this argument.

Reversed.

Ronita Faith BELL *v.* STATE of Arkansas

CR 97-1004 961 S.W.2d 36

Supreme Court of Arkansas
Opinion delivered March 26, 1998

Steve Kirk, for appellant.

No response.

PER CURIAM. Appellant Ronita Faith Bell, by her attorney, Steve Kirk, has two motions pending for an extension of time to file her brief. Prior to these motions, Bell through counsel, Steve Kirk, filed a motion for an extension to file her brief on October 7, 1997, and it was granted until November 7, 1997. She then asked for a second extension on November 6, 1997, and it was granted until December 22, 1997. She next moved for a third extension of time and to supplement the record on December 22, 1997, and this was granted on January 15, 1998. This was described as a "final extension." We stated that the brief would be due 14 days after the supplement to the transcript was filed. The supplement was filed on February 13, 1998, which made Bell's brief due on February 27, 1998.

The first of the two current motions for an extension was filed on February 27, 1998, and it asked for an extension until March 6, 1998. The second motion was filed on March 6, 1998, and requests an extension until March 16, 1998. Each motion asks that it be deemed a "final extension." Bell's brief was tendered to this court on March 16, 1998. We accept the brief for filing.

We do not grant extensions as a matter of course after a final extension has been given. The final extension occurred on January 15, 1998, with the brief due on February 27, 1998.

Attorney Steve Kirk is ordered to appear at 9:00 a.m. on Thursday, April 9, 1998, to show cause why he should not be held in contempt for failing to file appellant's brief in a timely manner.

Perry GUYNN *v.* STATE of Arkansas

CR 98-278 961 S.W.2d 35

Supreme Court of Arkansas
Opinion delivered March 26, 1998

Jack R. Kearney, for appellant.

No response.

PER CURIAM. Appellant was convicted on August 13, 1997, of possession of a controlled substance with intent to deliver, possession of drug paraphernalia, and manufacture of a controlled substance. He filed a notice of appeal on September 4, 1997, but the court's judgment and commitment order was not entered until October 6, 1997. On November 11, 1997, the Pulaski County Circuit Court granted the appellant an extension to file the record on or before March 3, 1998, and the record was tendered on March 2, 1998. Obviously, because the notice of appeal was filed prematurely, any extension to file the record was improper.

The appellant has filed a motion for belated appeal to compel the clerk's office to accept the record. In his motion, appellant states the reason the record was tendered late is that the "defendant and counsel were unaware that their notice of appeal and designation of record had preceded the filing of the judgment and commitment order."

This court has held that we will grant a motion for belated appeal when the attorney admits that the notice of appeal was untimely filed due to an error on his part. *See In Re: Belated*

Appeals in Criminal Cases, 265 Ark. 964 (1979) (per curiam). Here, the attorney does not admit fault on his part. We have held that a statement that it was someone else's fault or no one's fault will not suffice. *Clark v. State,* 289 Ark. 382, 711 S.W.2d 162 (1986). Therefore, appellant's motion must be denied.

The appellant's attorney shall file within thirty days from the date of this per curiam a motion and affidavit in this case accepting full responsibility for the untimely filing of the notice of appeal. Upon filing same, the motion will be granted and a copy of the opinion will be forwarded to the Committee on Professional Conduct.

Melvin Kent SHOEMATE *v.* STATE of Arkansas

CR 97-1209 965 S.W.2d 779

Supreme Court of Arkansas
Opinion delivered March 26, 1998

James Steven Dunham, for appellant.

No response.

PER CURIAM. On October 9, 1997, appellant, Melvin Kent Shoemate, by his attorney, James Steven Dunham, submitted a motion to file a belated appeal from his rape conviction. Shoemate contends that his trial counsel, L. Gray Dellinger, failed to timely file, within thirty days of the entry of judgment, a notice of appeal from Shoemate's conviction. In the absence of an affidavit

from Mr. Dellinger admitting negligence, we remanded the matter to the trial court for the purpose of settling the record and determining if the appellant had requested that Dellinger file a notice of appeal. On March 5, 1998, the supreme court clerk received a supplemental record on remand, and on March 12, 1998, Shoemate resubmitted his motion for a belated appeal.

After reviewing the evidence, the trial court concluded, in its order settling the record, that Shoemate did not request Dellinger to file a notice of appeal. Specifically, the trial court noted that Shoemate's and Dellinger's testimony indicated that they did not have the immediate opportunity to discuss the matter of filing an appeal because it was late in the evening following the jury's verdict and court's sentencing, and Shoemate was transported to jail and, then, to the Department of Correction within a week after his sentencing. Subsequently, Dellinger met with Mr. Larry Kissee, another attorney, and with Shoemate's wife, and Shoemate's mother to discuss the possibility of Mr. Kissee's pursuing an appeal. Following that discussion, no decision was reached regarding an appeal.

During a telephone conference on May 19, 1997, Dellinger, Kissee, and the appellant discussed the potential consequences of an appeal, including the possibility of a successful appeal, which could result in a new trial, a conviction, and a possible punishment of forty years to life in prison. Mr. Kissee testified that Shoemate did not want to take the chance of being sentenced to life in prison and that he had no doubt that Shoemate did not want to appeal.

Although Shoemate disputed the testimony regarding his desire to file an appeal, the trial court found Kissee's and Dellinger's testimony regarding the telephone conference more credible. Additionally, the trial court acknowledged that, following the telephone conference, Shoemate failed to contact Dellinger by phone or letter prior to the appeal deadline. In light of the trial court's findings of fact, particularly that the appellant failed to request that his attorney file a notice of appeal on his behalf, we deny the appellant's motion for a belated appeal.

Pat HAMES and Ben Robinson *v.*
Marybeth CRAVENS

97-687 966 S.W.2d 244

Supreme Court of Arkansas
Opinion delivered April 9, 1998

Harrill & Sutter, PLLC, by: *L. O'Neal Sutter* and *Sherri McDonough*, for appellants.

Kemp, Duckett, Spradley & Curry, by: *Stephen L. Curry*, for appellee.

W.H. "DUB" ARNOLD, Chief Justice. This is an appeal from the Pulaski County Circuit Court, Second Division, and from an order dismissing the appellants' complaint for lack of subject-matter jurisdiction. Finding no merit in appellants' arguments, we affirm.

Appellants, Ben Robinson and Pat Hames, are husband and wife and, respectively, own 1% and 49% of the issued and outstanding common stock of Partners in Rehab, Inc., a closely-held Arkansas corporation. Appellee Marybeth Cravens owns the remaining 50% of the Partners stock. Hames and Cravens are the sole directors of Partners. On May 16, 1996, the appellants filed suit against Cravens in the Pulaski County Circuit Court, alleging fraud and breach of fiduciary duty. Specifically, Robinson and Hames claim that, at the time of Partners's incorporation, Cravens intended to defraud them of proprietary information they contributed to Partners. Additionally, Robinson and Hames maintain

that Cravens violated her fiduciary duty by appropriating the proprietary information for the benefit of Rehab. Plus, Inc., a corporation allegedly organized by Cravens or by members of Cravens's family and in which Cravens plays some management role. In particular, appellants allege that Cravens solicited contracts with two Partners clients who then terminated contracts with Partners shortly after the incorporation of Rehab Plus.

According to the complaint, Robinson and Hames are personal guarantors of most of Partners's corporate debt, and Cravens's actions have altered the value of corporate debts for which the appellants are liable. Notably, at the time of the circuit court hearing, Partners was also the subject of a dissolution proceeding pending in the Pulaski County Circuit Court, styled *In re The Judicial Dissolution of Partners in Rehab, Inc.*, civil docket No. CV-96-6911.

On June 10, 1996, Cravens filed a motion to dismiss the appellants' complaint pursuant to Ark. R. Civ. P. 12(b)(1) and 12(b)(6), reasoning that the case was actually a derivative action to redress harm to Partners and not to appellants, individually. After a hearing on January 28, 1997 and based upon a reading of the complaint, Judge Chris Piazza agreed that, although the appellants alleged that Cravens harmed them, either individually or through a competitive business, the facts asserted and relief requested, by their very nature, involved the question of whether Partners suffered damages. The circuit court recognized that the allegations in the complaint constituted grounds for a derivative action, which sounds in equity and must be maintained in chancery court. Concluding that the appellants lacked standing to assert their claims individually, Judge Piazza dismissed the complaint pursuant to Rule 12(b)(1) for lack of subject-matter jurisdiction.

In reviewing a trial court's decision on a motion to dismiss, we treat the facts alleged in the complaint as true and view them in the light most favorable to the plaintiff. *Neal v. Wilson*, 316 Ark. 588, 595-96, 873 S.W.2d 552 (1994) (citing *Gordon v. Planters & Merchants Bancshares, Inc.*, 310 Ark. 11, 832 S.W.2d 492 (1992); *Battle v. Harris*, 298 Ark. 241, 766 S.W.2d 431 (1989)); *Mid-South Beverages, Inc.*, 300 Ark. 204, 205, 778 S.W.2d (1989)

(citing *Battle*, 298 Ark. 241)). Further, we note that a trial judge must look only to the allegations in the complaint to decide a motion to dismiss. *Neal*, 316 Ark. at 596 (citing *Wiseman v. Batchelor*, 315 Ark. 85, 864 S.W.2d 248 (1993); *Deitsch v. Tillery*, 309 Ark. 401, 833 S.W.2d 760 (1992)); *Mid-South Beverages, Inc.*, 300 Ark. at 205 (citing *Battle*, 298 Ark. 241)).

On appeal, the appellants first query whether they have standing, in their individual capacities, to assert a claim for an injury suffered by Partners and its shareholders. In Arkansas, the well-settled answer is no. As a general rule, a corporation is a distinct entity from its stockholders. *Wiseman v. State Bank & Trust, N.S., Inc.*, 313 Ark. 289, 854 S.W.2d 725 (1993). However, when a shareholder believes that the corporation has been harmed, he may be entitled to bring an action in a derivative suit, in the corporation's name, to seek redress for that injury. *See Taylor v. Terry*, 279 Ark. 97, 649 S.W.2d 392 (1983); Ark. R. Civ. P. 23.1; Ark. Code Ann. § 4-26-714 (Repl. 1991). Although the shareholder also may be injured, secondarily, the primary injury is to the corporation, and the shareholder's cause of action is derivative and not direct. Moreover, in Arkansas, a shareholder's derivative suit is an equity action maintainable in the chancery court. *See Red Bud Realty Co. v. South*, 153 Ark. 380, 241 S.W.2d 21 (1922).

In an apposite case, *Walker v. Hyde*, 303 Ark. 615, 798 S.W.2d 435 (1990), a plaintiff-shareholder sued defendants, also shareholders, for deprivation of majority control and ownership of the corporation, and loss of good will, business enterprise, future gross receipts, and net profits. Additionally, like the case at bar, the plaintiff sought relief from corporate indebtedness that she had personally guaranteed. Upon review of the complaint, this court affirmed the trial court's dismissal of the action. Specifically, this court reasoned that the relief sought by the plaintiff should be granted to the corporation and not to a shareholder. Any action to recover for the alleged losses was derivative in nature and an individual suit was not the proper route for relief. *Walker*, 303 Ark. at 618. Similarly, the trial court correctly concluded in the instant case that the appellants' claims essentially constituted a

derivative action, which could be maintained pursuant to Ark. Rule Civ. P. 23.1.

Our decision in this case is not to imply that shareholders may never bring a direct suit. For example, a shareholder may sue individually in an action to enforce that shareholder's voting rights, to compel the payment of dividends, or to protect minority shareholders. Contrary to the case at bar, these actions contemplate a direct injury to the shareholder distinct and separate from harm caused to the corporation. *See* 12B Fletcher, *Cyclopedia of Corporations* §§ 5915, 5922 (Perm. Ed. 1984).

Significantly, plaintiffs may prefer characterizing their claims as direct rather than derivative. First, derivative actions impose more stringent procedural requirements. *See* Ark. R. Civ. P. 23.1. Second, any recovery in a derivative action accrues to the corporation and not to the shareholders, individually. Third, a derivative action in chancery court precludes a trial by jury. Therefore, a plaintiff may carefully plead facts in a complaint in order to proceed in a direct action. For example, by alleging a direct injury, a plaintiff can maintain a direct action even if the corporation was similarly harmed. *See Brandon v. Brandon Constr. Co.*, 300 Ark. 44, 48, 776 S.W.2d 349 (1989) (citing 12B Fletcher, *Cyclopedia of Corporations* § 5911 (Perm. Ed. 1984)). Here, we simply find that the appellants failed to plead any individual harm.

Arkansas has adopted a clear standard to require fact pleading. According to Ark. R. Civ. P. 8(a)(1), a pleading that sets forth a claim for relief shall contain "a statement in ordinary and concise language of facts showing . . . that the pleader is entitled to relief." 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. *Brown v. Tucker*, 330 Ark. 435, 438, 954 S.W.2d 262 (1997) (citations omitted). 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.*; Ark. R. Civ. P. 8(f).

Although the appellants' complaint alleges that Cravens's conduct after Partners's incorporation caused Partners harm, it fails to plead facts demonstrating that any action prior to incorporation harmed them individually. Regarding direct harm, the appellants merely assert that Cravens "intended to deprive them of the fruits of their efforts at the time she agreed to incorporate Partners." In another paragraph of the complaint, the appellants claim that "but for Cravens's misrepresentation," they would not have developed Partners, given Cravens proprietary information, or guaranteed corporate debt. However, the proprietary information allegedly misappropriated by Cravens belonged to Partners and not to the appellants, individually, at the times relevant to the claimed misconduct. Here, the trial court properly concluded that the appellants lacked standing to assert the claims arising from their allegations because, by their very nature, the claims related to harm suffered by the company.

In any event, to plead a cause of action for fraud, the appellants must prove the existence of the following elements: (1) a false representation, usually of a material fact, (2) knowledge or belief by the defendant that the representation is false, (3) intent to induce reliance on the part of the plaintiff, (4) justifiable reliance by the plaintiff, and (5) resulting damage to the plaintiff. *Wiseman v. Batchelor*, 315 Ark. 85, 88-89, 864 S.W.2d 248 (1993). Moreover, to be well pleaded, fraud must be specifically alleged. *Beam Bros. Cont. v. Monsanto Co.*, 259 Ark. 253, 263, 532 S.W.2d 175 (1976). In *Burns v. Burns*, 199 Ark. 673, 135 S.W.2d 670 (1940), this court noted that the complaint must state something more than mere conclusions and must clearly set forth the facts relied upon as constituting the fraud. Additionally, in the very early case of *McIlroy v. Buckner*, 35 Ark. 55 (1880), this court said:

> It is not sufficient to plead fraud generally, or merely to characterize actions as fraudulent. The facts and circumstances constituting the fraud should be set forth. There should be some concealment, misrepresentation, craft, finesse, or abuse of confidence, by which another is misled, to his detriment; and these, or some of them, must be alleged and proved. Mere epithets, or adverbs characterizing conduct, which, in itself, may be innocent, amount to nothing.

Id. at 558-59.

Even drawing all reasonable inferences in favor of the complaint, the appellants fail to plead a case of fraud, which must include some facts regarding the alleged misrepresentation and Cravens's intent to defraud them. 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). *See Brown*, 330 Ark. at 438.

The appellants' second query is whether shareholders in closely held corporations should be required to bring a derivative action when the corporation is operated more as a partnership than as a corporation. Appellants urge us to decide that the answer to this question should be "no" and that a direct action is permissible. In addition to other persuasive authority from foreign jurisdictions, appellants cite *Hikita v. Nichiro Gyogyo Kaisha, Ltd.*, 713 P.2d 1197 (Alaska 1986), to support their position urging this court to adopt the modern trend permitting a direct shareholder action. However, *Hikita* noted only two major exceptions to the general rule, barring individual shareholder actions for corporate injuries: (1) where the shareholder suffered an injury separate and distinct from that suffered by other shareholders, and (2) where a special duty, such as a contractual duty, exists between the shareholder and the alleged wrongdoer. *Id.* at 1199 (citations omitted).

Arguably, the two actions classified in *Hikita* as "exceptions" to the general rule are actually independent actions to redress injuries suffered primarily by the shareholder and secondarily, if at all, by the corporation. In any event, the appellants' complaint does not plead facts to support a distinct and separate harm, nor does it allege that Cravens was bound by and breached any type of pre-incorporation agreement regarding the proprietary information, which would give rise to a direct cause of action. Reading the allegations in the appellants' complaint, any injury suffered by the appellants is secondary to the injury suffered by Partners, and that is the essence of a derivative action.

Viewing the facts alleged in the complaint as true and in the light most favorable to the appellants, the trial court prop-

erly dismissed the appellants' complaint for lack of subject-matter jurisdiction. Accordingly, we affirm.

NEWBERN, CORBIN, and BROWN, JJ., dissent.

DAVID NEWBERN, Justice, dissenting. Ben Robinson and Pat Hames, husband and wife, formed Partners In Rehab., Inc., with Marybeth Cravens. Mr. Robinson and Ms. Hames alleged that they agreed to invest in and work for the corporation in exchange for Ms. Cravens's efforts to obtain contracts with the Riley Corporation and the Catlett Corporation. They further alleged that thereafter Ms. Cravens formed Rehab. Plus, Inc., and solicited the Riley Corporation and Catlett Corporation accounts for Rehab. Plus, Inc.

The complaint, filed in Pulaski Circuit Court, was dismissed solely on the ground that it stated a stockholder's derivative claim, Ark. R. Civ. P. 23.1, and should have been filed in a chancery court. The Circuit Judge did not have before him a specific allegation of failure to state a claim for fraud, nor did he make any ruling in that respect. The real issue in this case is whether two of three shareholders must proceed against the other for breach of her fiduciary obligation to them only in the derivative format before a chancery court.

At common law, a shareholder had no means of redress against officers and majority shareholders whose actions injured their interests in corporations; thus, equity courts began to provide relief in the nature of the derivative suit early in the 19th century. That history is recited in *Ross v. Bernhard,* 396 U.S. 531 (1970), in which the Supreme Court recognized that the sole reason for equity jurisdiction in the so-called equitable stockholder's derivative action was lack of standing such plaintiffs once had in law courts. The Supreme Court held that, after the standing matter was settled, the claim on behalf of the corporation could proceed at law with the right of a jury trial guaranteed. *Id.* That means, of course, that in a federal court the judge decides the standing issue and then, assuming the remedy to be pursued on behalf of the corporation is a legal remedy, a jury may decide the facts and reach a verdict on the claim.

In Arkansas, our archaic division of law and equity courts leaves us with cases like this one in which the fundamental claim may be one at law, but it is thrown into an equity court, regardless of the remedy sought, because two hundred years ago the law courts were not flexible enough to allow such a case to be heard where it belonged.

There is a means to end this artificial situation when the standing question has to do with a close corporation. Mr. Robinson and Ms. Hames have presented a number of cases in their brief, from a variety of jurisdictions, in which it has been held that shareholders in a close corporation may proceed directly against others who have caused injury to their interests in the corporation. The majority has chosen to discuss only one of those cases and has ignored the others, thus giving short shrift to a meritorious argument. Some of the examples of the cases cited in support of the argument follow.

In *Thomas v. Dickson*, 250 Ga. 772, 301 S.E.2d 49 (1983), the Georgia Supreme Court dealt with the issue as one of first impression. Three men formed a corporation of which they became the officers and operators. One of them died. His widow, who inherited one third of the stock of the corporation, sued the other two incorporators claiming they had conspired to keep her share of the profits and dividends, had reneged on a promise to pay her a "death benefit," and had reduced the value of her stock. In response to the argument that the plaintiff was limited to bringing a derivative suit, the Court stated:

> The general rule is that a shareholder seeking to recover misappropriated corporate funds may only bring a derivative suit . . . .
>
> Although Georgia follows the general rule, we believe that in exceptional situations this Court . . . should look at the "realistic objectives" of a given case to determine if a direct action is proper . . . .
>
> In the instant case, the reasons requiring derivative suits do not exist. The reasons underlying the general rule are that 1) it prevents a multiplicity of lawsuits by shareholders; 2) it protects corporate creditors by putting the proceeds of the recovery back in the corporation; 3) it protects the interests of all shareholders

> by increasing the value of their shares, instead of allowing a recovery by one shareholder to prejudice the rights of others not a party to the suit; and 4) it adequately compensates the injured shareholder by increasing the value of his shares . . . .
>
> We will now examine this case to see if these reasons are applicable. First, Mrs. Dickson is the *only* injured shareholder; consequently, there can be no multiplicity of lawsuits, and there is no concern that a recovery by her will prejudice the rights of other shareholders.
>
> In addition, Mrs. Dickson would not be adequately compensated by a corporate recovery. For a shareholder, the potential benefit of a corporate recovery in such cases is the increase in the value of his or her shares . . . . There would be no such benefit to Mrs. Dickson, however, since, in a closely held corporation, there is no ready market for her shares.
>
> The final consideration underlying the general rule, the protection of creditors, is also not present in this case . . . . [T]here was no outstanding or dissatisfied creditor. [Internal citations omitted.]

Thomas v. Dickson, 301 S.E.2d at 50-51. All of the reasons recited by the Georgia Court apply in the case now before us.

In *Richards v. Bryan*, 879 P.2d 638 (Kan.App. 1994), the Kansas Court of Appeals reached the same result with respect to allegations by minority shareholders in a close corporation of a "freeze out" by the majority. It recognized the general proposition that "[a] shareholder may only litigate as an individual if the wrong to the corporation inflicts a distinct and disproportionate injury on the shareholder, or if the action involves a contractual right of the shareholder which exists independently of any right of the corporation." *Id.* at 646. Then the Court considered the close-corporation exception, recognizing that "an increasing number of courts are abandoning the distinction between a derivative and a direct action because the only interested parties are the two sets of shareholders." *Id.* at 647. It recited the concern about the corporation, under the control of the alleged wrongdoers, being the beneficiary of a derivative action, citing 2 O'Neal and Thompson, *O'Neal's Close Corporations*, § 8.11, p. 122 (3d ed. 1992), and then the following:

> In its Principles of Corporate Governance: Analysis and Recommendations § 7.01(d), p. 731 (Tentative Draft No. 11, 1991), the American Law Institute recommends allowing an independent cause of action for freeze-outs in the close corporate setting under certain circumstances:
>
> > If a corporation is closely held . . . , the court in its discretion may treat an action raising derivative claims as a direct action, exempt it from those restrictions and defenses applicable only to derivative actions, and order an individual recovery, if it finds that to do so will not (i) unfairly expose the corporation . . . to a multiplicity of actions, (ii) materially prejudice the interests of creditors in the corporation, or (iii) interfere with a fair distribution of the recovery among all interested persons.
>
> See, *Schumacher v. Schumacher*, 469 N.W.2d 793, 798-99 (N.D.1991).

879 P.2d at 647-48.

The same result was reached by the Ohio Supreme Court in *Crosby v. Beam*, 548 N.E.2d 217 (1989), a case in which minority stockholders in a close corporation claimed the majority stockholders had breached the fiduciary duty owed to the minority stockholders by misappropriating corporate funds. It was pointed out that, if the minority shareholders in a close corporation were forced to sue on behalf of the corporation, then any recovery would go to the corporation that remained under the control of the majority.

Underlying these cases permitting close-corporation shareholders to sue directly, in the circumstances stated, is the fact that most such corporations are operated more like partnerships than corporations. *See Johnson v. Gilbert*, 127 Ariz. 410, 621 P.2d 916 (1980); *Crosby v. Beam, supra.* In the case now before us, it would be wrong to require Mr. Robinson and Ms. Hames to sue on behalf the corporation (assuming the petition to dissolve it has not yet been granted) so that the shares owned by Ms. Cravens could benefit by a recovery from Ms. Cravens. *See Atkinson v. Marquart*, 112 Ariz. 304, 541 P.2d 556 (1975). It makes sense to require the derivative format with respect to a corporation having many shareholders whose interests require protection against the wrong allegedly perpetrated against all, but not when the alleged wrong-

doer is the only other shareholder and the rights of creditors and other (in this case nonexistent) shareholders are not prejudiced. *Watson v. Button*, 235 F.2d 235 (9th Cir. 1956).

The case of *Schumacher v. Schumacher,* cited above in the quotation from the *Richards* case, is especially interesting in the respect that it deals properly with the matter of precedence of legal and equitable issues resulting from one set of facts. The Supreme Court of North Dakota concluded that it was necessary to have a jury trial of legal issues arising from breach of a fiduciary relationship owed by one close-corporation shareholder to another prior to deciding the entitlement to equitable remedies. If the right to equitable relief were tried first, and the factual issues decided in that context by the court without a jury, then the plaintiff would, by the application of law of the case, be denied a jury trial.

Although it has been said that breach of a fiduciary duty is an equitable claim, *Watson v. Buton, supra*, that may well depend upon the remedy sought. We have no definitive ruling on whether breach of a fiduciary relationship must be pursued in equity, but we note that we have entertained appeals from both chancery and circuit courts where breach of a fiduciary relationship was the basis for a remedy, legal or equitable, being sought. *See, e.g., Wilson v. Wilson*, 327 Ark. 386, 939 S.W.2d 287 (1997)(appeal from chancery where remedy sought was an estate accounting and setting aside a deed); *Alexander v. Flake*, 322 Ark. 239, 910 S.W.2d 190 (1995)(appeal from circuit court where remedy sought was damages); *Green v. Jones-Murphy Properties, Inc.*, 232 Ark. 320, 335 S.W.2d 822 (1960)(appeal from circuit court where remedy awarded was damages).

The complaint in this case, as abstracted by the appellee, makes it clear that money damages is the remedy being sought, and that remedy belongs in a circuit court. Even if, however, the matter were one to be tried by a chancellor as a direct, rather than derivative, action, the proper procedure for the Trial Court would have been to transfer the case rather than dismiss it. *See Linder v. Howard*, 296 Ark. 414, 757 S.W.2d 549 (1988).

I respectfully dissent.

CORBIN and BROWN, JJ., join in this dissent.

ROBERT D. HOLLOWAY, INC. *v.* PINE RIDGE ADDITION RESIDENTIAL PROPERTY OWNERS

97-748 966 S.W.2d 241

Supreme Court of Arkansas
Opinion delivered April 9, 1998

Ellis Law Firm, by: *George D. Ellis*, for appellant.

Wright & Bonds, by: *Barbara P. Bonds*, for appellee Pine Ridge Residential Property Owners Multi-Purpose Improvement District No. 9.

Pike & Bliss, by: *George E. Pike, Jr.*, for appellee Capitol Development Of Arkansas, Inc.

W.H. "DUB" ARNOLD, Chief Justice. The constitutionality of Ark. Code Ann. § 14-94-127 (Repl. 1988) is the issue before us on appeal. The instant appeal challenges an order of the Pulaski County chancery court granting a motion for summary judgment and holding section 14-94-127 unconstitutional. Finding that the statute unconstitutionally delegates to the chancery court a solely legislative function, we affirm.

Appellant, Robert D. Holloway, Inc., an engineering firm in Maumelle, Arkansas, performed professional engineering services in a total amount of $247,811.06, on behalf of appellee Pine Ridge Addition Residential Property Owners Multi-Purpose Improvement District No. 9. After the appellant submitted plats

to the City of Maumelle on December 27, 1989, the City entered into an improvement district agreement with the district and the trustee, Worthen Bank & Trust Co., N.A. Appellant continued to perform engineering services for the district until November 14, 1990, when it received and tabulated construction bids. Following the City's agreement with the district and the trustee, the project was abandoned for unknown reasons, and the district never issued bonds to finance construction of the planned improvements. To date, the appellant has not been paid for the engineering services performed for the district.

Pursuant to Ark. Code Ann. § 14-94-127, the appellant filed a complaint on February 9, 1994, seeking judgment for the balance owed, the appointment of a receiver, and the levy of a tax against the real property in the district in an amount sufficient to pay the judgment, interest, costs, and attorney's fees. Specifically, section 14-94-127 provides:

> If for any reason the improvement contemplated by any district organized under this chapter is not made, the preliminary expense shall be a first lien upon all the real property in the district and shall be paid by a levy of a tax on it. The levy shall be made by the chancery court of the county and shall be collected by a receiver to be appointed by the court.

After the district filed its answer, appellee Capitol Development of Arkansas, Inc. moved to intervene in the action, arguing that the district owned no real or personal property and, ultimately, any tax assessed pursuant to the statute would be levied solely on Capitol Development's property because it owned all of the real property encompassed by the district. Capitol Development simultaneously moved for summary judgment, asserting that section 14-94-127 was unconstitutional because it gave the chancery court legislative discretion in determining a method to assess and levy a tax. The chancery court granted both the motion to intervene and the motion for summary judgment and held that section 14-94-127 is an unconstitutional delegation of legislative taxing power in violation of the separation of powers provisions of the Arkansas Constitution.

In reviewing summary judgment cases, this Court need only decide if the trial court's grant of summary judgment was appropriate based on whether the evidence presented by the moving party left a material question of fact unanswered. Further, the moving party always bears the burden of sustaining a motion for summary judgment. All proof must be viewed in the light most favorable to the resisting party, and any doubts must be resolved against the moving party. The moving party is entitled to summary judgment if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Ark. R. Civ. P. 56; *McCutchen v. Huckabee*, 328 Ark. 202, 943 S.W.2d 225 (1997).

Moreover, we note that acts of the General Assembly are presumed to be constitutional and will be struck down only when there is clear incompatibility between the act and the Arkansas Constitution. Here, where the trial court held section 14-94-127 unconstitutional, the appellees bear the burden of proving that the statute violated provisions of the Arkansas Constitution. *McCutchen*, 328 Ark. at 207; *McDougal v. State*, 324 Ark. 354, 922 S.W.2d 323 (1996).

Significantly, when the construction of a statute is at issue, the statute should be given that interpretation that will sustain rather than defeat it, and effect must be given, if possible, to every part of the statute. In construing a statute, we will presume that the General Assembly, in enacting it, possessed the full knowledge of the constitutional scope of its powers, full knowledge of prior legislation on the same subject, and full knowledge of judicial decisions under preexisting law. *McLeod, Comm'r of Revenues v. Santa Fe Trail Transp. Co.*, 205 Ark. 225, 168 S.W.2d 413 (1943). We must also give effect to the legislature's intent, making use of common sense and giving words their usual and ordinary meaning. *Kyle v. State*, 312 Ark. 274, 849 S.W.2d 935 (1993).

Here, however, the issue at bar involves not the interpretation of two conflicting statutory provisions but the absence of

"magic language" that the appellant argues can be read into the statute to save it, and the appellees claim that the missing language defeats the statute. Specifically, the contested magic language is "upon the assessed value for county and state taxation."

Analogous statutes, involving the payment of preliminary expenses when a planned improvement project is abandoned, have been held constitutional or would likely pass constitutional muster. *See e.g.*, Ark. Code Ann. §§ 14-92-238, 14-317-131, 14-318-124 (1987 & Repl. 1998). These statutes permit a chancery court to assess and levy taxes to pay preliminary expenses by (i) determining the total amount of preliminary expense, and (ii) spreading a tax throughout the district, via a legislatively defined method, sufficient to pay the expense. Significantly, these statutes do not vest the chancery court with any discretion to determine the method of levying the tax. However, pursuant to section 14-94-127, the chancellor could choose to compute the tax by distributing the burden over the real property within the district in proportion to (i) the assessed value for county and state taxation, or (ii) anticipated benefits.

In *Harrill v. Board of Comm'rs of Clinton Road Water Pipe Line Improvement Dist. No. 328 of Pulaski County*, 282 Ark. 348, 668 S.W.2d 538 (1984), pursuant to a nearly identical statute to the one at issue, a chancellor was authorized to determine the amount of preliminary expense, but the computation of the tax was merely a matter of distributing the burden over the total assessed value of the property within the district. Notably, the statute involved in *Harrill* did not vest the chancellor with any discretion in selecting the method of levying the tax. The statute was upheld precisely because the legislature did not delegate discretion in the assessment of the tax levy but retained that power by defining the specific method to levy the tax. *Id.* at 351.

Also, in *Neterer v. Dickinson & Watkins*, 153 Ark. 5, 239 S.W. 722 (1922), an early case relied upon by the *Harrill* court, the statute at issue authorized the payment of preliminary expenses, upon abandonment of an improvement project, to be paid by a tax levy on the real property within the district in proportion to the county assessment. However, the *Neterer* court held that expenses

were not properly payable from funds raised by taxation of "assessed benefits" because the statute prescribed the "assessed value" method. The *Neterer* decision also concluded that a court must find the authority, in the statute itself, to impose taxes to pay preliminary expenses of an abandoned improvement district. *Id.* at 10-11.

The power of taxation, whether by general taxation or by local assessment, is a legislative power that cannot be exercised in the absence of statutory authority. *Quapaw Cent. Business Improvement District v. Bond-Kinman, Inc.*, 315 Ark. 703, 870 S.W.2d 390 (1994). Here, the absence of language in section 14-94-127 directing the chancery court to use a particular method for computing the tax levy bestows upon the judiciary a nondelegable power of the legislature in violation of the separation of powers provisions of the Arkansas Constitution. *See* Ark. Const. art. 4, §§ 1, 2.

The absence of the "magic language" from section 14-94-127 designating a particular method of tax computation may well have been an oversight. Unfortunately, that oversight cost the appellant $247,811.06 and failed to afford it the same privilege and protection extended to professional firms working with other types of improvement districts whose projects are abandoned. Nevertheless, the chancery court correctly held that Ark. Code Ann. § 14-94-127 is unconstitutional, and we affirm the trial court's order granting appellee Capitol Development's motion for summary judgment.

Robert R. CORTINEZ *v.* SUPREME COURT COMMITTEE ON PROFESSIONAL CONDUCT

97-789 966 S.W.2d 251

Supreme Court of Arkansas
Opinion delivered April 9, 1998

[redacted]

[redacted]

The Cortinez Law Firm, P.L.L.C., by: *Christopher D. Anderson*; and *Hugh D. Brown*, for appellant.

William S. Roach, for appellee.

DAVID NEWBERN, Justice. Robert R. Cortinez, Sr., appeals from a decision of the Arkansas Supreme Court Committee on Professional Conduct ("Committee") to issue a letter of caution to him after finding him in violation of Rule 1.16(d) of the Model Rules of Professional Conduct. In its letter opinion, the Committee wrote that, upon termination of the attorney-client relationship, Mr. Cortinez did not invite his client, Anthony David, to discuss the legal consequences of his decision to end the relationship and did not return to Mr. David documents belonging to Mr. David. We affirm.

In January 1993, Mr. David's civilian employment with the Pine Bluff Arsenal, a Department of the Army installation, was terminated on the basis that he falsified his employment application. In response to a question on his employment application, Mr. David stated that he had not been convicted by a court martial. Arsenal personnel concluded, following an investigation, that the statement was false. It was later determined that, although Mr. David had received a non-judicial punishment for two counts of showing disrespect toward Petty Officers while serving in the United States Navy, he had not been convicted by a court martial.

Following his termination, Mr. David applied for and was denied unemployment benefits by the Employment Security Division of the Arkansas Labor Department. The basis of the denial was that Mr. David had been discharged for providing false information on his employment application.

On April 15, 1993, Mr. David consulted Mr. Cortinez concerning his termination and the subsequent denial of benefits. At the April 15 meeting, Mr. David and Mr. Cortinez discussed appealing the denial of unemployment benefits and suing the Arsenal for wrongful discharge. There was evidence that Mr. David gave Mr. Cortinez his termination letter from the Arsenal and an official "court memorandum" regarding the non-judicial punishment. Mr. David paid Mr. Cortinez $100 which, he

thought, was for agreeing to represent him in the wrongful-discharge action.

Mr. Cortinez argued that he only agreed to investigate the case. According to Mr. David, Mr. Cortinez advised him that the best course of action would be first to resolve the appeal of the denial of unemployment benefits and then to proceed slowly in the wrongful-discharge case to maximize the recovery. Mr. David agreed that Mr. Cortinez would represent him in the unemployment-compensation case for a fee of $350 contingent upon winning an award. Mr. Cortinez stated that Mr. David then signed a wrongful-discharge representation contract and one for representation with respect to the unemployment benefits. The contracts are part of the record. On the contract for the wrongful-discharge case, the phrase "$100 retainer for investigation only" is handwritten under the typed words "contingent upon recovery," preceded by a checked box. In his affidavit, Mr. David asserted that he did not have a written fee contract with Mr. Cortinez but that they agreed that the wrongful-discharge case was on a contingency basis.

On April 16, 1993, Mr. Cortinez wrote a letter to the Director of Civilian Personnel at the Arsenal. In the letter, Mr. Cortinez stated that he was representing Mr. David in regard to his job termination. He also stated in the letter that Mr. David had received non-judicial punishment while on active duty with the United States Navy but that he had not been convicted by a military court martial. Mr. Cortinez closed the letter by saying that he looked forward to a response "to this interesting wrongful discharge case."

On April 20, 1993, the Cortinez Law Firm sent Mr. David a letter of representation, stating that the attorney's fee would be on a contingency-fee basis, to Mr. David. The letter, which was entitled "Wrongful Discharge & Unemployment Compensation," welcomed Mr. David as a client and stated that the firm would receive its fee when the case was settled.

On May 4, 1993, the Deputy Command Judge Advocate of the Arsenal responded to Mr. Cortinez's April 16 letter. In his response, the Deputy Command Judge Advocate provided

grounds for Mr. David's termination different from those originally recited. He wrote that Mr. David

> . . . failed to properly respond to question 42 wherein it asked if he had ever forfeited any collateral. His Response in checking the *No Block* is in conflict with the disposition of the record of charges regarding his violation of two specifications of the Uniform Code of Military Justice (UCMJ) . . . . These Charges resulted in Mr. David's forfeiting $150.00 pay per month for 2 months and his reduction in rank to E2 (suspended for 6 months).

According to Mr. Cortinez, he decided not to pursue the termination matter because the Arsenal's decision to fire Mr. David would be difficult to set aside.

On May 5, 1993, an unemployment-compensation hearing was held in which Mr. Cortinez represented Mr. David, successfully as it later turned out. According to Mr. Cortinez, he wrote a memo-letter on May 6, 1993, which was sent to Mr. David, in which he advised Mr. David that he would not pursue the termination matter but hoped they would get a favorable decision on the unemployment compensation. A copy of the handwritten memo-letter appears in the record. Mr. Cortinez stated that he enclosed a copy of the Deputy Command Judge Advocate's May 4 letter, but the memo-letter does not show a reference of any sort to an enclosure. At the Committee hearing, Mr. David denied receiving the letter.

On May 14, 1993, Mr. David paid $350 to Mr. Cortinez per the agreement on the unemployment-compensation case. The words "wrongful discharge" were written on the receipt he received for the $350. In his affidavit, Mr. Cortinez stated that his secretary, Jackie Evans, inadvertently wrote "wrongful discharge" on the receipt.

Mr. Cortinez stated that he did not hear from Mr. David between May 5, 1993, and November 1995. However, there is certainly evidence to support the Committee's findings that, over the next two and a half years, Mr. David made periodic calls to the Cortinez Law Firm to learn the status of his wrongful-discharge case. According to Mr. David, he called Mr. Cortinez's Pine Bluff

office at least once every three months between May 1993 and June 1995 for a status report.

Mr. David stated that, in June 1995, he left a message for Mr. Cortinez at his Little Rock office in which he inquired about the status of the wrongful-discharge case. According to Mr. David, Mr. Cortinez then left a message for him on his answering machine. The message was that, if Mr. Cortinez had known that Mr. David wanted to know about the wrongful-discharge case, he would have brought the records from Pine Bluff. Mr. David stated that, in August 1995, at Mr. Cortinez's secretary's recommendation, he spoke with Joel Smith at the firm. Mr. David stated that Mr. Smith was to look for his records in the firm's Pine Bluff office, but the Pine Bluff office said that his records were at the Little Rock office.

According to Mr. David, in September 1995, Mr. Smith told him that his wrongful discharge was not pursued because his $350 fee had not been paid. Mr. David stated that, in October 1995, Mr. Smith told him that he would get back with him later because he could not find his records but that he owed $350. Mr. David stated that he called Mr. Smith again and that Mr. Smith told him that the firm's files showed that he had not paid the $350 fee. Mr. David stated that he told Mr. Smith that he had a receipt for the $350 and that Mr. Smith said he would check on it. In his affidavit, Mr. Smith stated that he only spoke to Mr. David on one occasion in November 1995; however, at the hearing, Mr. Smith, responding to questions from the Committee, admitted that he remembered conversations with Mr. David.

At the hearing, Mr. David provided the following testimony regarding his attempts to contact Mr. Cortinez:

> His son — he tried to look for my records. He said would I call to Little Rock. I called from Jefferson Heights to Little Rock and he said that, "Your records aren't right here, but I will try to find them. Call back later." I finally called back later and he said, "I don't know where your records are. They might be in the Pine Bluff office."
>
> ****

> And I said, "Well, I'm the Pine Bluff Arsenal case in Pine Bluff and I can't get in contact with Mr. Cortinez here." So they said, "Later. Call back later." All I kept — did was call back later. I talked to Joel Smith. I explained to him my situation and he said well, he couldn't help me but Mr. Cortinez would be in later. Call back. I called back and Mr. Cortinez was never in . . . .

Mr. David stated that, in November 1995, he called the firm and that Mr. Smith transferred his call to Mr. Cortinez. According to Mr. David, Mr. Cortinez told him that he did not pursue the wrongful-discharge claim because he had not paid the $350. Mr. David stated that he asked Mr. Cortinez whether he would have pursued the case if he had paid him the $350 from the unemployment case. According to Mr. David, Mr. Cortinez responded in the affirmative. Mr. David stated that, when he told Mr. Cortinez that he had a receipt for the $350, Mr. Cortinez told him to fax a copy of the receipt. Mr. David stated that Mr. Cortinez hung up on him when he asked how Mr. Smith knew that he still owed $350 when he could not find his records.

According to Mr. Cortinez, Mr. David persisted in attempting to force him to agree that he did not pursue his wrongful-discharge case because he did not pay the $350 fee. Mr. Cortinez further stated that he told Mr. David that he did not agree to represent him in the wrongful-discharge case and that the contract that he signed stated that Mr. Cortinez would investigate the termination.

In his affidavit, Mr. Cortinez stated that the $350 payment was not documented in the Little Rock bookkeeping system and that, consequently, both files were closed by the Pine Bluff office with no documentation of the fees being paid.

At the hearing, Mr. Cortinez stated that he told Mr. David that he should check with another attorney regarding whether his claim had any merit; however, there is nothing to that effect in the memo-letter by which he purportedly declined to represent Mr. David on the wrongful-discharge claim. Mr. Cortinez stated that he did not invite Mr. David to his office so that he could answer any questions regarding his decision not to continue with the case. He stated that he did not return Mr. David's termination letter

from the Arsenal. Other documents in the wrongful-discharge file include a blank employment-application form and the court memorandum regarding Mr. David's non-judicial violation.

Model Rule 1.16(d) states as follows:

> Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law.

We review a decision of the Supreme Court Committee on Professional Conduct *de novo* on the record and pronounce judgment as if our opinion had been rendered by the Committee. *Fink v. Neal*, 328 Ark. 646, 945 S.W.2d 916 (1997). We affirm the Committee's action unless it is clearly against the preponderance of the evidence and do not reverse the Committee's findings unless they are clearly erroneous. *Id. See also Colvin v. Committee on Professional Conduct*, 309 Ark. 592, 832 S.W.2d 246 (1992); *Muhammad v. Committee on Professional Conduct*, 291 Ark. 29, 722 S.W.2d 280 (1987). The Committee is in the superior position to determine the credibility of the witnesses and weigh the preponderance of the evidence. *Colvin v. Committee on Professional Conduct, supra.*

1. Application of Model Rule 1.16(d)

Mr. Cortinez argues that Model Rule 1.16(d), which applies "[u]pon termination of representation," does not impose any duty on him because he never represented Mr. David in the wrongful-termination case, and, instead, limited his involvement in the matter to investigating the facts to determine whether he would be willing to take the case. He further argues that he completed his attorney-client agreement with Mr. David when he conducted his investigation and sent the memo-letter to Mr. David.

In support of his argument, Mr. Cortinez refers to his wrongful-discharge contract with Mr. David. On the contract,

Mr. Cortinez wrote "$100.00 retainer for investigation only." Mr. Cortinez also refers to (1) Model Rule 1.2(c), which allows a limitation of representation; (2) Model Rule 3.1, which prohibits a lawyer from pursuing frivolous claims; and (3) Ark. R. Civ. P. 11, which requires an attorney to make a reasonable inquiry as to both the factual and legal basis for a pleading, motion, or other document before filing with the court.

At this point we need only say that there was before the Committee evidence that Mr. Cortinez did not continue to work on the wrongful-discharge case because he thought that Mr. David owed him $350 as a retainer for the wrongful-discharge case.

Whether Mr. Cortinez limited his contract of representation was a question of fact to be decided by the Committee. Based upon the evidence before it, the Committee could have concluded that an attorney-client relationship was formed with respect to the wrongful-discharge claim and that Mr. Cortinez did not pursue to its conclusion the "interesting" wrongful-discharge claim that presumably became even more interesting when the Arsenal changed its reason for discharging Mr. David.

2. Failure to surrender papers

a. Procedural due process

Mr. Cortinez also challenges the Committee's decision on the basis that he was deprived of due process because he was not given sufficient notice that the Committee planned to consider his alleged failure to return Mr. David's file as a potential violation of the Model Rules.

In his affidavit to the Committee, Mr. David alleged that Mr. Cortinez violated Model Rule 1.16(d). Additionally, in the Committee's April 30, 1996 letter to Mr. Cortinez in which it informed Mr. Cortinez of the claims against him, the Committee wrote that the allegations implicated several specific rules, including Model Rule 1.16(d). Mr. Cortinez was again informed that he was charged with violating Model Rule 1.16(d) at the beginning of the hearing before the Committee on November 8, 1996.

Mr. Cortinez argues that he had no notice that the Committee intended to consider whether his alleged failure to return Mr. David's file to him constituted a violation of Model Rule 1.16(d) because the Committee's April 30 letter did not specify which of the four parts of Model Rule 1.16(d) Mr. Cortinez allegedly violated. He further argues that it was not apparent from Mr. David's affidavit that the Committee intended to consider his alleged failure to return Mr. David's file because Mr. David did not complain in his affidavit that Mr. Cortinez failed to return his file to him.

The Committee's reference to Model Rule 1.16(d) was sufficient notice that the failure to return the client's papers was at issue. The Rule provides several examples of steps that an attorney must take to protect a client's interest upon termination of representation, including the return of the client's papers to the client. Mr. Cortinez should have been prepared to establish his compliance with all aspects of the Rule.

Mr. Cortinez cites *Colvin v. Committee on Professional Conduct, supra,* in support of his argument that the Committee should have specifically referenced his failure to return Mr. David's papers to him. In the *Colvin* case, we held that notice was inadequate when the attorney was notified of possible violations of certain rules but not the one of which he was found to be in violation. Here, there was clear notice of the allegations concerning the Rule ultimately found to have been violated.

b. Lack of evidence

Mr. Cortinez argues that the Committee's finding that Mr. Cortinez failed to return Mr. David's papers to him is clearly erroneous. He says he did not have any papers regarding the wrongful-termination case to which Mr. David was entitled and notes his testimony at the hearing in which he stated that he presented the documents that Mr. David gave him to the Administrative Law Judge at the unemployment-compensation hearing and that there was not any separate documentation regarding the wrongful-discharge case. He also notes that the Committee failed to indicate what papers he failed to return to Mr. David and that the

record does not show that Mr. David asked that the file be returned to him.

There is evidence from which the Committee could have found that Mr. Cortinez had Mr. David's papers in his possession and failed to return them. Mr. Cortinez stated that Mr. David gave him the termination letter from the Arsenal and the court memorandum regarding his non-judicial punishment at their April 15 meeting.

As to Mr. Cortinez's argument that the record does not provide any evidence that Mr. David sought the return of any papers, the clear language of the Rule does not require a demand from the client to trigger this obligation. It places an affirmative duty on the attorney, not the client, to protect the client's interests upon termination of representation.

Affirmed.

NEW PROSPECT DRILLING CO. *v.* FIRST COMMERCIAL TRUST, N.A. as Administrator of the Estate of Jolene Marie Jones, Deceased

97-615 966 S.W.2d 233

Supreme Court of Arkansas
Opinion delivered April 9, 1998

Tatum, Rife & Tatum, by: *Tom Tatum*; *Clevenger, Angel & Miller*, by: *Richard L. Angel*; and *Barrett & Deacon*, by: *D.P. Marshall, Jr.*, for appellant.

Peel Law Firm, P.A., by: *Richard L. Peel*, for appellees.

DAVID NEWBERN, Justice. This is a negligence case resulting from an automobile-truck accident in which Jolene Marie Jones died. Ms. Jones was driving a Mercury Topaz that collided with a Ford Ranger pickup truck driven by Carl Lewallen and owned by Mr. Lewallen's employer, appellant New Prospect Drilling Co. ("New Prospect"). As the result of a jury's verdict, appellee First Commercial Trust, N.A. ("First Commercial"), administrator of Ms. Jones's estate, recovered $3 million in damages against New Prospect. New Prospect argues for reversal on account of jury misconduct and misconduct by First Commercial's attorney during the trial. It also contends that the Trial Court erred by allowing a deputy sheriff to give expert testimony and that the damages awarded were not supported by substantial evidence. We affirm the judgment as modified to reduce the damages by $100,000.

1. *Expert testimony*

The action was originally brought against Mr. Lewallen and New Prospect. A nonsuit was taken with respect to Mr. Lewallen. A trial began in June 1996. A mistrial occurred, and the retrial resulting in the verdict favoring First Commercial was held in January 1997.

The accident occurred on two-lane Pope County Road 81 north of London. Ms. Jones was westbound, and Mr. Lewallen was eastbound. The issue of fault depended upon whether one or both of the vehicles crossed the center line. Mr. Lewallen testified he had dropped his watch inside his truck and had pulled off on the shoulder to retrieve it. Having done so, he pulled back onto the road, and the wreck occurred shortly thereafter. He remembered nothing about how it happened, and there were no other eyewitnesses to the crash.

In the first trial, First Commercial presented the testimony of Pope County Deputy Sheriff Danny Sorey who investigated the accident. In response to questions about how the accident happened, Deputy Sorey said that the Ford pickup was found straddling the center line and that a skid mark, shown in photographs to have been in the westbound lane, came from the right front wheel of the pickup. Objections to that testimony were sustained on the basis that Deputy Sorey had not been qualified as an expert.

At the second trial, New Prospect sought a ruling that Deputy Sorey not be allowed to offer expert opinion testimony. In response, counsel for First Commercial stated he would "qualify" the witness by presenting evidence of his education and experience in accident investigation. New Prospect asked the Trial Court to review the record of the previous trial and to assure that the rulings on the questions would be the same. The Trial Court responded that he would hope to follow the same "line" but that he would have to hear the questions asked this time before ruling.

On direct examination, First Commercial's counsel, Richard Peel, asked Deputy Sorey a number of questions about his accident-investigation training at the law-enforcement academy. Deputy Sorey recalled having studied various aspects of accident

investigation and added that he had been investigating accidents for six years at the time this one occurred. He said he had benefitted from the experience of others, including state police officers, with whom he had worked accidents.

Mr. Peel asked Deputy Sorey if, "based on [his] education and experience in [his] investigation of this accident," he had an opinion as to which tire on the Ford pickup was skidding. As the skid mark in question went into the westbound lane of traffic, an answer that it was the right front tire of the truck would place the truck squarely in the oncoming lane of traffic in which Ms. Jones had the right of way. Counsel for New Prospect objected on the ground that "[t]he proper foundation has not been laid . . . nor is he qualified to render that opinion . . . ." The Trial Court overruled the objection. Deputy Sorey testified that it was the truck's right front tire and further opined, over further objection, that the wreck occurred in the westbound lane.

On cross-examination, New Prospect questioned the deputy's credibility. Deputy Sorey acknowledged and reiterated his deposition testimony in which he had said he was not an expert. He admitted that his drawings of the scene in front of the jury were different from his field-note drawings, which apparently suggested the wreck occurred in Lewallen's eastbound lane. He initially had the Topaz in the eastbound lane, but that was error, he said, and he made a second drawing to correct that mistake. He conceded that most of the truck was in the eastbound lane after the accident and that he had not noted in his field notes whether there were any gouge marks at the scene on the day of the accident. The marks had been covered, he explained, and did not become visible until later. The deputy conceded that he "never got underneath the Ford Ranger" and attempted to follow the skid marks to either tire.

Although the cross-examination was effective and perhaps raised some questions about the deputy's thoroughness in investigating the scene, the abstract does not show any motion from New Prospect to strike his testimony on the ground that his expert qualifications had been somehow disproved in view of what had come out on cross-examination.

Each side presented an expert accident reconstructionist to testify about who was responsible for the accident. Deputy Sorey was a second expert witness for First Commercial on the issue of who had caused the collision.

New Prospect frames the issue as whether Sorey was properly declared an expert. Arkansas R. Evid. 702 provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." We have held that, "[w]hether a witness may give expert testimony rests largely within the sound discretion of the trial court, and that determination will not be reversed absent an abuse of discretion. On appeal, the appellant must demonstrate that the trial court has abused its discretion." *Wade v. Grace*, 321 Ark. 482, 486, 902 S.W.2d 785, 788 (1995) (citations omitted).

In *Smith v. Davis*, 281 Ark. 122, 663 S.W.2d 165 (1983), we acknowledged that our prior cases had precluded police officers from giving opinions as to the causes of accidents. We recognized, however, that other jurisdictions held to the contrary. The holding of the case appeared as follows:

> We need not expand our decision beyond the facts of this case: Where an officer investigates a vehicle accident, observes sufficient relevant evidence such as skid marks, debris from the vehicles, position of the vehicles, or makes other observations, and where he can rationally form an opinion about the point of impact, he should be allowed to testify as to that opinion.
>
> It is for the trial court to determine whether proper foundation has been laid for the testimony. *See Gruzen v. State*, 276 Ark. 149, 634 S.W.2d 92 (1982); *Dixon v. State*, 268 Ark. 471, 597 S.W.2d 77 (1980).

Id. at 125, 663 S.W.2d at 166.

We have continued to hold in favor of allowing such opinions. In *Sledge v. Meyers*, 304 Ark. 301, 303-04, 801 S.W.2d 650, 651 (1991), we held that the Trial Court had erroneously prohibited the trooper from stating "her opinion about the location of

the vehicles at the moment of impact." We noted in the *Sledge* case that, in *Ferrell v. Southern Farm Bureau Cas. Ins. Co.*, 291 Ark. 322, 724 S.W.2d 465 (1987), "we expressly said a qualified trooper could state 'who crossed over a center line.'" *Sledge v. Meyers*, 304 Ark. at 303, 801 S.W.2d at 651.

Deputy Sorey testified about the kinds of things that appear to be permissible under the cases mentioned above. His testimony dealt with the point of impact: in what lane did the collision occur, and what tire on Lewallen's truck caused the skid mark? He detailed his academy training and work experience and described his investigation at the scene that led him to reach his conclusions. We have been cited to no authority holding that a law officer's modest refusal to declare himself an expert disqualifies the officer.

New Prospect makes much of the fact that the judge in the first trial sustained objections to Sorey's testimony. First Commercial's response is that Mr. Peel spent more effort in qualifying Deputy Sorey in the second trial than in the first and that there was more of a basis for determination. Again, we are cited to no authority suggesting that a judge in such a circumstance is prohibited from changing his ruling.

New Prospect also asserts that, even if Deputy Sorey was entitled to give an opinion on the basis of his credentials, his testimony still should have been stricken for lack of foundation. New Prospect points to the concessions made by Deputy Sorey during cross-examination regarding what he did and did not do during his processing of the accident scene. Based on the information elicited on cross-examination, New Prospect says there was no foundation for his conclusions. But New Prospect did not use the information elicited on cross-examination to make a "lack of foundation"-type motion to strike.

There was a foundation-based objection raised during direct examination. Prior to that time, however, Deputy Sorey had established that he had processed the scene; taken measurements; determined the vehicles' positions in the road; detected the skid marks; and searched for gouge marks, finding some then and others later. The foundation objection was properly denied at that

time. If New Prospect then wished to strike the testimony in light of its cross-examination, it should have said so then. As it stands, much of New Prospect's argument that Deputy Sorey's opinions lacked foundation are being raised for the first time on appeal. We do not reverse on the basis of arguments not raised in the trial court. *Slaton v. Slaton*, 330 Ark. 287, 294, 956 S.W.2d 150 (1997); *Jones v. Jones*, 320 Ark. 449, 898 S.W.2d 23 (1995).

2. Attorney misconduct resulting in excessive verdict

New Prospect cites numerous examples of alleged attorney misconduct that it argues led to the verdict of $3 million, which it considers to be excessive.

First, New Prospect complains about the opening statement of Mr. Peel in which he referred to the fact that the members of Ms. Jones's family had not reached "closure" with respect to the death of their seventeen-year-old daughter and sister and that they had to "deal" with her "death at the funeral and after."

New Prospect suggests that, in conjunction with later references by witnesses to the fact that the case had been tried once before, the opening-statement language suggested New Prospect was somehow at fault for delay. There were indeed some references by witnesses to the earlier trial. Most of them seemed to be inadvertent. From the record before us, we cannot say that the references created any prejudice toward New Prospect.

The second misconduct argument has to do with Mr. Peel's questioning of Don Johnston, who testified as an expert on behalf of New Prospect. On several occasions after Mr. Johnston made a statement on cross-examination, Mr. Peel asked if the jury was to "just take [his] word" for the truth of the statement. New Prospect attempted to inquire of Mr. Johnston whether Mr. Peel had asked that he serve as an expert for First Commercial in the case and thus to prove that Mr. Peel was questioning the trustworthiness of a witness he had previously attempted to procure for his client. The Trial Court refused to allow it on the ground that Mr. Peel would have to become a witness to refute any such evidence and that that would not be permitted. *See* Model Rule of Profes-

sional Conduct 3.7. New Prospect has not demonstrated that ruling to have been in error.

We do not mention all of New Prospect's allegations of misconduct, but there are two others we choose to discuss that were raised in New Prospect's motion for a new trial. First Commercial contends that Mr. Peel, at one point during the trial, said something like, "Those damn defense lawyers will argue with a wall all day long." The contention is that it was said in such a manner as to be audible to the jurors. Mr. Peel, in response, argued at trial that he did not use the word "damn" and that his remark was not overheard by the jury.

Finally, and perhaps most serious, there is a contention that Mr. Peel improperly appealed to the sympathy of the jurors in his closing argument. After Mr. Angel, arguing for New Prospect, had reminded the jurors of the Trial Court's instruction not to allow "sympathy" to enter their verdict, Mr. Peel, in rebuttal, agreed with that position but said, ". . . in cases like this if you measure a tremendous loss, you can't help but have some sympathy for them. You can't separate the two." Defense counsel's objection was sustained.

In support of its argument that the jury's verdict was affected by these instances of misconduct, New Prospect cites this language: "If the transgression be flagrant — if the offensive remark has stricken deep, and is of such a character that neither rebuke nor retraction can entirely destroy its sinister influence — a new trial should be promptly awarded . . . ." *German-American Ins. Co. v. Harper*, 70 Ark. 305, 307-08, 67 S.W. 755, 756 (1902). It is our view of the case that the instances of alleged misconduct on the part of Mr. Peel were not of the sort described in the quoted standard. Nor was it a situation such as we confronted in *Alexander v. Chapman*, 289 Ark. 238, 711 S.W.2d 765 (1986), where it appeared that counsel ran roughshod over the Trial Court's rulings. The responses of the Trial Court to the objections and the new-trial motion were within the Trial Court's discretion, and we have not been given sufficient reasons to reverse on the basis of counsel's misconduct.

3. *Jury misconduct*

After the closing arguments and instructions had been given, the jury retired to deliberate. The bailiff was summoned to the jury room and given a note apparently containing a question about damages. The Trial Court instructed the bailiff to take all the jury instructions to the jury. According to his affidavit, the bailiff entered the jury room to deliver the instructions and at that point observed two toy cars on the table in front of the jury foreman. The cars, which were sports-car models, were not part of the evidence he had delivered earlier to the jury room. The bailiff informed Judge Patterson that he believed "the jury was going to use the cars to reenact the accident." The bailiff was directed to bring the jury, along with the toy cars, into the courtroom. The bailiff returned to the jury room and saw that "all of the jurors were gathered around the foreman" and that "they were moving the cars around on the table."

The jury returned to the courtroom. Judge Patterson explained that they could not use the toy cars, which he retained and made a part of the record. In his statement denying the "drastic remedy" of a mistrial, the Trial Court said that he knew it was wrong for the jurors to have had the toy cars in their deliberations but that he saw "no harm in it."

The model cars were made one of the subjects of the motion for a new trial, and they were displayed during oral argument before this Court. New Prospect argues that, because of the differences in the configurations of the models from the actual vehicles — *e.g.*, that the models did not have wheels that could be turned to emulate those of the car and truck involved in the wreck, that neither was a truck — the possibility of prejudice was great.

In response to New Prospect's new-trial motion, First Commercial filed twelve identical juror affidavits. Each of the affidavits provided, in relevant part, as follows:

> No extraneous, prejudicial information was improperly brought to the jury's attention during deliberations. No outside influence was improperly brought to bear upon any juror. The jury fore-

> man, Kenneth Zelnick, did have two toy cars which were on the jury table. The cars were brought out after the jury had voted on the issue of liability and just before the jury sent out first note asking about damages. The cars were not considered on the issue of damages. Nothing about the presence or use of these two, small toy cars provided any information not introduced at trial or brought any outside influence to bear upon any juror. The jury foreman could as well have brought in two packs of cigarettes, two women's makeup compacts, two folded pieces of paper, two erasers, two shoes, or any two other items small enough to fit on the table. The fact that the objects on the table were miniature cars did not provide or demonstrate to the jury any information that was not presented as evidence at trial.

At a hearing on the new-trial motion, New Prospect moved to strike the affidavits on the ground that, "[o]n their face, they violate Rule 606(b) of the Arkansas Rules of Evidence." New Prospect called the jury foreman, Kenneth Zelnick, to the stand. He admitted that he produced the cars during jury deliberations. In questioning Mr. Zelnick, Mr. Angel, on behalf of New Prospect, made it clear that he did not wish to elicit testimony concerning either discussions in the jury room about the car or any impact the presence of the toy cars had on the jurors. He asked, however, what Mr. Zelnick had done with the model cars in the jury room. Mr. Zelnick said he "laid them on the table with the idea that they might help me or some of the other members of the jury to visualize how the cars may have been positioned on the road before and after the accident." First Commercial did not cross-examine Mr. Zelnick.

New Prospect then called juror Kathy Lloyd to the stand. She remembered that Mr. Zelnick produced the two cars during deliberations and put them on the table at an angle. Ms. Lloyd said that there was a picture of the accident scene in front of them and that Mr. Zelnick "set the toy cars like the cars were angled in the picture. That's about as long as they were in there. He sat the cars beside the picture. He didn't sit them directly on top of anything." Ms. Lloyd said that she did not believe Mr. Zelnick "moved the cars. He lined them up. I mean, he may have moved them by lining them up, but he did not move them by rolling

them around." First Commercial did not cross-examine Ms. Lloyd.

The Trial Court struck the juror affidavits with the exception of the portions that read,

> The jury foreman, Kenneth Zelnick, did have two toy cars which were on the jury table. The cars were brought out after the jury had voted on the issue of liability and just before the jury sent out its note about damages. The cars were not considered on the issue of damages.

After further discussion about Rule 606(b) and the "reasonable possibility of prejudice" standard to be applied, the Trial Court denied the new-trial motion and said that the "allegation concerning misconduct of the jury and the evidence pertaining thereto did not affect the substantial rights of the parties to this action."

In *Diemer v. Dischler*, 313 Ark. 154, 160, 852 S.W.2d 793, 796 (1993), a motion for a new trial was made on the basis of juror affidavits to the effect that two jurors had gone to the scene of the accident that was the subject of the trial and had experimented with respect to whether a car could be brought to a stop within a certain distance. The affidavits indicated that the two jurors had revealed their experiment and its result to the others. Citing *Borden v. St. Louis Southwestern Ry. Co.*, 287 Ark. 316, 698 S.W.2d 795 (1985), and *St. Louis Southwestern Ry. Co. v. White*, 302 Ark. 193, 788 S.W.2d 483 (1990), we held the standard to be applied was whether the jurors' misconduct created a reasonable possibility of prejudice, but we stated that on review we reverse the denial of a motion for a new trial only if there has been a manifest abuse of discretion. We held there had been no such abuse of discretion.

We reach the same conclusion in this case. The use of the toy cars, brought to the jury room for the purpose of a demonstration, comes close to the bringing in of extraneous evidence, and we agree it should not have occurred. That, however, is not the same as saying that a jury may not use "props" to reenact an event. While we conclude that it was improper for a juror to have brought the toy cars into the jury room, it seems a close question

because we would clearly have found no impropriety had the jurors used two items they might have found at hand, such as pencils or erasers, or perhaps books, to demonstrate their views to each other on how the accident occurred.

Even though the Trial Court indicated he found no "actual prejudice," rather than reciting the "reasonable possibility of prejudice" standard, we cannot say his overruling of the new trial motion was a manifest abuse of discretion. The evidence given by the bailiff and that of the jurors conflicted. A juror said the toy cars were placed on the table in the jury room and were moved to relative positions occupied by the damaged cars in one of the photographs in evidence. The Trial Court need not have believed the cars were used in a full-blown reenactment of the crash or that, if such a reenactment had occurred, any juror might possibly have disregarded the fact that the toy cars did not resemble the vehicles involved in the wreck.

New Prospect contends on the one hand that the toy cars were so different from the ones involved in the wreck that it was improper to use them. On the other hand, it contends that the toy cars were too similar to the ones involved, in comparison with items such as books or pencils, and thus misleading as they did not have some of the characteristics of the vehicles involved in the crash, such as the height of the truck and wheels that turn. To hold that the toy cars were so much like the vehicles involved in the wreck and yet were so different that there was a reasonable possibility of prejudice, and thus a manifest abuse of discretion in denying a new trial, would ignore the common sense possessed by jurors and commonly exercised by them in viewing the evidence presented.

In *United States v. Abeyta*, 27 F.3d 470 (10th Cir. 1994), a juror used his personal pocket knife to reenact a crime during jury deliberations. In reaching the conclusion that there was no constitutional violation, the Court noted that there was "simply no constitutional command preventing a jury from using common sense and ordinary and uninflammatory props to reenact a crime in the privacy of the jury room." *Id.* at 477. Obviously we do not cite

the case for its constitutional-law aspect but as reinforcement of our view that jurors would not be misled by the "props."

[redacted] In view of the clear evidence as to the nature of the vehicles involved in this case and the obvious differences between them and the toy cars, we cannot say that there was any reasonable possibility of prejudice resulting from their presence in the jury room or that there was an abuse of discretion in the denial of the new-trial motion.

4. Damages

a. Conscious pain and suffering

New Prospect contends that the damages award should shock the conscience of the Court and cause a new trial. It first complains about the $1,000,000 awarded for conscious pain and suffering by the decedent. The contention is that the evidence that Ms. Jones was conscious and suffering after the accident was tenuous and that the amount of the award must have been based on the misconduct of counsel causing prejudice on the part of the jury.

Susan Humphrey testified that she arrived on the scene of the accident prior to the police and the emergency medical personnel. Part of Ms. Humphrey's testimony, as abstracted, follows:

> I went over to the car. Her head was bent over funny and she had blood coming out of her mouth. There was blood on her arms. I kept telling her to hold on, that the police and the paramedics had been called and would be there soon and God loved her. At some point she was moving her arms. I'm not sure why, but I told her to stop moving because she might hurt herself. At some point the blood stopped coming out of her mouth. She must have been swallowing it, because her breathing got really bad. It was hoarse and raspy. When I told her to stop moving, she did. She quit moving her arms and was still for me. Then when her breathing got really bad, I'd tell her to take a deep breath, and she would take a deep breath. Then she would go back to the shallow, raspy breathing. I'd tell her to take another deep breath a few seconds later and she would breathe again . . . . I had the definite impression that I was able to communicate with her . . . . When I told her to quit moving, it was like, "OK, I've got your attention. You know, I can hear," and

> she would quit moving. It was like she was trying to let me know she could hear me or something.

In view of that testimony, we cannot say the evidence was insufficient to show that there was conscious pain and suffering on the part of Ms. Jones or that the damage award in that respect shocks the conscience of the Court.

b. Awards to siblings absent evidence of grief

The award of damages was apportioned by the jury among the family members of the decedent. New Prospect argues that the $50,000 awards made to Russell E. Jones and Rebecca McKinney should be reversed because neither testified at the trial and no other witness presented evidence of mental anguish on the part of either of them. We agree.

First Commercial argues that we can affirm the two awards, as Act 589 of 1993 (Ark. Code Ann. § 16-62-102 (Supp. 1997)) permits recovery by a family member of a decedent for "grief normally associated with the loss of a loved one." Our cases decided prior to Act 589 have required something more than "normal" grief. *See Peugh v. Oliger*, 233 Ark. 281, 345 S.W.2d 610 (1961), overruled on other grounds, *Fountain v. Chicago, R.I. & Pac. Ry.*, 243 Ark. 947, 422 S.W.2d 878 (1968).

We are not concerned here with the extent to which the statute may have changed the law as to the extent to which grief must be demonstrated, but with whether it must be demonstrated to some degree. Absent some such evidence from or on behalf of Ms. McKinney and Mr. Jones, we cannot uphold the judgments in their favor.

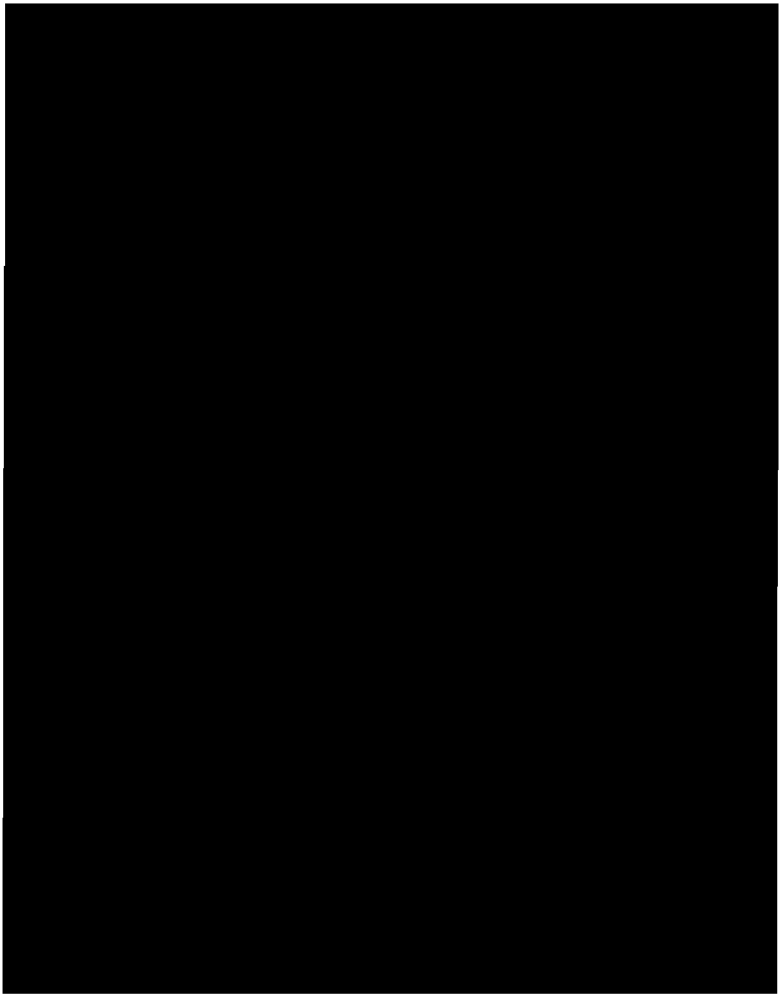
First Commercial has agreed in its brief that, if Act 589 is not to be interpreted as permitting damages to Mr. Jones and Ms. McKinney in this case, their awards may be remitted. We modify the judgment by removing those awards, thus reducing the total recovery by $100,000.

Affirmed as modified.

Bellinda BARRERA *v.* Annette VANPELT

97-801 965 S.W.2d 780

Supreme Court of Arkansas
Opinion delivered April 9, 1998



Brown, Schwander, & Greene, P.L.C., by: *Alice Ward Greene*, for appellant.

Claibourne W. Patty, Jr., for appellee.

TOM GLAZE, Justice. This is a will contest case involving William Yuhola Laneer's 1973 will, which disinherited his son, William Richard Laneer, by giving him one dollar and giving the balance of his estate, equally, to his four daughters, Bellinda Barrera, Annette Vanpelt, Ramona Desich, and Joan Edens. After William Y. died in 1996, Vanpelt petitioned to probate the 1973 will and requested she be appointed executrix. Barrera then petitioned to contest the 1973 will alleging, among other things, that the will was executed through fraud and undue influence and that William Y. had expressed no preference of any one of his children over another. Vanpelt, Desich, and Edens filed a motion to dismiss, asserting Barrera had no standing under Ark. Code Ann. § 28-40-113(a) (1987) to contest the will because her pecuniary share would be less, not more, if the will was set aside. Barrera responded, stating she had standing as an interested party to contest the will under § 28-1-102(a)(11) (1987).

At trial, the parties developed two primary issues, (1) whether Barrera had standing to challenge William Y.'s 1973 will, and (2) if so, whether Barrera had shown that William Y. had revoked the will, leaving his estate to be distributed to his five children by the laws of descent and distribution. Although the trial court found Barrera had standing to contest the 1973 will, it rejected her claim that the will had been revoked or destroyed. Upon finding William Y.'s will valid, the trial court admitted the will to probate and appointed Vanpelt to serve as executrix.

Barrera appeals, challenging the trial court's findings made in support of its ruling that the will is valid. Vanpelt cross appeals, arguing the trial court erred in finding Barrera had standing to challenge the will's validity. We first consider the standing issue.

■ ■ Vanpelt characterizes the issue of standing as one of first impression in Arkansas; if it is, it is an easy one to decide.[1] As

[1] We note that, in *Spicer v. Estate of Spicer*, 55 Ark. App. 267, 935 S.W.2d 576 (1996), our court of appeals considered § 28-1-102(a)(11) (1987) and held that, because appellant was a beneficiary of the trust and a second codicil affected his beneficial interest, he had standing as an "interested person."

the trial court stated in its order, § 28-40-113(a) establishes who may contest a will, and the manner in which it is done. That provision provides that an "interested person" may contest the probate of a will, or any part thereof, by stating in writing the grounds of his objection and filing them in the court. Section 28-1-102(a)(11) defines "interested persons" to include any heir, devisee, spouse, creditor, or any other having a property right, interest in, or claim against the estate being administered and a fiduciary. A devisee is further defined to include a legatee — a person entitled by will to personal property. Ark. Code Ann. §§ 28-1-102(a)(6) and (14). Here, Barrera (and all of her sisters) was given an equal share of her father's (William Y.'s) estate, so she unquestionably meets the term "interested person" as defined by law. In addition, if William Y.'s will were set aside for some reason, Barrera also would qualify along with her siblings as an "heir" within that statutory-defined term.

Vanpelt cites several secondary authorities for the proposition that before a person can contest a will, the contestant must have some pecuniary or beneficial interest in the estate of the decedent that is detrimentally affected by the will. *See* 80 AM.JUR.2d, *Wills*, § 892 (1975). She further argues that, the mere circumstance that a person may be interested in the administration, distribution, or partition of an estate is not sufficient if he will not suffer any detriment from the will. *Id.*, *see also* 95 C.J.S. *Wills*, § 329 (1957); cf. 39 A.L.R.3d 321. As set out and discussed above, our statutes, §§ 28-1-102(a)(11) and 28-40-113(a), very clearly permit devisees and legatees, having an interest in the estate, the right to contest a will, and nothing in those provisions requires that the contestant's interest must be detrimentally affected by the will. The first rule in considering the meaning and effect of a statute is to construe it just as it reads, giving the words their ordinary and usually accepted meaning in common language. *See Dunklin v. Ramsey*, 328 Ark. 263, 944 S.W.2d 76 (1997). Accordingly, we hold Barrera had standing to question the validity of William Y.'s will.

We now turn to Barrera's argument that William Y.'s 1973 will was revoked and should be set aside. A short discussion of the events surrounding the execution of the will is needed. Attorney

Hubert Alexander prepared the will in 1973. At that time, William Y. and his wife harbored bad feelings toward their son, William R., who at his father's urging, had been made a partner in William Y.'s lumber business. Sometime after being made a partner, William R. believed money was missing from the business, and he determined the money went into an account bearing his mother's and Vanpelt's names. He sued the company for an accounting. He also reported the company to the Internal Revenue Service. These ill feelings resulted in William Y. and his wife going to Alexander, who advised them that, in order to preclude William R. from inheriting their estate, they would need to name William R. in their mutual wills in order to prevent him from receiving an intestate share upon their deaths. Identical wills subsequently were prepared for William Y. and his wife, giving a one dollar amount to William R. and the remainder of the estate to his four sisters. Mrs. Laneer predeceased William Y., making William Y.'s will the one at issue in this case.

It is significant to mention that William Y. actually had executed three original wills, as all three wills had been properly witnessed. One will was on paper captioned "Last Will and Testament" — this will and a second original executed copy were given to William Y. A third copy, properly executed and witnessed, was retained by Alexander. A photocopy of the original will was given to Vanpelt. After William Y. died, no one could find the will executed on will paper amongst his possessions; however, a copy of one of the three original wills was found in his lockbox after his death. This copy of the original and Alexander's executed and duly attested original copy were introduced for admission to probate by Vanpelt.

After the parties submitted their evidence and testimony, the trial court found that any one of the three original wills could suffice as the original will. It further concluded that, even though the two original wills previously given William Y. were missing at the time of William Y.'s death, causing a rebuttable presumption to arise that William Y. had destroyed his 1973 will, the court found that Vanpelt's proof had overcome any presumption of revocation.

The trial court's decision correctly acknowledged the general rule that it will be presumed that a testator destroyed a will, executed by him in his lifetime, with the intention of revoking the will, if he retained custody of the will or had access to it, and if it could not be found after his death. *Rose v. Hunnicutt*, 166 Ark. 134, 265 S.W.2d 651 (1924); *see also Gilbert v. Gilbert*, 47 Ark. App. 37, 883 S.W.2d 859 (1994). This presumption, however, may be overcome by proof. *Id.* The proponent of the will has the burden of proving by a preponderance of the evidence that the decedent did not revoke the will during his lifetime. *Garrett v. Butler*, 229 Ark. 653, 317 S.W.2d 283 (1958); *see also Thomas v. Thomas*, 30 Ark. App. 152, 784 S.W.2d 173 (1990). This court in its de novo review on appeal will not reverse the findings of the probate judge unless they are clearly erroneous, giving due deference to his or her superior position to determine the credibility of witnesses and the weight to be accorded their testimony. *Baerlocker v. Highsmith*, 292 Ark. 373, 730 S.W.2d 237 (1987). In the present case, two of William Y.'s original wills had been given William Y for him to retain, but neither of the two wills could be found after his death. Under these circumstances and our case law, the trial court was correct in presuming William Y. had revoked his will before he died. Thus, the critical issue is whether the probate judge was clearly erroneous in concluding Vanpelt, as the proponent of William Y.'s will, offered sufficient evidence to overcome any presumption that William Y. had revoked his will. We hold the record supports the judge's decision.

The respective parties offered circumstantial but conflicting evidence on the revocation issue. For example, Barrera testified that William Y. had expressed on various occasions that all five of his children should be treated equally, and that, on one occasion after execution of their wills in 1973, both William Y. and his wife gave each of the five children a gift of $5,000.00. Barrera also related that, after his wife's death, William Y. said that he had five children and now his assets would be divided among the five children. Barrera's husband testified to the same effect, namely, that William Y. wanted all of his children to share equally in his estate. William R.'s testimony corroborated the Barreras', plus he added that his relationship with William Y. had changed for the better "sometime in the 1970's around his parents' 50th wedding anniversary." And finally, Arlina Jefferson, William Y.'s caretaker dur-

ing his final months, testifed that, although William Y. had never mentioned a will, he had told Jefferson that he wanted all his children treated equally.

The probate judge was provided with contrary evidence to that presented by Barrera, which, if believed, showed William Y. had never revoked his 1973 will. In this respect, we first note that, while William Y. and his wife executed mutual wills in 1973, no direct evidence was offered at the hearing of the probate of William Y.'s will that showed he had actually revoked his will or had said he had revoked or destroyed his will. In fact, even though Barrera and William R. both testified that William Y. had denied ever having executed a will like his wife's (disinheriting William R.), considerable evidence was presented showing they had executed identical wills. It is further undisputed that, as mentioned earlier, a copy of William Y.'s 1973 will was found in his lockbox after he died. This court has held that a photocopy of a properly executed and attested will can be probated in place of a lost or destroyed will. *See Tucker v. Stacy*, 272 Ark. 475, 616 S.W.2d 473 (1981). In the present case, William Y. not only had an original copy of his 1973 will in his lockbox, but also he knew his attorney Hubert Alexander had retained the third original will. Nonetheless, no evidence was offered showing William Y. had made any effort to revoke or destroy the will retained by Alexander. Nor was any evidence introduced reflecting William Y. had made any attempt to destroy the copies of his will previously given to his daughters.

The foregoing evidence, plus testimony establishing that William Y. and his wife bore and retained ill feelings towards William R. for suing the family business and reporting it to the IRS, is sufficient to support the probate judge's decision to probate William Y.'s will. From this evidence, we believe the judge could reasonably conclude, as he did, that, if William Y. had intended for all of his children to receive equal shares, he had from 1973 to his death to prepare another will, and that, other than the fact that two of William Y.'s three original wills were missing, the evidence preponderated in showing William Y. had not revoked his will.

Affirmed.

Darin DANIEL and Dana Honeycutt-Daniel, On Behalf of Themselves and the Citizens, Residents, Taxpayers, and Inhabitants of White County, Arkansas *v.* The Honorable Glen JONES, County Judge of White County, Arkansas, et al.

97-634 966 S.W.2d 226

Supreme Court of Arkansas
Opinion delivered April 9, 1998
[Petition for rehearing denied May 14, 1998.*]

* THORNTON, J., would grant.

Nichols, Wolff, Ledbetter & Campbell, by: *H. Gregory Campbell* and *Mark W. Nichols*, for appellants.

Gill Law Firm, a professional association, by: *C. Tad Bohannon*, for appellees (White County Judge and Quorum Court Members).

Lightle, Beebe, Raney, Bell & Hudgins, by: *Mike Beebe* and *Donald Raney*; *Williams & Anderson*, by: *Leon Holmes* and *J. Madison Barker*, for appellees (Mayors of White County Cities).

DONALD L. CORBIN, Justice. This is a class-action suit claiming an illegal exaction. Appellants Darin Daniel and Dana Honeycutt-Daniel, on behalf of themselves and the citizens, residents, taxpayers, and inhabitants of White County, appeal the judgment of the White County Chancery Court dismissing their claim against Appellees, the White County judge, members of the quorum court, the county treasurer, the mayors of the various cities in White County, and the State of Arkansas. Appellants' claim concerns a county ordinance passed by a majority of voters that imposed a countywide one-percent (1%) sales tax. The ballot reflected that the revenues generated from the sales tax would be used for five designated purposes. It is not disputed that the tax revenues are being used for purposes other than those stated on the ballot. On appeal, Appellants argue that using the tax proceeds for purposes other than those designated on the ballot violates Article 16, § 11, of the Arkansas Constitution of 1874 and Ark. Code Ann. § 26-74-308 (Repl. 1997). Our jurisdiction of this appeal is pursuant to Ark. Sup. Ct. R. 1-2(a)(1) & (17)(vi), as the issues raised require our interpretation of the Arkansas Constitution and acts of the General Assembly. We find merit to Appellants' argument and reverse.

The relevant facts are not in dispute and were stipulated to by all parties. On July 19, 1989, the White County Quorum Court adopted Ordinance No. 89-14 to set a special election to submit for the voters' approval the levy of a one-percent (1%) countywide sales tax. Ordinance No. 89-14 provided in part:

> BE IT ENACTED BY THE QUORUM COURT OF THE COUNTY OF WHITE, STATE OF ARKANSAS: AN EMERGENCY ORDINANCE TO BE ENTITLED: AN ORDINANCE TO PLACE BEFORE THE VOTERS OF WHITE COUNTY A PROPOSAL FOR A COUNTY WIDE ONE PERCENT (1%) SALES TAX AND FOR OTHER PURPOSES.

SECTION 1.

That pursuant to Act 991 of 1981 the General Assembly of Arkansas empowered the various Quorum Courts of the respective Arkansas counties with the authority to call an election for the levy of a one percent (1%) county wide sales tax. That said election shall be held within one hundred and twenty (120) days of the ordinance calling for the election. ([Ark. Code Ann. §] 26-74-307)

SECTION 2.

That the County is in need of additional funding to maintain the present level of services now provided to the people of White County and to enable the County officials to plan for future growth and services and solid waste management.

SECTION 3.

That the ballot title shall be as follows:

[ ] "For adoption of a one percent (1%) sales tax within White County."

[ ] "Against adoption of a one percent (1%) sales tax within White County."

On August 15, 1989, the county quorum court adopted Ordinance No. 89-17 as an amendment to Ordinance No. 89-14. Ordinance No. 89-17 reflected in pertinent part:

Be it enacted by the Quorum Court of the County of White, State of Arkansas: An Ordinance to be entitled:

An Ordinance to designate the use of the revenue generated by the 1% sales tax that will appear on the Ballot during a Special Election Tuesday August 22, 1989.

SECTION 6. That it is the consenses [sic] of the White County Quorum Court, that revenues generated from the imposition of the tax be divided as follows:

A. 50% County Road
B. 25% County General
C. 5% Volunteer Fire Departments
D. 10% Non-Mandated Services
E. 10% Capital Improvements

A special election was held on August 22, 1989, wherein the voters were presented with the ballot for Ordinance No. 89-17, which read in pertinent part:

COUNTY SALES TAX

An ordinance to adopt a one percent (1%) sales tax within White County.

The sales tax money is to be used as follows:

50%	for County Road
25%	for County General
5%	for Volunteer Fire Departments
10%	for Capital Improvements
10%	for Non-Mandated Services (includes Extension Office, Program for Aging, County Library and Veterans Office)

FOR adoption of a one percent (1%) sales tax within White County

AGAINST adoption of a one percent (1%) sales tax within White County

The voters approved the measure. White County began levying and collecting the sales tax on October 1, 1989, and is currently doing so. Since October 1, 1989, the State of Arkansas has received the tax monies collected and remitted the funds to the county and its cities on a per capita basis. White County receives a check each month from the State Treasurer for approximately 45.50% of the sales tax collected. Upon receipt of the county's share of the revenues, the county treasurer prepares a report allocating those funds as set out in the foregoing ballot. The remaining 54.50% of the sales tax monies, however, is distributed by the State Treasurer among the cities on a per capita basis. The cities then use their shares of the tax proceeds for their own purposes. Neither Ordinance No. 89-14, Ordinance No. 89-17, nor the actual ballot disclosed to the voters that the cities within the county would receive a portion of the sales tax proceeds, or that such proceeds would be used for purposes other than those designated in Ordinance No. 89-17 and the ballot. Nor do the ballot and ordinances reveal the method by which the sales tax is to be collected and distributed to the various governmental entities. The ordinances and the ballot further do not mention

that the State Treasurer would deduct the sum of three percent (3%) from the sales tax collected as a service fee, pursuant to Ark. Code Ann. § 26-74-313 (Repl. 1997).

On June 22, 1995, Appellants filed their complaint pursuant to Article 16, § 13, of the Arkansas Constitution, requesting that the trial court declare the levy and collection of the one-percent (1%) sales tax an illegal exaction. Appellants requested further that the trial court grant an injunction to prevent county officials from collecting the sales tax and a mandatory injunction ordering the refund and return of taxpayer monies illegally exacted, after apportionment of reasonable attorney's fees pursuant to Ark. Code Ann. § 26-35-902 (Repl. 1997). Subsequent amended complaints were filed, wherein Appellants claimed, among other things, that the sales tax monies were being levied and collected in violation of Article 16, § 11, of the Arkansas Constitution and section 26-74-308. Specifically, they contended that because the ballot and Ordinance No. 89-17 declared particular uses for the revenues generated from the sales tax, all such revenues must be spent only for those designated purposes, and for nothing else. They claimed that because the ballot and ordinances failed to disclose that portions of the sales tax proceeds would be distributed to the cities, it was illegal to give them any share of such proceeds.

Appellees filed a motion to dismiss the complaints pursuant to ARCP Rule 12(b)(6), insisting that the sales tax was being collected in accordance with Arkansas law and that Appellants had failed to state sufficient facts upon which relief could be granted. They asserted that Act 991 of 1981, now codified at Ark. Code Ann. §§ 26-74-301 to -314 (Repl. 1997), requires that portions of the sales tax collected be distributed to the cities within the county levying the tax. They contended that Act 991 does not contain any exceptions to the State Treasurer's statutory duty to distribute portions of the tax to the cities, and that the county imposing the tax has no responsibility or control over the distribution of the proceeds. Additionally, Appellees asserted that Act 991 provides that cities within the county may spend their shares of the tax revenues for any purpose for which their general funds or the county's general funds may be used. They argued

further that the designation on the ballot of how the revenues generated from the tax would be spent referred only to the way in which the county's share of those revenues would be spent, and that this should have been evident to the voters by the fact that the ballot referred to such uses as "County Road" and "County General."

The trial court agreed with Appellees and granted their motion to dismiss. The trial court ruled that Act 991 is the authority by which this sales tax was implemented, and that just as the Act enables the county to levy such a tax, it also limits the power of the county to undertake such action. The court found that Act 991 directs the State Treasurer to distribute the sales tax collected to the county and the cities on a per capita basis after the State Treasurer deducts a three-percent (3%) service charge. *See* section 26-74-313. The trial court found further that the State Treasurer had fulfilled such statutory duties in this particular instance.[1] The trial court ruled that the designation on the ballot by the quorum court of the proposed uses of the tax revenues, as provided in section 26-74-308(c), pertained only to the county's share of the revenues, and that the designation by the county as to its intended uses of the revenues could not bind the cities as to how they must use their shares of the revenues. To allow the county to control the cities' shares, the trial court reasoned, would empower the counties beyond that authority specifically delegated to them by the General Assembly.

The trial court also found that section 26-74-308(c), included in Act 278 of 1983, makes no reference to the cities or state and speaks in terms of proceeds derived from the tax, rather than revenues collected. Accordingly, the trial court reasoned that such a reference is applicable only to the revenues received by the county *after* the State has deducted its appropriate percentage and the cities have received their respective portions. The trial court found that Act 991, as amended and reenacted, is the later

[1] On appeal, Appellants do not dispute that the State is to receive three percent of the sum collected from the tax as a fee for its services. This court has previously upheld the State's right to receive such fee. *See Porter v. McCuen*, 310 Ark. 562, 839 S.W.2d 512 (1992) (holding that such allocation is mandated under existing law).

enactment of law and that it controls as to any conflict with Act 278. The trial court ruled that there was no violation of Article 16, § 11, as the White County sales tax is being distributed according to statute in pursuance of law.

Appellants now contend that the trial court erred in dismissing their claim, as they assert that the collection of the county sales tax revenues and their distribution to the cities for purposes other than those designated on the ordinances and ballot, violates Article 16, § 11, of the constitution and section 26-74-308. Appellants argue that the voters of White County who approved the sales tax were entitled to rely upon that information provided on the ballot as the final word of how the revenues would be spent. We agree.

Before reaching the particular arguments raised by Appellants, we must determine whether the chancellor's order was in fact a dismissal under Rule 12(b)(6) or a grant of summary judgment as provided in Rule 56. When considering a Rule 12(b)(6) motion to dismiss, the trial court must treat the facts as true and view them in the light most favorable to the party who filed the complaint. *Oldner v. Villines*, 328 Ark. 296, 943 S.W.2d 574 (1997). The trial court must not look beyond the complaint unless it is treating the motion as one for summary judgment. *Id.* The trial court must not lend consideration to any factual conclusions reached through the arguments of counsel and exhibits and may not base its decision on allegations contained in the briefs and exhibits. *Id.* Here, there were no questions of fact to be determined. The parties to the action agreed upon and stipulated to the relevant facts and exhibits, thereby acknowledging the truth of such facts. The chancellor clearly treated the motion as one to dismiss for failure to state facts upon which relief could be granted. Thus, upon review, we also must construe the complaint liberally, accepting the facts alleged as true and viewing them in a light most favorable to Appellants. *Brown v. Tucker*, 330 Ark. 435, 954 S.W.2d 262 (1997).

Act 991 is a comprehensive delegation by the General Assembly to the county quorum courts of the authority to impose a countywide one-percent (1%) sales tax. Sections 26-74-307 and

-308 provide for the precise method of calling for an election to levy such a sales tax and the required form of the ballot. Section 26-74-308(c) provides:

> (c) The ballot may also indicate designated uses of the revenues derived from the sales tax and, *if the tax is approved, the proceeds shall only be used for the designated purposes.* [Emphasis added.]

Section 26-74-313 provides in pertinent part:

> (b) . . . any sales tax collected by the director under this subchapter on behalf of any county shall be deposited with the State Treasurer in trust and shall be kept in a separate suspense account.
>
> . . . .
>
> (d)(1) *The State Treasurer shall transmit to the treasurer or financial officer of each city and county their per capita share,* after deducting the amount required for claims, overpayments, and bad checks, as certified by the director.
>
> . . . .
>
> (3) Transmittals shall be made at least quarterly in each fiscal year. *Funds so transmitted may be used by the cities and counties for any purpose for which the city's general funds or county's general funds may be used. Before transmitting these funds, the State Treasurer shall deduct three percent (3%) of the sum collected as a charge by the state for its services specified in this subchapter*[.] [Emphasis added.]

Appellants rely on section 26-74-308(c), as well as Article 16, § 11, of the constitution, for their argument that the tax currently being levied by White County is an illegal exaction; they contend that because the ballot reflected only five designated purposes for the tax revenues, any other use of the revenues is in conflict with that section and the constitution.

Appellees contend that sections 26-74-308(c) and 26-74-313 can be read harmoniously, if we adopt the reasoning of the trial court that the designated uses or purposes that may be declared on the ballot, as provided in section 26-74-308(c), refer only to the county's use of its share of the tax revenues, not to the whole of the sales tax collected. They contend that the legislature has permitted the county to designate specific purposes on the ballot, but that it has nonetheless required the State Treasurer to distribute the

tax revenues to the county and its cities on a per capita basis. To accept Appellants' reading of the statutory provisions, Appellees urge, would completely defeat the entire taxation scheme designed by the General Assembly.

We initially turn to the issue of whether the sales tax currently being levied and collected is an illegal exaction in violation of Article 16, § 11, of the Arkansas Constitution. For purposes of interpreting our constitution, we have made clear that when the language of the provision is plain and unambiguous, each word must be given its plain, obvious, and common meaning. *Oldner*, 328 Ark. 296, 943 S.W.2d 574. "Neither rules of construction nor rules of interpretation may be used to defeat the clear and certain meaning of a constitutional provision." *Foster v. Jefferson County Quorum Court*, 321 Ark. 105, 108, 901 S.W.2d 809, 810 (1995). Article 16, § 11, provides:

> No tax shall be levied except in pursuance of law, and every law imposing a tax shall state distinctly the object of the same; *and no moneys arising from a tax levied for one purpose shall be used for any other purpose.* [Emphasis added.]

In *Oldner*, we stated that the express intent of that constitutional provision "is for the object to be stated so that the tax revenues cannot be shifted to a use different from that authorized." 328 Ark. at 305, 943 S.W.2d at 579. It is the use of the funds for a different purpose that constitutes an illegal exaction. *Id.* (citing *Hartwick v. Thorne*, 300 Ark. 502, 780 S.W.2d 531 (1989); *Bell v. Crawford County*, 287 Ark. 251, 697 S.W.2d 910, *cert. denied*, 475 U.S. 1120 (1985)). Where a primary purpose of the tax could not be accomplished, but the collection of the tax was continued, this court held that an illegal exaction had occurred. *Hasha v. City of Fayetteville*, 311 Ark. 460, 845 S.W.2d 500 (1993). Similarly, in *Oldner*, we held:

> When a tax is enacted by the General Assembly or approved by a vote of the people without the statement of a purpose, the resulting revenues may be used for general purposes. We fail to see how the voting public could be misled on this point. *It is only when a diversion of tax revenues occurs from a specific purpose that has been authorized to an unauthorized purpose that an illegal exaction*

> *occurs*. We have no doubt that that is the evil sought to be remedied by Article 16, § 11.

328 Ark. at 305, 943 S.W.2d at 579 (emphasis added). Whether the governmental entity levying and collecting the tax intended to put the revenues to "good use" is of no consequence, so long as the funds are being spent on any purpose other than those specified on the ballot. *Hartwick*, 300 Ark. 502, 780 S.W.2d 531.

Here, there is no dispute that the revenues collected from the sales tax are being spent by the cities of White County for purposes other than those five uses designated on the ballot. There is no allegation that the county has applied any of its share of the revenues to any other purposes other than those designated on the ballot. The question then becomes whether the voters were otherwise put on notice of the fact that the cities, as well as the State, would receive their portions of the revenues as set out in section 26-74-313.

Appellees contend that the cities' portions of the revenues are being spent in accordance with the purposes set out in section 26-74-313(d). They argue that this court should look to that section, as well as the remainder of Act 991, to determine whether the tax revenues are being spent appropriately pursuant to Article 16, § 11. We disagree with this argument.

We held in *Oldner*, 328 Ark. 296, 943 S.W.2d 574, that for purposes of construing Article 16, § 11, the "law imposing the tax" is the levying ordinance. Accordingly, we look to the levying ordinance, rather than the enabling legislation, in determining whether the expenditures of the tax revenues are authorized. Here, the levying ordinance, Ordinance No. 89-17, declared five specific purposes for the tax revenues, the same five purposes that were subsequently designated on the ballot. The voters of White County were entitled to rely upon the information provided to them in the levying ordinance and the ballot when casting their votes; hence, any use of the revenues for purposes other than those provided constitutes an illegal exaction. This conclusion is consistent with this court's long-held position that the ballot title is the final, definitive statement to the voters as to that which they are being asked to decide.

In *Arkansas-Missouri Power Corp. v. City of Rector*, 214 Ark. 649, 654, 217 S.W.2d 335, 337 (1949), this court held that it is to the title of the ordinance and the ballot title "that the electors had the right to look to ascertain what they were asked to approve[.]" This court held further that "[t]he ballot title is the final word of information and warning to which the electors had the right to look as to just what authority they were asked to confer[.]" *Id.* Correspondingly, in *Christian Civic Action Comm. v. McCuen*, this court observed:

> It has long been regarded as axiomatic that the majority of voters, when called upon to vote for or against a proposed measure at a general election, will derive their information about its contents from an inspection of the ballot title immediately before exercising the right of suffrage. This, indeed, is the purpose of the ballot title.

318 Ark. 241, 245, 884 S.W.2d 605, 607 (1994) (citations omitted). In *Ragan v. Venhaus*, 289 Ark. 266, 711 S.W.2d 467 (1986), upon which Appellants rely, this court held that "[t]he citizens are entitled to be informed by plain language about what they are voting, and this court has long insisted on that standard." *Id.* at 271, 711 S.W.2d at 469. Mere references to acts of the legislature in a ballot title were insufficient to inform voters about what it was they were voting, as "[t]he *voters do not have ready access to the acts of the legislature*, and we cannot presume they know what repealing effects a later act may have on a former act." *Id.* (emphasis added).

We are thus not persuaded by Appellees' argument that the White County voters could have known, ostensibly from an inspection of the statutory law, that the cities would receive their per capita shares of the tax revenues as set out in section 26-74-313. Appellees rely on this court's holding in *City of Little Rock v. Waters*, 303 Ark. 363, 797 S.W.2d 426 (1990), in support of this argument. At issue in that case was Act 31 of 1987, which provided that in all counties where the voters had approved a sales tax, pursuant to Act 991 of 1981 or Act 26 of the First Extraordinary Session of 1981, a use tax of equal rate would be imposed automatically, without requiring the approval of the voters. This court upheld the imposition of the use tax on the grounds that the General Assembly has the inherent authority to impose a tax and that there is no fundamental right of the citizens to vote on that issue.

Appellees argue that the holding in *Waters* is applicable here, as they contend that in both cases, the complaint is that the voters who approved the sales tax were not informed of the implications of corresponding legislative enactments.

We decline to follow the reasoning of *Waters*. Instead, we conclude that the holding in *Waters* is incorrect, and we overrule that decision to the extent that it conflicts with our holding today. We now embrace the reasoning expressed by the dissent in that case, namely that the voters' right to be fully informed of the matter for which they are casting their votes is paramount. In other words, where the General Assembly has established the right of the voters to approve the imposition of a tax, any consideration of the legislature's general power to tax is secondary to the voters' right to full disclosure of the nature of the tax and its proposed purposes. "[T]he General Assembly only authorizes the imposition of the tax. It is imposed by a vote of the people who will pay it." *Waters*, 303 Ark. at 373, 797 S.W.2d at 432 (Newbern, J., dissenting).

Applying such reasoning to the present case, we conclude that the White County voters' right to full disclosure as to how the tax revenues would be spent outweighs any consideration of the General Assembly's authority to establish the particular scheme of distribution of those revenues. Both the levying ordinance and the ballot reflected five designated purposes for which the sales tax revenues would be used. The voters were instructed by the ballot that if the one-percent (1%) sales tax was approved, all the revenues generated would be spent in those five areas. The voters were not specifically informed, nor could they be presumed to have known, that the legislative act that empowered the county to levy such a tax also provided that the cities would be given their per capita shares of the revenues and would be allowed to spend the money for purposes other than those designated on the ballot.

Accordingly, any use of the sales tax revenues for purposes other than those designated by the levying ordinance and the ballot is in violation of Article 16, § 11, of the Arkansas Constitution and constitutes an illegal exaction. We thus reverse the ruling of the trial court and remand for further proceedings consistent with this opinion.

Patricia ANDERSON and Nina Kelly *v.* Herbert GRAHAM, Roger Raney, and W.A. Raney d/b/a R & W Trucking Company, a Partnership

97-58 966 S.W.2d 223

Supreme Court of Arkansas
Opinion delivered April 9, 1998

Stephen T. Arnold, for appellants.

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

ROBERT L. BROWN, Justice. Appellants Patricia Anderson and Nina Kelly appeal from the denial of a motion for a directed verdict and denial of a motion for a new trial. They urge that each ruling constituted error by the trial court. We disagree on both counts and affirm.

On September 14, 1992, Anderson and Kelly were the driver and passenger, respectively, in a station wagon and had come to a stop on Highway 82, a two-lane road in Stamps. The reason for their stop was that the vehicle in front of them had come to a halt to make a left-hand turn at an intersecting street. While they were stopped, their car was hit from behind by appellee Herbert Graham, who was driving an 80,000 pound tractor-trailer rig owned by appellees Roger Raney and W.A. Raney d/b/a R & W Truck-

ing Company, a partnership (Raney). Graham had just crested a small hill and was unable to stop in time to avoid the accident. Following the accident, both Anderson and Kelly were taken to the Magnolia Hospital and treated in the emergency room.

Anderson and Kelly subsequently filed suit against Graham and Raney for negligence and asked for damages of $250,000 and $1,343,978, respectively. A three-day jury trial followed in which Anderson and Kelly called Graham as an adverse witness as part of their case-in-chief. After they rested, they moved the court for a directed verdict on the basis that Graham had admitted negligence and, thus, the trial court should direct the jury to enter a verdict in their favor as a matter of law. The trial court declined to do so. Much of the plaintiffs' case and the defense case consisted of medical records and deposition testimony of doctors regarding the physical condition of Anderson and Kelly. Graham and Raney presented medical evidence of accidents after the 1992 accident at issue where Kelly had suffered injuries similar to those complained of in this case. On cross-examination of Anderson, they also brought out that she was involved in a 1994 accident in which she injured herself in some of the same areas complained of in the present matter.

Following the verdict and entry of judgment, Anderson and Kelly moved for a new trial, claiming that the jury verdict was against the great weight and preponderance of the evidence. In making their motion, Anderson and Kelly repeated that Graham had essentially admitted both his negligence and the fact that the accident was the proximate cause of their injuries. The new-trial motion was denied. Anderson and Kelly now claim on appeal that it was error for the trial court to deny both motions.

We first consider the claim by Anderson and Kelly that it was error to deny their directed-verdict motion. We initially address the uniqueness of such a motion. In *Morton v. American. Med. Int'l, Inc.*, 286 Ark. 88, 689 S.W.2d 535 (1985), we stated: "[w]e are not aware of any Arkansas case in which a verdict for the party not having the burden of proof has been set aside in a negligence case solely because it was not supported by substantial evidence." The same still holds true.

In *Morton*, this court fully explained the difficulty of a plaintiff's appeal from a denial of a directed-verdict motion:

> The argument now made is presented so rarely that it seldom finds its way into the books. We did consider it in *Spink v. Mourton*, 235 Ark. 919, 362 S.W.2d 665 (1962). There the plaintiff, having lost below, argued that there was no substantial evidence to support the verdict and that (as it would logically follow) a verdict should have been directed for the plaintiff. In rejecting that argument we quoted with approval this language from *United States Fire Ins. Co. v. Milner Hotels*, 253 F.2d 542 (8th Cir. 1958):
>
>> Thus, no matter how strong the evidence of a party, who has the burden of establishing negligence and proximate cause as facts, may comparatively seem to be, he is not entitled to have those facts declared to have reality as a matter of law, unless there is utterly no rational basis in the situation, testimonially, circumstantially, or inferentially, for a jury to believe otherwise.

Morton, 286 Ark. at 90, 689 S.W.2d at 536. *See also Young v. Johnson*, 311 Ark. 551, 845 S.W.2d 509 (1993). We then went forward in *Morton* and stated the common-law rule as expressed in *Cluck v. Abe*, 328 Mo. 81, 40 S.W.2d 558 (1931), that the defendant is entitled to have the jury assess the credibility of the plaintiff's case even though the defendant offers no evidence himself. The jury may believe or disbelieve the plaintiff's witnesses irrespective of the fact that the evidence is uncontradicted and unimpeached. *Morton*, 286 Ark. at 90, 689 S.W.2d at 536.

On the same day that our opinion in the *Morton* case was handed down, this court delivered its opinion in *Schaeffer v. McGhee*, 286 Ark. 113, 689 S.W.2d 537 (1985). In *Schaeffer*, the plaintiff appealed from a jury verdict in favor of the defendant, under facts similar to those in the case before us, and from the denial of a motion for a new trial. The plaintiff argued that there was no evidence to support the jury's verdict in favor of the defendant because plaintiff's vehicle had been struck from behind by the defendant's vehicle while stopped in traffic. This court observed that the fact plaintiff's vehicle was struck from the rear did not raise a presumption of negligence and that the jury's ver-

dict could very easily have been attributed to the fact that the road at the time of the accident was glazed with ice and snow. We noted that where sufficiency of the evidence is the issue on appeal, our standard of review is whether the verdict is supported by substantial evidence.

We also affirmed in *Schaeffer* the notion that the defendant is under no obligation to present any evidence contradicting the plaintiff's case. We stated:

> Obviously in appeals from a verdict for the defendant the rule [of substantial evidence] cannot always be read literally, as the defendant may have introduced little or no proof, yet the jury found against the plaintiff. It makes little sense in such cases for the appellant to argue the strict application of the rule, insisting that a reversal is required because the defendant's proof failed to meet the substantial evidence test. The evident fact is the plaintiff failed to convince the jury, or fact finder, of an essential element of proof. That seems to have been the case with this jury, it simply did not think the defendant was negligent, or that the plaintiff's injuries were proximately caused by the negligence, if any. Thus, the lack of substance is not with the defendant's proof, but with the plaintiff's. *See Morton v. American Medical International, Inc.*, 286 Ark. 88, 689 S.W.2d 535 (1985).

Schaeffer, 286 Ark. at 115, 689 S.W.2d at 539.

In *Weber v. Bailey*, 302 Ark. 175, 787 S.W.2d 690 (1990), this court reviewed a case that was factually similar to the instant case. In *Weber*, the defendant was driving a pickup truck and pulling a stock trailer when he came over the crest of a hill, saw vehicles stopped in front of him, and was unable to stop his truck before running into the back of the plaintiff's vehicle. The defendant testified that he was driving forty to forty-five miles per hour at the time he topped the hill, even though the posted speed limit was thirty-five. He further testified that he saw the vehicles after climbing the hill, and that they were forty or fifty yards down the hill. The jury returned a verdict in favor of the defendant. This court quoted with approval the passages from *Morton* and *Schaeffer* set out above, and concluded that "the questions of negligence and proximate cause were for the jury to decide, and it resolved

them in [defendant's] favor." *Weber*, 302 Ark. at 178, 787 S.W.2d at 692.

Anderson and Kelly contend that their case differs from the *Morton-Schaeffer-Weber* line of cases. They say this is so because here Graham admitted to negligence. We disagree. It is true that Graham testified to the following facts:

- that he knew about the particular stretch of Highway 82 and the location of the hill he crested before the accident and that there were intersecting streets on the other side of the hill;
- that he saw the Anderson/Kelly station wagon ahead;
- That he could have avoided the accident if he had been driving at a reduced speed; and
- that he continued at a steady speed regardless of the dangers ahead.

Anderson and Kelly particularly underscore this exchange between Graham and counsel for Anderson and Kelly which, they urge, shows that Graham admitted negligence:

> COUNSEL: But you elected on your own, even though you knew you were loaded and even though you knew this hill was here, you elected to proceed over that hill at thirty to thirty-five miles per hour, didn't you?
>
> GRAHAM: I selected the speed that I could go through town without holding up a lot of traffic without having to downshift more trying to pull up and down hills.
>
> COUNSEL: That was for your convenience, wasn't it, sir?
>
> GRAHAM: Well, my convenience and the other traffic convenience.

Graham, for his part, argues that the evidence viewed most favorably in his light as appellee is:

- that his speed going through Stamps was 29 to 30 m.p.h. going up hills and as high as 35 m.p.h. going down hills. The speed limit was 30 m.p.h.;
- that to stop in time after cresting the hill, he would have had to be traveling 20 to 25 m.p.h.;
- that there were no warning signs about a dangerous intersection;
- that the sun momentarily blinded him at the top of the hill;

- that he hit his brakes as soon as he saw the station wagon but could not veer to the left because of an oncoming truck or to the right for fear of rolling his truck over on top of Anderson/Kelly's station wagon; and
- that there was not enough distance from the top of the hill to the station wagon for him to stop.

In this explanation, we discern no admission of negligence on Graham's part. In fact, he maintains that he did everything he could to avoid the accident. Moreover, there was evidence in this case that the hill and the intersection were dangerous, and that a driver, using ordinary care, could find himself in the situation of not being able to stop in time to avoid a car stopped at the intersection. Even Kelly said to Anderson while they were halted at the intersection: "[T]his is a bad place to have to stop." Hence, there is evidence to support a jury verdict that Graham acted reasonably under the circumstances.

■ ■ We conclude that our standard of review with respect to the denial of the plaintiff's motion for directed verdict is whether the defendants' case was utterly without a rational basis. *See Morton v. American Med. Int'l, Inc., supra.* It is clear to us that the case of Graham and Raney was not utterly without a rational basis. With regard to the denial of the motion for a new trial, we are of the opinion that there was substantial evidence to support the jury verdict, giving the verdict the benefit of all reasonable inferences permissible under the proof. *See Bell v. Darwin,* 327 Ark. 298, 937 S.W.2d 665 (1997); *Weber v. Bailey, supra.* Accordingly, we hold that the trial court did not err in denying either the motion for a directed verdict or the motion for a new trial.

Because we are not confronted in this case with the issue of a defendant who chose to present little or no evidence at trial, there is no need for us to consider this question, as we did in *Schaeffer v. McGhee, supra.* Moreover, since we conclude there was substantial evidence supporting a defendant's verdict on the negligence question, we need not address the issue of causation.

Affirmed.

THORNTON, J., not participating.

D.B. GRIFFIN WAREHOUSE, INC. *v.*
Margaret SANDERS, Individually and as Administratrix of the Estate of
Charles Sanders, Deceased, Appellee;
Travelers Insurance Company, Intervenor

CA 97-1573 965 S.W.2d 784

Supreme Court of Arkansas
Opinion delivered April 9, 1998

Daggett, Van Dover, Donovan & Perry, PLLC, by: *J. Shane Baker*, for appellant.

Wilson & Valley, by: E. Dion Wilson, for appellee.

PER CURIAM. On February 10, 1998, appellee Margaret Sanders filed a motion to dismiss the appeal filed by appellant D.B. Griffin Warehouse, Inc., on the basis that the filing of the record was not timely. The allegations made, and supported by three affidavits, are that appellant's record was due for filing in the Supreme Court Clerk's Office on December 31, 1997; that it was tendered but not filed on December 26, 1997, due to lack of a circuit court's certificate, nonpayment of the filing fee, and failure to present the original record; that these defects were corrected after the filing deadline (apparently on January 2, 1998); and that the filing of the record was stamped December 26, 1997. Documents sent out by the Supreme Court Clerk's Office show the record was filed on December 26, 1997. The record itself shows receipt and filing as of December 26, 1997.

It has long been the practice of the Supreme Court Clerk's office to accept records which are tendered on time and to allow seven days for any errors in form to be corrected. Those errors may include subsequent payment of the filing fee and certification of the record by the circuit clerk. When the defects are corrected, the date of filing is the date the record was tendered — in this case, December 26, 1997.

We are mindful that Ark. Code Ann. § 21-6-401 (Repl. 1996) contemplates payment of a filing fee before the record is filed and that our caselaw makes the payment of the fee a condition of the filing, which is jurisdictional. *See In Re Smith*, 183 Ark. 1025, 39 S.W.2d 703 (1931). Here, of course, the fee was paid, and the record was marked "filed" as of the date it was tendered. Thus, the record was tendered within the jurisdictional time frame and was marked "filed" on that date after errors in form were corrected and the filing fee was paid.

It is clear to us that counsel for appellant relied on this practice by the Supreme Court Clerk's office. In fact, counsel for appellee Sanders attaches a letter from appellant's counsel as part of his Supplement to Motion to Dismiss, where appellant's counsel states, in effect, that he understands that this is the practice of the clerk's office.

Though the record in this case may not have been stamped filed as of December 26, 1997 until January 2, 1998, this was done in accordance with the longstanding practice of the clerk's office.

The motion to dismiss is denied.

NEWBERN, J., not participating.

Edwin G. DIEHL *v.* STATE of Arkansas

CR 98-304 962 S.W.2d 369

Supreme Court of Arkansas
Opinion delivered April 9, 1998

Gene O'Daniel, for appellant.

No response.

PER CURIAM. Appellant Edwin G. Diehl has filed a motion for belated appeal. Appellant was convicted on August 11, 1997, of driving while intoxicated, but he was not formally sentenced until September 10, 1997. The record reflects that the notice of appeal was filed on September 12, 1997; however, the judgment and commitment order was not entered until September 16, 1997. Thus, the notice of appeal was untimely and ineffective. *See* Ark. R. App. P.—Civ. 4.

Appellant's attorney Gene O'Daniel has assumed responsibility for failing to verify that the judgment and commitment order had been filed prior to the filing of the notice of appeal. The motion reflects that Mr. O'Daniel was mistakenly informed by Appellant's trial counsel that the notice of appeal had to be filed by September 12, 1997. Because he has admitted responsibility for the error, we grant the motion for belated appeal. 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*).

Melissa HOLCOMB *v.* R.F. HOLCOMB

97-972 966 S.W.2d 257

Supreme Court of Arkansas
Opinion delivered April 9, 1998

Tom F. Donovan, for appellant.

Boyce R. Davis, for appellee.

PER CURIAM. Appellee R.J. Holcomb, by and through his attorney Boyce R. Davis, moves for dismissal of the above-captioned appeal from an order entered by the Washington County Probate Court on March 21, 1997, and an order overruling recon-

sideration entered on April 28, 1997. The cause involves the guardianship of two minor children, Ryan Mart Holcomb and Zachary Alexander Holcomb. Appellant Melissa Holcomb, the children's natural mother, filed notice of this appeal on both May 27, 1997, and again on July 3, 1997.

In support of his motion to dismiss, Appellee states that on January 5, 1998, the parties agreed to a settlement pursuant to a November 12, 1997 hearing. The settlement agreement included, *inter alia*, dismissal of this appeal. Appellee attached the trial court's January 5, 1998 order to his motion for dismissal. He attached the transcript of the November 12, 1997 hearing to his first amended motion for dismissal filed on March 25, 1998. Appellee alleges that Appellant failed to initiate dismissal of the appeal as stipulated in the agreement between the parties.

Appellant, by and through her attorney Tom F. Donovan, argues that we should deny this motion because Donovan was not a party to the January 5, 1998 agreement, having entered his first appearance for Appellant on March 31, 1997. Attorney James Hornsey, who represented Appellant at the November 12, 1997 hearing, signed the January 5, 1998 agreement for Appellant. In support of her argument to deny the motion for dismissal, Appellant alleges that significant issues of law remain to be decided, and further, that the trial court lost jurisdiction in this case after notice of this appeal was filed, thereby voiding all subsequent orders by the probate court.

We reinvest jurisdiction in the probate court in order for that court to resolve the issue of the January 5, 1998 agreement between the parties. We further remand this case in order for the probate court to resolve the conflicting allegations of the parties and to decide any remaining issues of fact and law. *Gullett v. Gullett*, 251 Ark. 497, 473 S.W.2d 180 (1971); *McCluskey v. Kerlen*, 4 Ark. App. 334, 631 S.W.2d 18 (1982).

Motion granted; appeal dismissed; case remanded.

GLAZE, J., would submit and ask for briefs.

Jason Mark SMITH *v.* STATE of Arkansas

CR 98-329 962 S.W.2d 813

Supreme Court of Arkansas
Opinion delivered April 9, 1998

Joel O.Huggins, for appellant.

No response.

PER CURIAM. Appellant Jason Mark Smith, by and through his attorney, has filed a motion for a rule on the clerk. His attorney, Joel O. Huggins, states in the motion that the record was tendered late due to a mistake on his part.

We find that such an error, admittedly made by an 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.

James RHODES *v.* STATE of Arkansas

97-868 967 S.W.2d 550

Supreme Court of Arkansas
Opinion delivered April 16, 1998

[redacted]

Bill Luppen, for appellant.

Winston Bryant, Att'y Gen., by: *Mac Golden*, Asst. Att'y Gen., for appellee.

W.H. "DUB" ARNOLD, Chief Justice. This is an interlocutory appeal filed by appellant James Rhodes from the Pulaski County Circuit Court's denial of his motion to transfer his criminal case to juvenile court. Jurisdiction is properly before this court pursuant to Ark. Sup. Ct. Rule 1-2(11) (1997) as the record in this appeal was lodged before September 1, 1997, the effective date of our appellate jurisdiction rule change. *See In Re: Supreme Court Rule 1-2,* 329 Ark. 656 (per curiam). We affirm the trial court's decision.

On February 21, 1997, appellant and Damien Deshun Brown were charged by felony information with aggravated robbery and theft of property. The charges stemmed from the December 16, 1996, robbery of the Maple Street Grocery Store in Little Rock. We affirmed the denial of Brown's motion to transfer his case to juvenile court in *Brown v. State*, 330 Ark. 518, 954 S.W.2d 276 (1997). The appellant was seventeen-years-old at the time of the commission of the offenses, and just nine days short of his eighteenth birthday when his transfer motion was denied by the trial court on April 25, 1997. The appellant's date of birth is May 4, 1979. Thus, he is now almost nineteen years old.

At appellant's transfer hearing, Detective Jeff Norman of the Little Rock Police Department testified that the appellant and two other subjects entered the store on the date in question. One of

the suspects had a gun and threatened to shoot a store employee if he did not open the cash register. The employee was so nervous that he was unable to open the register. After two of the suspects were unable to open the cash register themselves, they grabbed a box of candy bars and a package of cigarettes then fled on foot. Appellant and Brown were apprehended in the area shortly after the robbery. The store employee identified the appellant as the person who had held the gun on him. Appellant admitted his involvement in the robbery to Detective Norman, confirming that he had held the gun on the employee.

Appellant's mother, Mary Rhodes, also testified at the hearing. She related that her son had a prior history in juvenile court. Specifically, her son had been placed on probation for theft of property on September 12, 1996. One week after the appellant was placed on probation, a pick-up order and petition for revocation of his probation were filed. After the appellant tested positive for drugs, he was sent to Recovery Way in Oklahoma.

In determining whether a criminal case should be transferred to juvenile court, the trial court must conduct a hearing and consider the following factors under Ark. Code Ann. § 9-27-318(e) (Supp. 1995):

> (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.

Though the trial court must consider all of the factors listed above, it is not required to give them equal weight. *Thompson v. State*, 330 Ark. 746, 958 S.W.2d 1 (1997); *Fleetwood v. State*, 329 Ark. 327, 947 S.W.2d 387 (1997); *Olgesby v. State*, 329 Ark. 127, 946 S.W.2d 693 (1997). A decision to try the juvenile as an adult must be supported by clear and convincing evidence. *Id.* We will

not reverse the trial court's decision in this regard unless it is clearly erroneous. *Id.*

In making his argument that the trial court erred in denying his motion to transfer his case to juvenile court, the appellant claims that, although the evidence demonstrated that he was in possession of a handgun, there was no evidence presented that anyone was injured by Brown or by him. However, no actual injury need occur if the offense is serious and violent. *Sanders v. State*, 326 Ark. 415, 932 S.W.2d 315 (1996). We have held that aggravated robbery is a serious and violent offense. *Booker v. State*, 324 Ark. 468, 922 S.W.2d 337 (1996).

Appellant further claims that he has completed a drug recovery program and has made A's and B's in training school, demonstrating that he is not beyond rehabilitation. His argument ignores the serious nature of the crime of aggravated robbery, and the evidence of the use of violence in the commission of this offense. Given the presence of these two factors, we have often declined to hold that a trial court was clearly erroneous in denying transfer. *See Toliver v. State*, 330 Ark. 488, 953 S.W.2d 887 (1997)(collecting cases). Detective Norman's testimony demonstrated that appellant participated in a serious offense and that he held the victim at gunpoint. Moreover, Ms. Rhodes's testimony confirmed that the appellant had a prior history of criminal acts, from which the trial court could have rightfully concluded that the appellant had participated in a repetitive pattern of adjudicated offenses showing that he was beyond rehabilitation. Finally, the appellant is now almost nineteen years of age. 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. Rhodes had not been committed to DYS. *See Brown v. State, supra*; *Maddox v. State*, 326 Ark. 515, 931 S.W.2d 438 (1996); Ark. Code Ann. § 9-28-208(d) (Supp. 1995). For all of the foregoing reasons, we conclude that the trial court's decision to deny appellant's motion to transfer his charges to juvenile court was supported by clear and convincing evidence.

Affirmed.

Pamela F. SKOKOS *v.* Theodore C. SKOKOS

95-1029 968 S.W.2d 26

Supreme Court of Arkansas
Opinion delivered April 16, 1998
[Opinion on granting of rehearing issued June 4, 1998]

Henry Hodges; and *Robinson, Staley & Marshall*, by: *Robert L. Robinson Jr.*, for appellant.

Dover & Dixon, P.A., by: *Philip E. Dixon*; and *Dodds, Kidd, Ryan & Moore*, by: *Judson C. Kidd*, for appellee.

DAVID NEWBERN, Justice. Pamela F. Skokos, the appellant, filed a complaint for divorce against Theodore C. Skokos, the appellee, on June 1, 1993. Custody and property issues were litigated before Chancellor Alice Gray in hearings that were protracted and acrimonious. The final decree, entered on March 30, 1995, granted a divorce to Ms. Skokos, awarded custody of the parties' minor child to Mr. Skokos, and divided property. Prior to the entry of the decree, while the case was pending in the Chancery Court, the parties brought matters before this Court for reso-

lution. *See Skokos v. Gray*, 318 Ark. 571, 886 S.W.2d 618 (1994)(denying Ms. Skokos's petition for writ of *certiorari* to disqualify Chancellor Gray, Mr. Skokos's attorney, and attorney *ad litem*); *Hodges v. Gray*, 321 Ark. 7, 901 S.W.2d 1 (1995)(affirming in part and reversing in part on Ms. Skokos's counsel's interlocutory appeal from contempt citations).

Following entry of the final decree, Ms. Skokos filed on August 14, 1995, a motion to vacate the judgment under Ark. R. Civ. P. 60. Ms. Skokos was unable to obtain a hearing and ruling on the Rule 60 motion, and she appealed to this Court and asked that the case be remanded for the adjudication of that motion. We granted her request in *Skokos v. Skokos*, 322 Ark. 563, 909 S.W.2d 653 (1995). Ms. Skokos again moved that we disqualify Chancellor Gray, who, in her response to Ms. Skokos's motion, announced her decision to recuse. We accepted Chancellor Gray's recusal and assigned Chancellor Jim Hannah to preside on remand. Chancellor Hannah held a hearing on Ms. Skokos's Rule 60 motion and denied it in an order filed on July 17, 1996.

Ms. Skokos now appeals from the final decree entered by Chancellor Gray and the order entered by Chancellor Hannah denying her motion to set aside the decree.

In seeking reversal of the decree, Ms. Skokos first argues that the Chancellor erroneously determined that the Skokoses had made an effective gift of three of their residences, held as tenancies by the entirety, to "qualified personal residence trusts" and that the residences were owned by the trusts, rather than the Skokoses, and thus were not subject to division under Ark. Code Ann. §§ 9-12-315 and 9-12-317 (Repl. 1993 and Supp. 1997). Second, she argues that the Chancellor undervalued the Skokoses' shares in two cellular-telephone companies as a result of erroneous evidentiary rulings excluding expert testimony offered by Ms. Skokos and limiting her cross-examination of Mr. Skokos's expert witness. Third, Ms. Skokos argues that the Chancellor erred in rejecting her claim of entitlement to a "surcharge" or "reimbursement" for allegedly "improper" payments made by Mr. Skokos with marital funds. Fourth, she argues that Chancellor Gray erred by refusing to recuse.

Ms. Skokos further asserts that the judgment should have been vacated or set aside under Ark. R. Civ. P. 60(c)(4) on account of what she views as "extrinsic fraud" practiced upon the Chancery Court by one of Mr. Skokos's trial counsel and the attorney *ad litem* appointed to represent the minor child. Ms. Skokos does not seek reversal of Chancellor Gray's custody ruling or maintain that she is entitled under Rule 60 to relief from that part of the judgment granting her a divorce and vesting Mr. Skokos with custody of the minor child.

Mr. Skokos urges an affirmance on these points but maintains as a preliminary matter that Ms. Skokos waived her right to bring this appeal when she accepted over $6 million in cash or other assets that Mr. Skokos conveyed to her in accordance with the property division prescribed by Chancellor Gray's decree.

We conclude that some, but not all, of Ms. Skokos's arguments have merit. Thus, we affirm the decree in part and reverse it in part and remand the case for further proceedings consistent with this opinion.

1. *Waiver of appeal*

As to Mr. Skokos's assertion that Ms. Skokos waived her right to appeal when she accepted over $6 million in cash and other assets provided in the decree, we hold that he waived his right to contend the appeal is barred. We do conclude that Ms. Skokos is barred from appealing from the ruling made on her request that the decree be set aside pursuant to Rule 60, as that was not included in the waiver.

An appellant "waives his right to an appeal by accepting a benefit which is inconsistent with the claim of right he seeks to establish by the appeal." *Shepherd v. State Auto Property & Cas. Ins. Co.*, 312 Ark. 502, 509, 850 S.W.2d 324, 327 (1993), *quoting Bolen v. Cumby*, 53 Ark. 514, 515, 14 S.W. 926, 927 (1890). *See also Jones v. Rogers*, 222 Ark. 523, 525, 261 S.W.2d 649, 650 (1953) (stating "when an appellant accepts a portion of a challenged order inconsistent with his appeal, he thereby waives his appeal"). No doubt Ms. Skokos's acceptance of benefits from

some portions of the decree would bar her appeal but for the agreement entered between her and Mr. Skokos to the contrary.

The agreement at issue here was signed by Henry Hodges, counsel for Ms. Skokos, and Judson C. Kidd, counsel for Mr. Skokos. The agreement is contained in the following letter, dated April 13, 1995, from Mr. Hodges to Mr. Kidd:

> HAND DELIVERED
>
> . . . . . .
>
> Dear Jud:
>
> This will confirm our various discussions concerning your delivery of checks, stock certificates, and other property pursuant to the Court's Decree entered March 30, 1995. It is understood and agreed that Pam is accepting these funds and these properties subject to a reconciliation of the accounting ordered to be furnished by Mr. Skokos and, of course, *subject to her right to appeal the Decree. In other words, it is understood there is no prejudice to Pam's right to appeal* and Pam's right to be furnished an accounting that is acceptable according to the terms of the Decree.
>
> Kind regards,
> /s/ Henry
> Henry Hodges
>
> . . . . . .
>
> [Emphasis added]

The following appears below Mr. Hodges's signature:

> ACCEPTED AND AGREED TO:
> /s/ Judson C. Kidd
> Judson C. Kidd

[redacted] Although we are aware of no case on point, we can conceive of no reason to reject the position that an appellee may, as Mr. Skokos has done in part, "waive" his right to declare a waiver of appeal on the part of an appellant. Thus, an appeal should not be dismissed where, as here, the appellant has acted in reliance upon the appellee's promise that her acceptance of payment under the judgment will not prejudice her right to appeal.

Mr. Skokos contends, however, that the agreement merely conferred on Ms. Skokos the right to question a forthcoming accounting of Mr. Skokos's expenditure of marital funds during

the pendency of the divorce action and did not confer the right to appeal the decree. Mr. Skokos asserts, in the alternative, that the agreement is ambiguous and, in accordance with *Don Gilstrap Builders v. Jackson*, 269 Ark. 876, 601 S.W.2d 270 (Ark. App. 1980), should be construed against Ms. Skokos, the drafter. Mr. Skokos claims that he would not have made any payment to Ms. Skokos under the decree "if he had thought [Ms. Skokos] was reserving a right to appeal to force him to make even more payments."

As we read the agreement "and consider it from its four corners, as we must, its terms appear clear and unambiguous." *Barton v. Sturgis*, 224 Ark. 924, 927-28, 278 S.W.2d 114, 117 (1955). The agreement clearly and unambiguously states that Ms. Skokos would accept payment from Mr. Skokos subject to her right to an accounting *and* her right to appeal the decree. It is our duty to construe these unambiguous terms "according to the plain meaning of the language employed," *Roth v. Prewitt*, 225 Ark. 466, 469, 283 S.W.2d 155, 157 (1955); *see Unigard Security Ins. Co. v. Murphy Oil USA, Inc.*, 331 Ark. 211, 221, 962 S.W.2d 735, 740 (1998), and thus we hold that the agreement permits Ms. Skokos to appeal the decree in spite of her acceptance of benefits under it. Mr. Skokos's assertion that the agreement means anything else is, at best, facetious.

Whether the agreement permits Ms. Skokos to appeal from Chancellor Hannah's order denying relief under Rule 60 is a different matter. The agreement was signed on April 13, 1995, well before the filing of the Rule 60 motion on August 14, 1995, and the filing of Chancellor Hannah's order on July 17, 1996. By its terms, the agreement allows Ms. Skokos to appeal only the "decree." The agreement does not contemplate post-decree motions. Nothing in the text of the agreement expressly discusses, let alone permits, an appeal from a ruling on any type of post-decree motion. The parties could have included language permitting such an appeal had they chosen to do so.

Accordingly, we hold that the "right to appeal the decree" conferred on Ms. Skokos by the agreement does not encompass the right to appeal the order denying her motion

under Rule 60 to vacate the judgment. As Ms. Skokos's acceptance of over $6 million under the judgment is inconsistent with her argument that the judgment should be vacated under Rule 60, we conclude the point is waived.

2. *Personal residences*

The Skokoses acquired three personal residences during their marriage — #10 Edgehill Road in Little Rock, and 131 Hosta Bay and 1519 Long Point Lane in Hot Springs. Each was held by them as tenants by the entireties. The Chancellor found that they were not marital property at the time of the divorce because the Skokoses had conveyed them to qualified personal residence trusts ("QPRTs") after agreeing between themselves to do so. The QPRTs were created apparently for the purpose of avoiding taxation (*i.e.*, estate planning) but to maintain family control of the residences.

Joe Gelzine, an attorney who drafted the QPRT documents, testified that the device creates three interests in the property thus conveyed: (1) a reversionary interest in the grantor, (2) a possessory interest in the grantor, and (3) a contingent remainder interest in beneficiaries of the trust. The grantor to a QPRT can end the trust, forfeiting the tax benefits, and thus obtain his or her reversionary interest.

The evidence was conflicting as to whether Mr. or Ms. Skokos was the prime mover in setting up the QPRTs. We do know, however, that while Mr. Skokos was away, participating in the Desert Storm operation in 1991, Ms. Skokos, with Mr. Gelzine's help, quitclaimed her interest in the Edgehill residence to the Skokos family trust of which Mr. Skokos was trustee. As Mr. Skokos's attorney in fact, she likewise quitclaimed his interest to the family trust. By special warranty deed, Mr. Skokos thereafter conveyed the Edgehill property to himself, individually, and then he conveyed the property to the QPRT by special warranty deed, also signed by Ms. Skokos. A similar transaction occurred with respect to the Hosta Bay property. The Skokoses' two children were the contingent remaindermen named in these trusts.

Mr. and Ms. Skokos conveyed the Long Point Lane property by quitclaim deed to Ms. Skokos, individually, and she then conveyed it by special warranty deed to herself as trustee of a QPRT. The contingent remainderman was Dr. Kemp Skokos, Theodore Skokos's brother. Ms. Skokos's deposition testimony indicated that the gift to Kemp Skokos was made in gratitude for assistance (presumably financial) he had given as the Skokoses entered the cellular- telephone business.

Pursuant to these arrangements, Mr. Skokos, as grantor, retained a 25-year possessory interest in the Edgehill and Hosta Bay properties, and Ms. Skokos retained a 15-year possessory interest in the Long Point Lane property. Ms. Skokos lost her possessory interests in the Edgehill and Hosta Bay residences and was compensated for them in the divorce decree. The parties, however, were not required to account for the value of the reversionary interests they retained in those properties.

Ms. Skokos contends the conveyances to the QPRTs should be set aside because she was overreached by a "dominant spouse" in creating them. *See Shipp v. Bell,* 256 Ark. 89, 505 S.W.2d 509 (1974). There was evidence that Ms. Skokos is a college-educated person who sold real estate for a time and was thus at least somewhat familiar with property transactions, having been a "million dollar club" salesperson. The Skokoses' son, who was a law student when the QPRTs were created, recalled his mother discussing the trusts and acknowledging their effects with some concern over what might happen should she and Mr. Skokos ever divorce. Mr. Skokos is an attorney, and thus perhaps obviously more knowledgeable about such transactions than Ms. Skokos, but he contends that he had not heard of the QPRT idea before he left the country, that he was gone in 1991 when Ms. Skokos began the process, and that it was her idea to do so.

■ ■ It is enough to say that, where there is a factual dispute about the conditions surrounding the making of a deed, the determination by the Chancellor, whose job it is to assess the credibility of the witnesses, *Lawson v. Lawson*, 226 Ark. 643, 291 S.W.2d 518 (1956), will not be reversed unless it is clearly erroneous, *Calvin v. Calvin*, 308 Ark. 109, 823 S.W.2d 843 (1992), or

unless it is clearly against the preponderance of the evidence, *Weber v. Weber*, 256 Ark. 549, 508 S.W.2d 725 (1974), viewing the evidence in the light favorable to the appellee. *Dennis v. Dennis*, 239 Ark. 384, 389 S.W.2d 631 (1965). We must remand the case, however, for reconsideration of distribution of the parties' interests in the marital residences, not for any further consideration of the validity or effectiveness of the QPRT instruments and preceding conveyances, but because the reversionary interests that were created and acquired by the parties during the marriage were clearly marital property, *see* Ark. Code Ann. § 9-12-315(b) (Repl. 1993), and those reversionary interests were erroneously not considered in the distribution of the marital property.

3. Shares in cellular-telephone companies

Ms. Skokos asserts that the Chancellor's determination of the fair market value of the parties' shares in two cellular-telephone companies should be reversed on account of erroneous evidentiary rulings concerning the testimony of expert valuation witnesses. We agree that at least one of the rulings at issue constituted an abuse of discretion, requiring reversal.

Toward the end of their marriage, Mr. and Ms. Skokos acquired minority interests in two cellular-telephone companies. Using marital funds, they acquired a 49.99-percent interest in the Atlantic Cellular/New Hampshire RSA One, Limited Partnership ("the New Hampshire company"), and a 10.35-percent interest in the Little Rock Cellular Partnership ("the Little Rock company"). The Little Rock company apparently does business under the name of "Little Rock Cellular One." Title to the two blocks of shares was held by other companies owned solely by Mr. Skokos, but the parties agree that the shares at issue are marital property.

Mr. and Ms. Skokos agreed that the Chancellor should determine the fair market value of the shares and that Mr. Skokos would pay Ms. Skokos one half of the determined value and retain sole ownership of the shares.

Ms. Skokos first presented expert testimony from Steven Schroeder regarding the value of the shares in both the New

Hampshire company and the Little Rock company. Mr. Schroeder opined that the parties' shares in the New Hampshire company were worth $9 million, after applying a 20-percent "minority discount," and that their shares in the Little Rock company were worth $7.4 million, after applying a 30-percent "minority discount." Mr. Schroeder's written appraisal was admitted into evidence.

Ms. Skokos then sought to introduce expert testimony from Matthew Fox on the value of the parties' shares in the New Hampshire company. Mr. Fox was prepared to testify that those shares were worth between $8.6 million and $11.6 million and that the value of the shares should not be subjected to a "minority discount." Mr. Fox also would have challenged some of the views expressed by Thomas Buono, Mr. Skokos's expert witness, in his appraisal. Chancellor Gray, however, prohibited Ms. Skokos from introducing Mr. Fox's testimony and his written appraisal.

Mr. Skokos presented expert testimony from Mr. Buono and introduced his written appraisal into evidence. Mr. Buono testified that the value of the parties' 49.99-percent interest in the New Hampshire company was $7.58 million before consideration of any "discounts." Mr. Buono then applied a 55-percent "lack of marketability" discount, and a 15-percent "lack of control" discount, to arrive at an assessment of $2.9 million for the value of the parties' shares in the New Hampshire company.

Mr. Buono testified that the "pre-discount" value of the parties' shares in the Little Rock company was $6.076 million. He then applied a 45-percent "lack of marketability" discount, and a 20-percent "lack of control" discount, to arrive at an assessment of approximately $2.67 million for the value of the parties' shares in the Little Rock company.

Mr. Buono testified that the values he assigned to each block of shares might be subject to further "capital call" adjustments.

Counsel for Ms. Skokos cross-examined Mr. Buono for some period of time, but his examination was terminated when Chancellor Gray interrupted it and allowed Mr. Buono to leave the courtroom in order to board an airline flight. Thereafter, Ms.

Skokos recalled Mr. Schroeder and presented his testimony in rebuttal to Mr. Buono's.

In her final decree, Chancellor Gray indicated that she found Mr. Buono's "analyses and conclusions" to be "entitled to more weight and credibility" than those of Mr. Schroeder. The Chancellor accepted Mr. Buono's assessment of $2.9 million for the value of the parties' 49.99-percent interest in the New Hampshire company but subtracted $199,000, which represented the "outstanding capital call." The final value of these shares, according to the Chancellor, was approximately $2.7 million, and she ordered Mr. Skokos to pay half of that amount, or $1,350,500, to Ms. Skokos. The Chancellor also accepted Mr. Buono's assessment of $2,673,440 for the value of the parties' 10.35-percent interest in the Little Rock company. The Chancellor made no "capital call" adjustments to this figure, and she ordered Mr. Skokos to pay half of the above amount, or $1,336,720, to Ms. Skokos. Thus, the Chancellor determined that Ms. Skokos's interest in the shares of both companies was worth $2,687,220, and Ms. Skokos accepted payment in this amount from Mr. Skokos following entry of the final decree.

Ms. Skokos now maintains that the Chancellor abused her discretion when she prohibited Mr. Fox from testifying and later terminated Ms. Skokos's counsel's cross-examination of Mr. Buono. We agree with Ms. Skokos with respect to the exclusion of Mr. Fox's testimony. A closer question is presented with respect to the cross-examination of Mr. Buono, but we need not address it in view of our holding that the exclusion of Mr. Fox's evidence will require a new hearing on this point.

Chancellor Gray declined to allow Mr. Fox to testify as an expert because she believed he had a "conflict of interest." The conflict, according to the Chancellor, was based upon his employment as a vice president at Stephens, Inc., which owns a substantial amount of stock in the Alltel company, a competitor of Little Rock Cellular One. The Chancellor indicated that, on account of these factors, she "would have reason to question [Mr. Fox's] impartiality." Counsel for Ms. Skokos further suggested at trial that Mr. Fox should be prohibited from testifying on account of a

separate "conflict" based on an unrelated lawsuit filed by Mr. Skokos against Stephens, Inc., and other parties. In her ruling excluding Mr. Fox's testimony, however, the Chancellor did not mention that argument.

[redacted] The Chancellor clearly erred in determining that Mr. Fox had a "conflict of interest" that rendered his expert testimony inadmissible *per se*. There is no dispute that Mr. Fox's involvement in this case was limited to reviewing information about the New Hampshire company and preparing an assessment of the Skokoses' 49.99-percent interest in that company. It is undisputed that the New Hampshire company has nothing to do with the Little Rock cellular-telephone market and does not compete with Alltel or any other entity in which Mr. Fox's employer, Stephens, Inc., has an interest. It also is undisputed that Mr. Fox had no occasion to review confidential financial records of the Little Rock company and that Mr. Fox would not have given an opinion as to the value of the parties' 10.35-percent interest in that company. Mr. Fox's testimony that he did not know much about the litigation between Mr. Skokos and Stephens, Inc., and had only read about the matter in the newspaper, was likewise unrefuted.

[redacted] There is nothing in the record to suggest Mr. Fox had a conflict of interest that prevented him from giving an expert opinion on the value of the Skokoses' shares in the New Hampshire company. Nor do we agree that, if indeed he could have been considered biased, he should necessarily have been disqualified. *See DF&R Corp. v. American Intern. Pacific Industries Corp.*, 830 F. Supp. 500, 504-05 (D. Minn. 1993) (holding that evidence of "a conflict of interest or bias" was insufficient to warrant exclusion of expert witness's affidavit). *See, e.g., Senff v. Estate of Levi*, 515 N.E.2d 556, 559 (Ind.App. 1987)(stating "a bias or sentiment is not sufficient to cause a witness to be incompetent"); *Satterthwaite v. Estate of Satterthwaite*, 420 N.E.2d 287, 290 (Ind.App. 1981), *citing* 97 C.J.S. *Witnesses* § 168; *Sumter County v. Pritchett*, 186 S.E.2d 798, 802 (Ga.App. 1971)("A mere personal interest or bias does not render the witness incompetent to testify."); *Crier v. Marquette Cas. Co.*, 159 So.2d 26, 29 (La. App. 1964)("Interested persons are competent witnesses . . . .").

We also disagree with the contention that Mr. Fox's testimony might properly have been excluded as "cumulative" under Ark. R. Evid. 403. The Chancellor suggested that Ms. Skokos "would not be prejudiced" by her ruling excluding Mr. Fox's testimony as to the value of the Skokoses' shares in the New Hampshire company because Ms. Skokos had already presented Mr. Schroeder's testimony on that issue. Chancellor Gray appeared skeptical of Ms. Skokos's claim that she needed "two experts to testify to the value of the same cellular entity."

According to Ark. R. Evid. 403, relevant evidence may be excluded if its probative value is *substantially* outweighed by "considerations of undue delay, waste of time, or needless presentation of cumulative evidence." We have compared the testimony of both witnesses, and it does not appear the witnesses were so similar in their credentials, opinions, and approaches to the valuation question that the introduction of Mr. Fox's testimony would have amounted to a "*needless* presentation of cumulative evidence." Rule 403 (emphasis added).

4. Surcharges

Ms. Skokos asserted at trial that she was entitled to be reimbursed for one half of the allegedly "improper" payments made by Mr. Skokos with marital funds both before and after Ms. Skokos filed her complaint for divorce. The Chancellor determined the payments at issue were not improper and denied Ms. Skokos's request for a "surcharge" or reimbursement. Ms. Skokos argues on appeal that this determination was clearly erroneous and should be reversed. We affirm on this point.

In a divorce action, a spouse may recover his or her interest in marital property that the other spouse has transferred if the latter made the transfer for the purpose of defrauding the former of his or her interest in the property. *Pierson v. Barkley*, 253 Ark. 131, 133, 484 S.W.2d 872, 873 (1972); *Dowell v. Dowell*, 207 Ark. 578, 182 S.W.2d 344 (1944).

In *Ramsey v. Ramsey*, 259 Ark. 16, 531 S.W.2d 28 (1975), the wife was granted a divorce but appealed the Chancellor's division of property. We reversed and remanded, in part, because the

Chancellor had failed to make an award to the wife for personal property that her husband had fraudulently transferred. We said that

> there was a preponderance of the evidence to show that there was a wrongful disposition of personal property by appellee to defeat appellant's marital interest and that it was error for the court to refuse to consider or make any order concerning items removed by appellee. An extensive enumeration of these items was made by appellant and it was not substantially contradicted. *See Carr v. Carr*, 226 Ark. 355, 289 S.W.2d 899. *See also, Austin v. Austin*, 143 Ark. 222, 220 S.W. 46; *Wilson v. Wilson*, 163 Ark. 294, 259 S.W. 742.

Ramsey v. Ramsey, 259 Ark. at 23, 531 S.W.2d at 33. *See also Hardy v. Hardy*, 228 Ark. 991, 995, 311 S.W.2d 761, 763-64 (1958)("A husband has the right to make a transfer of his property, either with or without consideration, even though he strips himself of all means of supporting his wife, and leaves her without the means of subsistence, provided that he does so in good faith and without intention of defrauding her of her just claims upon him and his estate.")(citation omitted).

On appeal, Ms. Skokos argues that she is entitled to be reimbursed for one half of each of three particular transfers that, in her view, were improperly made by Mr. Skokos. She claims she is entitled to a 50-percent "surcharge" against: (1) a gift of $60,000 made to the Skokoses' three children through the Theodore C. Skokos Irrevocable Trust No. 3; (2) another $60,000 gift to the children allegedly made through the Theodore C. Skokos Irrevocable Trust No. 4; and (3) a $645,000 payment made by Mr. Skokos to Sheffield Nelson. Thus, Ms. Skokos seeks a reimbursement or surcharge for one half of $765,000, or $382,500. We hold that Ms. Skokos is not entitled to this sum.

a. Gifts to children

Ms. Skokos maintains that Mr. Skokos improperly funnelled $120,000 in gifts to their three children through two successive trusts established at a Texas bank after Ms. Skokos had filed for divorce. Ms. Skokos testified at trial that she believed some por-

tion of these gifts should be "charged back" against Mr. Skokos but that she did not expect for her children to "pay [her] back." Ms. Skokos seeks a 50-percent "surcharge" with respect to the total $120,000 because she believes the gifts were made "without her knowledge and consent."

Two trusts are at issue here. The first trust — the Theodore C. Skokos Irrevocable Trust No. 3 — was created on October 1, 1993, after Ms. Skokos's complaint for divorce had been filed. The *corpus* of Trust No. 3 was stock that Mr. Skokos, as grantor, conveyed to the Texas bank serving as trustee. The trust terminated on January 17, 1994, at which time gifts of $20,000 were made to each of the three Skokos children, for a total gift of $60,000. The second trust — the Theodore C. Skokos Irrevocable Trust No. 4 — was created on October 20, 1994, also after the filing of Ms. Skokos's complaint for divorce. The terms of Trust No. 4 provided that the trust would terminate on January 16, 1995, at which time gifts of $20,000 would again be made to each of the three Skokos children. Trusts Nos. 3 and 4 were successors to a trust initially created by Mr. Skokos in 1992. The provisions of Trusts Nos. 3 and 4 were apparently the same as those established in connection with the 1992 trust.

Ms. Skokos argues on appeal that she is entitled to a 50-percent surcharge against the $60,000 gift made through Trust No. 3 *and* the $60,000 gift made through Trust No. 4. It appears, however, that Ms. Skokos made no request to the Trial Court to impose any surcharge with respect to the latter gift. The summary of "items to be surcharged to Ted Skokos" that was prepared and submitted to the Trial Court by Ms. Skokos's accountant included only the $60,000 gift that was made in January 1994 through Trust No. 3 and did not refer to any gift that might have been made through Trust No. 4. Ms. Skokos's proposed findings of fact and conclusions of law refer to only one of the two $60,000 gifts at issue. No reference is made to a date or the identity of a particular trust, but we assume it refers to the gift that was made in January 1994 through Trust No. 3. In any event, the pleading does not refer to *both* gifts that are mentioned on appeal.

We are not directed to any other place in the 15-volume abstract, and we have not located such a place, which demonstrates that Ms. Skokos requested the Chancellor to impose a surcharge on any gift made in connection with Trust No. 4. We are aware that counsel for Ms. Skokos mentioned Trust No. 4 in connection with an objection he raised in response to Mr. Skokos's testimony concerning the creation of the initial trust in 1992. Counsel objected that the testimony concerning the 1992 instrument was irrelevant because Ms. Skokos was "complaining about . . . the new trusts, Texas Trust Number Three and Four that Mr. Skokos created without Mrs. Skokos's agreement, and we think contrary . . . to the spirit and the terms of the Court's . . . restraining order entered when the divorce was filed." Even here, however, counsel voiced no request for a surcharge on any gift that might have been made through either trust. When Mr. Skokos later testified that the funds in Trust No. 4 had been frozen and that no gift had even been made to the children through that trust, counsel made no request for a surcharge and did not refute Mr. Skokos's claim. Counsel simply responded: "Well, we would ask that those gifts be frozen, Your Honor, and that $60,000 — if it's still there, we're very happy that it's there." Even if Ms. Skokos had requested the Chancellor to impose a surcharge on any gift that the children may have received through Trust No. 4, the Chancellor's final decree does not address such a claim. The abstract does not otherwise indicate that the Chancellor made a ruling on that issue.

For these reasons, we do not reach the merits of Ms. Skokos's claim asserting an entitlement to a 50-percent surcharge on any gift the Skokos children may have received through Trust No. 4. We decline to address an argument if the abstract does not show that it was made in the Trial Court, *Webber v. Webber*, 331 Ark. 395, 400, 962 S.W.2d 345 (1998), *and* ruled upon there. *Sanders v. Bradley County Human Servs. Public Facility Bd.*, 330 Ark. 675, 683, 956 S.W.2d 187, 191 (1997).

The issue of Ms. Skokos's right to a surcharge on the gift made through Trust No. 3, however, is preserved for our review. Ms. Skokos clearly raised that issue with the Chancellor, and the

Chancellor's order addressed, and rejected, the argument as follows:

> The three children received $20,000 each in early 1994 from a joint trust fund. The payments were made pursuant to a multi-year estate plan previously agreed upon by the parties. Plaintiff wants one half of each payment back, but wants Defendant to repay her rather than the children. The request lacks merit.

We hold that the Chancellor's ruling is not clearly erroneous. There is ample evidence in the record that supports the Chancellor's conclusion that the gift through Trust No. 3 was not improperly made.

The testimony showed that Trust No. 3 succeeded a trust that Mr. Skokos created in 1992 during a trip to Texarkana, Texas. Mr. Gelzine testified that he flew to Texarkana with Mr. and Ms. Skokos and their children and that they met with personnel from a Texarkana bank and executed the appropriate documents. Mr. Gelzine testified that he recommended the provision for the $20,000 per child gift in order to reduce the Skokoses' tax liability. Mr. Gelzine testified that, as far as he could determine, "everyone was clear on what the provisions of the trust [were]."

Mr. Skokos testified that he and Ms. Skokos "visited at length" about the creation of the 1992 trust and the provision for the gifts to the children. He testified that he and Ms. Skokos wanted to fashion the trust so that the children would receive the gift over a period of several years. According to Mr. Skokos, the terms of the successor trusts did not vary from those he had discussed with Ms. Skokos prior to the creation of the 1992 trust.

In support of her claim that the gifts to the children under Trust No. 3 were improper, Ms. Skokos relies on Mr. Gelzine's concessions in his testimony that: (1) he helped prepare the trust documents but did so without seeking Ms. Skokos's input or involving her in the process; and (2) he prepared the trust documents at Mr. Skokos's direction and upon verifying with Mr. Kidd that he "could go ahead and set up another Texas trust." Mr. Gelzine added, however, that Trust No. 3 was created only for tax-relief purposes.

Whether or not Ms. Skokos was aware of, or consented to, the creation of Trust No. 3 and the $60,000 gift to her children that was authorized by the trust, we know of no authority that entitles a spouse to be reimbursed in a divorce proceeding for every nonconsensual transfer of marital funds made by the other spouse. Under the rule announced in *Pierson v. Barkley*, *supra*, and *Ramsey v. Ramsey*, *supra*, and the other cases cited above, it was necessary for Ms. Skokos to prove that Mr. Skokos effectuated that transfer of marital property (the $60,000) with the specific intent to defraud Ms. Skokos of her interest in that property. Proof of that sort is clearly lacking in the record.

b. Payments to Sheffield Nelson

Ms. Skokos also maintains that she is entitled to a 50-percent surcharge against $645,000 that Mr. Skokos transferred to Sheffield Nelson by payments made both before and after the filing of her complaint for divorce. Mr. Skokos acknowledges that he paid that amount to Mr. Nelson in three installments: $450,000 on October 2, 1991; $100,000 in April or May of 1993; and $95,000 in November of 1993. Ms. Skokos claims the payments were improper, and therefore subject to a surcharge, because they were part of a "secret" and "illegal" referral fee that Mr. Skokos paid to Mr. Nelson in return for an attorney-referral to him of a shareholders' derivative case involving Worthen Bank, a case for which Mr. Skokos received an attorney's fee following a settlement hearing in February 1988.

Ms. Skokos claims that any payment of fees by Mr. Skokos to Mr. Nelson for referring the Worthen Bank case would have been "illegal" and "unethical" because Mr. Skokos, during the settlement hearing, did not disclose that Mr. Nelson would be sharing in the fees awarded and represented to the presiding judge that he would not share the fees with anyone who was not disclosed. Ms. Skokos appears to base her theory upon written correspondence not admitted into evidence in which Mr. Skokos and Mr. Nelson, in the months following the settlement of the Worthen Bank case, discussed the possibility of Mr. Nelson receiving a $50,000 referral fee.

At trial, however, both Mr. Skokos and Mr. Nelson explained that the $645,000 payment had no relationship to the Worthen Bank case and was not a "referral fee" of any kind. According to their testimony, the payment was made pursuant to an agreement they reached concerning Mr. Skokos's operations in the cellular-telephone market.

Mr. Skokos testified that he received a cellular-telephone franchise through a lottery conducted by the Federal Communications Commission. Under the terms of the license approved on May 7, 1990, Mr. Skokos was required to commence operations within 18 months or else face forfeiture of the license. Concerned that he would not be able to obtain adequate financing within the allotted time, Mr. Skokos turned to Mr. Nelson for assistance in June 1990. They reached a verbal agreement whereby Mr. Skokos promised to pay a "loan-commitment fee" to Mr. Nelson in return for Mr. Nelson's promise to loan Mr. Skokos several million dollars if called upon to do so.

Mr. Skokos did not call upon Mr. Nelson for a loan, as he found other backing for his cellular-telephone venture. Although he had secured the financing promise of Mr. Nelson, Mr. Skokos hired the firm of Daniels and Associates to locate an investor. That firm located Atlantic Cellular, which paid $11.5 million to Mr. Skokos for a 50.01-percent controlling interest in the cellular-telephone franchise. The purchase and sales agreement, signed on February 28, 1991, by Ms. Skokos while Mr. Skokos was overseas, included a covenant on Mr. Skokos's part that no one, aside from Daniels and Associates, would receive a commission or finder's fee "in connection with the transaction contemplated by this agreement." The deal closed in April 1991, and Daniels and Associates received a finder's fee of $250,000.

Mr. Skokos testified that he could have "walked away" from the agreement with Mr. Nelson, as it would not have been necessary for him to rely on the line of credit that Mr. Nelson had promised to make available. Mr. Skokos testified that he discussed the matter with Ms. Skokos and indicated to her that he felt he should honor the agreement. According to Mr. Skokos, Ms. Skokos advised him to "do whatever you think is right."

Thereafter, Mr. Skokos and Mr. Nelson agreed in writing that Mr. Skokos would pay a negotiated fee of $650,000. The Chancellor received into evidence a written memorandum, dated October 2, 1991, that Mr. Nelson wrote to Mr. Skokos recounting the terms of their agreement on "the New Hampshire Cellular matter." Mr. Skokos promised to pay $450,000 on October 2, 1991; $100,000 in April 1993; and $100,000 in April 1994. In his memorandum, Mr. Nelson referred to the payments as a "finder's fee/legal fee." Mr. Skokos testified that he discussed the agreement with Ms. Skokos. According to Mr. Skokos, "She told me to do whatever I thought was right, and I said, I think this is right. I owe the money, and I paid it." Ms. Skokos acknowledged in her deposition that she viewed the obligation that Mr. Skokos had incurred as a marital debt.

Mr. Skokos testified that he made the first two payments more or less as scheduled but that he renegotiated the terms regarding the third payment so that Mr. Skokos paid only $95,000 but did so in November 1993, earlier than originally scheduled. Mr. Skokos testified that he sought to make a reduced payment ahead of schedule because "I wanted to get my affairs in order before my divorce trial started." Thus, the total amount paid to Mr. Nelson was $645,000. It appears that some, if not all, of these payments were (1) reported by Mr. Nelson as income on his tax returns; and (2) reported by Mr. and Ms. Skokos as business-expense deductions on joint tax returns that each of them signed.

Mr. Skokos and Mr. Nelson acknowledged in their testimony that they had discussed in 1988 the possibility of Mr. Nelson receiving a $50,000 fee for having referred the Worthen Bank case. They testified, however, that they ultimately dropped the matter when Mr. Skokos refused to pay a referral fee and that the payment of $645,000 bore no relationship to the Worthen Bank case. In one of the memoranda cited by Ms. Skokos, Mr. Skokos makes clear his intention not to pay any fee for Mr. Nelson's referral of the case.

Ms. Skokos's accountant testified that the $645,000 payment did not pass the "smell test," noting that a reasonable fee for a $1,000,000 line of credit would only be $100,000. Our under-

standing of the testimony is, however, that Mr. Nelson was ready to advance "several million" dollars.

The Chancellor, evidently relying on the above testimony, and the acknowledgement by Ms. Skokos in a deposition that the obligation to Mr. Nelson was a marital one, rejected Ms. Skokos's contention that the payment to Mr. Nelson was subject to a "surcharge":

> Plaintiff seeks to surcharge Defendant for funds paid to Sheffield Nelson. Plaintiff previously acknowledged the debt to Sheffield Nelson pursuant to an agreement made years before the parties separated. The debt was a marital responsibility. There is insufficient evidence in this record to establish any impropriety regarding the agreement and payments.

The propriety or lack of propriety, other than in the context of the relationship between Mr. and Ms. Skokos, of the payments to Mr. Nelson is not at issue in this appeal. Rather, as noted above, we are concerned with whether the payments were made to defraud Ms. Skokos of her marital interest in the funds. "Ordinarily, we do not reverse a chancellor where the decision turns largely on disputed facts and witness credibility, as we accede to [her] superior position to observe the witnesses and gauge their demeanor." *Dopp v. Sugarloaf Mining Co.*, 288 Ark. 18, 21, 702 S.W.2d 393, 394 (1986). The ruling was not clearly erroneous.

5. *Recusal*

The final argument advanced by Ms. Skokos in support of reversing Chancellor Gray's decree is that the Chancellor erred in declining numerous requests made by Ms. Skokos's counsel that she recuse from the case. We affirm on this point.

In *Skokos v. Gray*, 318 Ark. 571, 886 S.W.2d 618 (1994), we denied Ms. Skokos's *certiorari* request to disqualify Chancellor Gray. We held that *certiorari* does not lie for such discretionary matters as recusal, and we noted that the grounds asserted in support of the judge's recusal in the petition could not be argued later in the event of an appeal from the final decree. *Id.* at 575, 886 S.W.2d at 621. Ms. Skokos invites us to reconsider this point and

to consider the conduct Ms. Skokos mentioned in the petition for the writ. We decline to do so. We only consider at this point facts occurring subsequent to our denial of the writ that are cited in Ms. Skokos's brief as bases for holding the Chancellor should have recused.

Ms. Skokos points to the following events. First, she says a disqualifying bias was evident in the rulings excluding Mr. Fox's testimony and limiting the cross-examination of Mr. Buono. Second, she contends the Chancellor failed to make a timely disclosure of her relationship with a law partner of Byron Eiseman, an attorney scheduled to testify as an expert witness for Mr. Skokos. Third, she maintains the Chancellor should have recused because her court reporter communicated with another judge about the conduct of Ms. Skokos's counsel.

> Judges must refrain from presiding over cases in which they might be interested and must avoid all appearance of bias. *Reel v. State*, 318 Ark. 565, 886 S.W.2d 615 (1994). However, we will not reverse a judgment on the basis of a trial judge's decision not to disqualify unless the judge has abused her discretion. *Id.* To decide whether there was an abuse of discretion, we review the record to determine if any prejudice or bias was exhibited. *Id.* The question of bias is usually confined to the conscience of the judge. *Noland v. Noland*, 326 Ark. 617, 932 S.W.2d 341 (1996). Judges are presumed to be impartial, and the party seeking disqualification has the burden of showing otherwise. *Turner v. State*, 325 Ark. 237, 926 S.W.2d 843 (1996).

Dolphin v. Wilson, 328 Ark. 1, 4, 942 S.W.2d 815, 817 (1997).

a. Evidentiary rulings

Bias will not ordinarily be evidenced in the fact of adverse rulings such as the evidentiary rulings complained of in this case. *See Trimble v. State*, 316 Ark. 161, 172, 871 S.W.2d 562, 567 (1994); *Roe v. Dietrich*, 310 Ark. 54, 59, 835 S.W.2d 289, 292 (1992). Although we have determined it was error to have refused Mr. Fox's testimony and may have been error to have limited the cross-examination of Mr. Buono, we cannot say that those rulings exhibited the sort of personal bias toward Ms. Skokos's case that would have required recusal.

b. Byron Eiseman

Henry Hodges, one of Ms. Skokos's lawyers, filed a complaint against the Chancellor with the Judicial Discipline and Disability Commission on a matter not related to this case. In that proceeding, the Chancellor was represented by a member of the law firm of Friday, Eldredge, and Clark. During the phase of the trial concerned with the QPRTs, Byron Eiseman, a member of that firm, appeared in the courtroom. The Chancellor noted the fact that persons she did not know were in the courtroom. Later, she realized that Mr. Eiseman was a member of the Friday firm. She announced it was her practice to recuse in matters in which the Friday firm served as counsel, and she invited motions.

Counsel for Ms. Skokos moved that the Chancellor recuse. The contention was that Mr. Eiseman's name had been on Mr. Skokos's witness list and that the Chancellor thus should have known of his connection with Mr. Skokos much earlier. In addition, Mr. Eiseman's name and his potential testimony, although not the name of his law firm, had been mentioned orally several times in the proceedings. After the Chancellor made her announcement, counsel for Mr. Skokos withdrew Mr. Eiseman as an expert witness. Mr. Eiseman left the courtroom and did not testify. The Chancellor took the motion under advisement and later announced she would not recuse.

Ms. Skokos asserts that recusal was necessary, in spite of the fact that Mr. Eiseman was withdrawn as a witness and never testified, because of Mr. Eiseman's "improper participation" in the case, consisting of sitting at counsel's table and being "*de facto*, if not *de jure*, co-counsel to [Mr. Skokos] in the trial."

The Chancellor's explanation in response to the motion included the fact that she had not read the witness list and that she did not realize a member of the Friday firm was in the courtroom until she recalled seeing Mr. Eiseman's name on correspondence, apparently from her attorney.

We cannot tell from the record before us the extent, if any, of Mr. Eiseman's participation in this case beyond having been consulted and listed as an expert witness for Mr. Skokos. We

note the Chancellor's remarks that she did not know him and that he had, to her knowledge, not appeared before her previously. The record does not demonstrate any bias resulting from the incident, and, given the withdrawal of Mr. Eiseman, we cannot say any appearance of bias was such as to require recusal.

c. Marjorie Gachot and Judge John Harkey

The final basis asserted by Ms. Skokos for Chancellor Gray's recusal is a communication made by the Chancellor's court reporter, Marjorie Gachot, to the Honorable John Harkey, of Batesville, a chancellor in a separate judicial district. Ms. Skokos's counsel alleged the communication demonstrated that the Chancellor was conducting an "investigation" of Bob Robinson, one of her lawyers, and that bias against her and her counsel was thus apparent. A motion for recusal was filed on February 6, 1995, attaching an affidavit from Judge Harkey. We affirm on this point.

There was considerable skirmishing over the holding of a hearing on the motion. Ms. Skokos's counsel wanted the hearing to be held with Judge Harkey's testimony being taken by telephone. Counsel for Mr. Skokos insisted on having Judge Harkey present in the courtroom for cross-examination. Counsel for Ms. Skokos sought a continuance, which was not granted, for that purpose. He also attempted to have Chancellor Gray testify under oath.

A hearing was held during which Mr. Robinson read from Judge Harkey's affidavit to the effect that Chancellor Gray's court reporter, Marjorie Gachot, had called to speak with Judge Harkey's court reporter and, upon learning that she was unavailable, spoke with Judge Harkey. Ms. Gachot allegedly asked about Mr. Robinson's conduct in Judge Harkey's court, suggesting that Mr. Robinson's conduct had been a problem.

Ms. Gachot testified at the hearing that she had been a court reporter since 1967 and had worked with Chancellor Gray for two years. She said she had indeed called to speak with Judge Harkey's court reporter and that her conversation with Judge Harkey had lasted less than a minute. She said she asked only if Mr. Robinson had been in Judge Harkey's court. She insisted she did not tell

Judge Harkey about rumors she had heard about Mr. Robinson's conduct before him. She said Chancellor Gray had been made aware she was going to call and that she had made the call out of curiosity because she had been concerned about Mr. Robinson's behavior before Chancellor Gray and thought she might help solve the problem. She insisted that the affidavit of Judge Harkey was "not correct" in its statement that she impugned the conduct of Mr. Robinson.

The Chancellor again refused to recuse, and in her order she declared that Mr. Robinson was not being "investigated" by her or by her staff. She pointed out that, even if she had personally called Judge Harkey to discuss the matter of conduct of counsel, that would have been permissible in accordance with the Code of Judicial Conduct, Canon 3, § 7(c).

We decline to reverse the Chancellor's decision not to recuse. The decision was, again, a discretionary one, and we cannot say the record demonstrates that the Chancellor was biased toward Ms. Skokos or her counsel.

In closing, we note that, after Chancellor Gray's recusal, Chancellor Jim R. Hannah was assigned to the case. Chancellor Hannah's assignment to this case will continue upon remand.

Affirmed in part; reversed in part, and remanded.

Special Justices JIM BURNETT, TED N. DRAKE, SEARCY W. HARRELL, JR., and LYNN WILLIAMS join in this opinion.

GLAZE, CORBIN, BROWN, and IMBER, JJ., not participating.

ARKANSAS OKLAHOMA GAS CORPORATION *v.* WAELDER OIL & GAS, INC., and Southwestern Glass Co., Inc.

97-830 966 S.W.2d 259

Supreme Court of Arkansas
Opinion delivered April 16, 1998

Daily & Woods, P.L.L.C., by: *Jerry L. Canfield*, for appellant.

Warner, Smith & Harris, PLC, by: *Joel D. Johnson*, for appellees.

TOM GLAZE, Associate Justice. This appeal is the second one between the parties. *See Southwestern Glass Co. v. Arkansas Oklahoma Gas Corp.*, 325 Ark. 378, 925 S.W.2d 164 (1996). In *Southwestern Glass I*, we held that Arkansas Oklahoma Gas (AOG) failed to show how Southwestern Glass's proposed pipeline to be constructed in Ft. Smith would be inconsistent with the city's use of its right-of-way. Because the trial court had found differently and had issued a temporary restraining order enjoining Southwestern Glass and its contractor, Waelder Oil & Gas, Inc., from completing construction of Southwestern Glass's pipeline, we reversed and remanded with directions that the trial court's injunction be dissolved.

On remand, the trial court held a hearing to permit Southwestern Glass and Waelder the opportunity to show any damages they may have incurred which resulted from the erroneous entry of the trial court's temporary injunction. *See Citizens' Pipe Line Co. v. Twin City Pipe Line Co.*, 183 Ark. 1006, 39 S.W.2d 1017 (1931); *see also* Ark. Code Ann. § 16-113-405 (1987) (assessment of damages upon dissolution of injunction or restraining order), and § 16-113-203 (1987) (bond for damages and costs required for injunction to become effective); and Ark. R. Civ. P. 65. After the hearing, the trial court ruled that Southwestern Glass and Waelder

presented no evidence of damages that they had sustained between the time the temporary restraining order was issued on June 28, 1995, and when it was dissolved on July 18, 1996. The trial court further declared Southwestern Glass and Waelder were not entitled to attorney's fees under case law or statute, but it still made an award based on exhibits pertaining to attorney's fees incurred by Southwestern Glass in the amount of $3,978.35, and Waelder in the sum of $8,239.95, as a condition of the surety bond that AOG had obtained when the restraining order was granted. While Southwestern Glass and Waelder do not appeal the trial court's decision denying them damages, AOG appeals, arguing the trial court erred in making its award.[1] AOG's argument has merit.

We initially point out that the trial court fully recognized the long-established rule in Arkansas that attorney's fees are not recoverable in injunction cases. *Citizens' Pipe Line Co.*, 183 Ark. 1006, 39 S.W.2d 1017 (1931); *Tolbert v. Samuels*, 229 Ark. 676, 317 S.W.2d 715 (1958); *Oliphant v. Mansfield & Co., et al.*, 36 Ark. 191 (1880); *McDaniel v. Crabtree*, 21 Ark. 431 (1860). Moreover, the general rule in Arkansas is well settled that attorney's fees are not awarded unless expressly provided for by statute or rule. *Security Pac. Housing Servs., Inc. v. Friddle*, 315 Ark. 178, 866 S.W.2d 375 (1993); *Chrisco v. Sun Ind., Inc.*, 304 Ark. 227, 800 S.W.2d 717 (1990). And while not argued, we mention Ark. Code Ann. § 16-22-308 (Repl. 1994), which allows for the award of attorney's fees in certain civil actions, including actions for breach of contract. However, this statute fails to help Southwestern Glass and Waelder, since no contract breach is argued here, and as discussed in this court's opinion, *infra*, AOG's surety bond in no way specifies or provides for attorney's fees in these circumstances.

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[1] We note that Waelder argues AOG should not be allowed to contest the terms of the surety bond, because AOG never made such an argument below. However, Waelder and AOG developed opposing theories below — Waelder arguing the bond supported an award, and AOG insisting that such an award was not permissible in injunction cases or under statute or rule. It is these same arguments that are now made on appeal and are squarely before us for a decision.

In awarding attorney's fees conditioned upon AOG's bond, the trial court relied on the following wording from the *Citizens' Pipe Line* case:

> The rule is thus stated in chapter on Injunctions, 32 C.J., § 744: "Complainant's liability for wrongful issuance of an injunction at his instance may, of course, be fixed by the bond that he was required to give as a condition to the granting of the injunction. But, although there is contrary authority, the general rule, unless changed by statute, is that, without a bond for the payment of damages or other obligations of like effect, a party against whom an injunction has been wrongfully issued can recover no damages unless he can make out a case of malicious prosecution by showing malice and want of probable cause on the part of the party who obtained the injunction." 183 Ark. at 1010, 39 S.W.2d at 1018 (1931).

First, we note that, contrary to the trial court's ruling that the foregoing language somehow authorizes attorney's fees, that decision, as already discussed hereinaboye, actually holds that such fees are not allowed as damages when an injunction has been dissolved. In this respect, we find it telling that the trial court, Southwestern Glass or Waelder cite no Arkansas statute, rule, or case law which provides for attorney's fees when an injunction has been granted erroneously and a bond had been issued to effectuate the injunction.

Second, AOG's surety bond's language, itself, fails to support the trial court's award of attorney's fees. In this respect, the bond reads as follows:

> Surety, on behalf of itself and its principal [AOG], acknowledges their indebtedness to defendants in the amount of $25,000.00 conditioned on the payment by [AOG] of all damages, costs, and attorney's fees incurred by defendants in the event that it is finally decided that [AOG] is not entitled to the temporary restraining order entered in the captioned litigation.

As provided by AOG's bond, Southwestern Glass and Waelder were entitled to damages, costs, and attorney's fees they incurred in the event the temporary injunction granted AOG was set aside. However, neither Southwestern Glass nor Waelder presented evidence of damages and they do not contend otherwise on appeal.

Neither Southwestern Glass nor Waelder has shown it has incurred attorney's fees as authorized by statute, rule, or case law.

Finally, Waelder urges us to reconsider this court's decision in *Citizens Pipe Line Co.* and hold attorney's fees are recoverable in any injunction case. To support this requested change in law, Waelder cites only to secondary legal authority, 42 AM. JUR. 2d, *Injunctions* § 373 (1969), and offers no convincing argument why our present law regarding attorney's fee awards should be overruled. *See Sanders v. County of Sebastian*, 324 Ark. 433, 922 S.W.2d 334 (1996). We decline Waelder's request.

Reversed and remanded.

THORNTON, J., not participating.

BROWN and IMBER, JJ., concur for the added reason that the bond language regarding "damages, costs, and attorney's fees" is in the conjunctive. An award of attorney's fees is inapproriate absent an award of damages.

Vincent James HUSSEY *v.* STATE of Arkansas

CR 97-450 966 S.W.2d 261

Supreme Court of Arkansas
Opinion delivered April 16, 1998

William M. Howard, Jr., for appellant.

Winston Bryant, Att'y Gen., by: *Gil Dudley*, Asst. Att'y Gen. and *James Gowen*, Law Student Admitted to Practice Pursuant to Rule XV(E)(1)(b) of the Rules Governing Admission to the Bar of the Arkansas Supreme Court, under the supervision of *Kelly K. Hill*, Deputy Att'y Gen., for appellee.

TOM GLAZE, Justice. This appeal is a companion case to *Harris v. State*, 331 Ark. 353, 961 S.W.2d 737 (1998), where we upheld the capital-murder conviction of Derrick Harris for the shooting death of Jimmy Gathings, a Monticello used-car dealer. Harris's sole point on appeal was that the State had presented testimony that was so conflicting that it was insufficient to sustain a jury verdict of guilty. We disagreed, and held that the trial court had correctly denied Harris's directed-verdict motion based on the eyewitness testimony of Albert Lambert and Jerry Majors. Both men testified that they heard "pows" or "banging" sounds, observed Harris and another man leaving Gathings's office, and subsequently found Gathings had been shot. In *Harris*, we upheld the jury verdict of guilty and concluded that any incon sistencies in the witnesses' testimony went to their credibility.

For his first point of error, appellant Vincent Hussey challenges the trial court's denial of his motion for a directed verdict. Hussey contends the State failed to prove a robbery had been committed or that he had committed a homicidal act, thus failing to prove the charge of capital murder. However, in reviewing the record, it is clear there is sufficient evidence to support Hussey's conviction for capital murder.

As in *Harris*, Lambert and Majors testified that they heard what sounded like shots coming from Gathings's office and saw two men running from the office with pistols in their hands. Lambert and another man got in a truck and followed the two men to a nearby location where the men were picked up by others sitting in a red car. In *Harris*, Lambert identified Harris as the first man leaving Gathings's office. In the present case, Lambert identified Hussey as the second man. Myron Briggs testified that, on the day of Gathings's murder, he dropped Harris and Hussey off at a pool hall before the murder, and picked them up afterwards as they ran to Briggs's car. Briggs said he took them to where Hussey resided.

Majors testified the same as he had in *Harris*, plus he described the second man out of Gathings's building as wearing a brown or tan flannel shirt with a red shirt underneath and a blue or black toboggan on his head — the same clothing Hussey wore the day of Gathings's murder. Scott Sherrill, a serologist, testified the red shirt Hussey wore on that day had blood stains matching Gathings's blood type.

Hussey gave officers conflicting statements that implicated him in Gathings's murder. Hussey first asserted he was not involved in the murder, but after signing a rights form, he conceded he went to Gathings's office, but said "another guy pulled the trigger." In another statement, Hussey related that Harris and a man named Stanford offered Hussey and two friends $500.00 to serve as lookouts while Harris robbed Gathings's store. At trial, Hussey claimed he stood somewhere outside Gathings's building, but in an earlier statement, he said that he was stationed inside,

where he saw Gathings reach for Harris's gun and Harris reacted by shooting Gathings.

In sum, Hussey's own pretrial statements, and even his trial testimony, were at odds with his attempts to explain his participation, if any, in the shooting death of Gathings. This court has often stated that false and improbable statements explaining suspicious circumstances are admissible as proof of guilt. *Thomas v. State*, 312 Ark. 158, 847 S.W.2d 695 (1993). Our court has further held that one eyewitness's testimony is sufficient to sustain a conviction. *Harris*, 331 Ark. 353, 961 S.W.2d 737. In reviewing the foregoing evidence most favorable to the State, we hold that there is more than substantial evidence to support the jury verdict finding Hussey guilty. *See Id.*

Hussey's second and final point for reversal is that the trial court erred in ruling he had voluntarily waived his rights and confessed. Again, Hussey's argument is without merit. In support of this point, Hussey claims that he was never given a chance to read his statements, that he was beaten by an officer before giving his statement, and that he was driven to a secluded area by an officer and at gunpoint forced to sign one of his statements. Hussey also testified that he was wearing ankle shackles and handcuffs when an officer beat and rammed Hussey's head into a window. He claimed an administrator, Barbara Pirtle, and an inmate, Scott Cruce, witnessed these events. However, not only did the officers deny such actions had taken place, but both Pirtle and Cruce testified they did not see anything that would indicate Hussey was being hurt.

When reviewing the voluntariness of confessions, we make an independent determination based on the totality of the circumstances and reverse the trial court only if its decision was clearly erroneous. *Kennedy v. State*, 325 Ark. 3, 923 S.W.2d 274 (1996). Based upon the foregoing evidence, we are unable to say the trial court was clearly erroneous in finding Hussey's statements were a product of his own free will.

In accordance with Ark. Sup. Ct. Rule 4-3(h), 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, Hussey's judgment of conviction is affirmed.

Glenn HIGGINBOTHAM *v.* JUNCTION CITY SCHOOL DISTRICT, Alvin Kelly, Leon Hines, Randall J. Lyons, Stan Owens, John Sims, and Kevin Hux

97-749 966 S.W.2d 877

Supreme Court of Arkansas
Opinion delivered April 16, 1998

Pat Hall, for appellant.

William C. Brazil, for appellees.

DONALD L. CORBIN, Justice. Appellant Glenn Higginbotham raises two issues against Appellee Junction City School District (the District), for whom Appellant was formerly employed as a high school principal, and the individual Appellees, the District's superintendent and school board members. The Union County Circuit Court upheld the District's decision to refuse Appellant's attempted withdrawal of his resignation. Our jurisdiction is pursuant to Ark. Sup. Ct. R. 1-2(a)(17), as this appeal involves a significant public interest and interpretation of the Teacher Fair Dismissal Act (the Act), codified at Ark. Code Ann. §§ 6-17-1501 to -1510 (Repl. 1993). We affirm.

In July 1994, the District hired Appellant as the high school principal for the 1994-95 school year. Appellant served as principal for the District until December 19, 1994, when Superintendent Alvin Kelly asked him to resign.

Kelly had conferenced with Appellant on both September 30, 1994, and October 24, 1994, about Appellant's performance of his duties. A memo dated September 30, 1994, from Kelly directed Appellant to allow Dale Hux, another teacher and dean of students, to handle discipline matters in order for Appellant to "supervise the instructional program, interact with the students and teachers in order to get to know them and their needs." The memo further set forth procedures for written announcements, intercom usage, lunch detention, and organizing "items of importance." After discussing these issues with Appellant, Kelly placed the memo in Appellant's personnel file.

Another memo from Kelly, dated October 25, 1994, followed the October 24, 1994 conference between Kelly and Appellant. In that memo, Kelly cited six concerns regarding discipline and gave suggestions for improvement. The issues in the October 25, 1994 memo were similar to those in the September 30, 1994 memo.

On December 19, 1994, Kelly presented a letter to Appellant, detailing ten serious concerns about Appellant's "effective and efficient operation" of the school. The concerns included Appellant's calling students "yard apes" over the intercom; failing to remember names of students and teachers; failing to maintain necessary materials for operating the school; paddling students without witnesses; "[e]xcessive cross-examination of teachers on routine referrals of students to the office"; poor written and oral communications skills; his monitoring activities, which were viewed as a "joke" by students; poor leadership; teachers' resentment of Appellant's evaluations of them; using profanity in the classroom; and failing to maintain professional rapport with teachers. The letter further stated:

> I am hereby requesting that you resign immediately. If you feel a resignation is not in order, I will begin termination procedures immediately.

Appellant wrote, "As of today, I resign," and signed his name across the letter. He then cleaned out his office and turned in his keys the same day. Kelly notified the board members of Appellant's resignation that night by telephone. Appellant later alleged that he wrote those words of resignation because he did not want a termination on his resume. Appellant also alleged that Kelly promised to pay him his salary for January if he resigned immediately.

On December 20, 1994, Appellant attempted to retract his resignation through letters written by his attorney to Kelly and the school's attorney, Bill Prewett. Appellant reported back to work on December 22, 1994, although no one else was there because of the holidays. The District responded that Appellant's resignation had already been accepted. The District further advised Appellant to request a hearing no later than January 5, 1995. Additionally, Prewett wrote:

> [T]he Superintendent of Schools will recommend to the Board at its meeting on January 10 that Mr. Higginbotham be terminated as of December 19, the day of his resignation. The recommendation for termination is based upon the reasons set forth in Mr. Kelly's letter of December 19 which was delivered to Mr. Higginbotham on that date. A copy of the letter is enclosed for your information.

Appellant requested a hearing, a transcript of the hearing, names of witnesses expected to testify at the hearing, and exhibits expected to be presented. Although the District made the exhibits and other discovery available for Appellant to copy, Appellant did not go to Prewett's office to copy them before the hearing.

The hearing occurred on February 1, 1995. Prewett presided as the hearing officer at the board's request. The board did not provide a court reporter, but tape recorded the hearing and had it transcribed. Prewett read statements against Higginbotham by parties who were not present at the hearing. Superintendent Kelly testified about the facts leading up to the resignation. Appellant and his attorney voluntarily left the hearing before it was over without making a statement or introducing evidence. After finding that Appellant had reported his resignation to the

Missouri Unemployment Commission in writing, the board, upon motion, voted to formally accept Appellant's resignation.

On April 21, 1995, Appellant appealed the board's decision to the Union County Circuit Court. Appellant's complaint alleged claims for violation of the Teacher Fair Dismissal Act, breach of contract, misrepresentation, outrage, mental distress, and duress. In the alternative, Appellant alleged that he was constructively discharged. .The trial court conducted the hearings on November 1 and November 19, 1996. Appellant testified that he thought Kelly was just helping him by issuing the September 30, 1994 and October 25, 1994 directives because he had walked into a bad situation in the school, which had employed four principals within four years. Appellant further testified that he was not formally evaluated during his employment with the Junction City Public Schools; he admitted, however, that he was aware of the concerns notated in the two prior memos and was also aware of his options when he wrote and signed his resignation on the December 19, 1994 letter. During cross-examination, Appellant admitted that he intended for his resignation to be effective immediately. Appellant further admitted that in his application for Missouri unemployment benefits that he completed on December 20, 1994, he wrote "because I didn't fulfill job as told and then asked to resign, resigned." When questioned about why he left the February 1, 1995 school board hearing before it was over, Appellant testified that he left because he had heard enough accusations and realized he was not going to get anything accomplished and was not allowed to present his side at what he had referred to as the "kangaroo court."

Superintendent Kelly testified about the problems he discussed with Appellant in their two 1994 conferences. Kelly stated that he did not ask Appellant to sign either the September 30, 1994 memo or the October 25, 1994 memo, nor was Appellant told he could disagree or that the memos would be put into his file. Kelly also stated that Appellant told him that "if you don't want me here, I don't want to be here[.]" Kelly testified that he informed the board members of Appellant's resignation by telephone the night of December 19, 1994. Kelly further testified he would have suspended Appellant on December 19, 1994, if

Appellant had not resigned. Kelly admitted that he promised to pay Appellant his January salary, but stated that he did not do so because Appellant later tried to withdraw his resignation.

Margaret McGaha, assistant elementary principal at Junction City, testified that Appellant told her over the telephone "that he thought it was best that he resigned because he knew that Mr. Kelly, or we were unhappy with his work."

High school secretary Diana Dove testified that she often had to rewrite Appellant's announcements because they did not make any sense. Dove further testified that Appellant also kept shorter hours than the other administrators and had frequent memory problems.

Board members testified that they accepted Appellant's resignation over the telephone on December 19, 1994, when Kelly communicated it to them. Board member Randall Lyons testified that the board first accepted Appellant's resignation before terminating him.

In a letter opinion dated February 13, 1997, and judgment filed on March 12, 1997, the trial court concluded that Appellant properly resigned, that the board accepted the resignation when delivered to Kelly as the board's agent, and that the board denied Appellant's attempt to withdraw his resignation at the February 1, 1995 hearing. The trial court found that there was sufficient cause for the denial of Appellant's attempted withdrawal of his resignation and that the board did not act in an arbitrary, capricious, or discriminatory manner. The trial court also found that Appellant was not under duress when he resigned. The trial court dismissed all of the claims but the Act violations on the basis that an appeal under the Act cannot be expanded to include tort and contract actions. The trial court did not rule on the issue of whether the District conducted a proper termination proceeding due to its finding that Appellant had resigned.

Additionally, the trial court found that there was insufficient evidence to substantiate Appellant's alternative claim for constructive discharge. Given that two board members worked at the school on a part-time basis, the trial court had concerns that the

board was not completely impartial. The trial court concluded, however, that there was sufficient evidence to support the board's actions. The trial court further found that the record of the February 1, 1995 hearing was properly preserved and that the twenty-seven gaps in the transcript did not affect its substance or overall accuracy. On April 7, 1997, Appellant filed notice of this appeal.

This court addressed the standard of review for school board decisions in *Hamilton v. Pulaski County Special Sch. Dist.*, 321 Ark. 261, 900 S.W.2d 205 (1995):

> We recognize that it is not our function to substitute our judgment on renewal matters for either that of the circuit court or that of the School Board. *Allen v. Texarkana Public Schools*, 303 Ark. 59, 794 S.W.2d 138 (1990); *Green Forest Public Schools v. Herrington*, 287 Ark. 43, 696 S.W.2d 714 (1985). When the issue before us is whether procedures under the Teacher Fair Dismissal Act have been strictly complied with, however, that is clearly a matter for this court's review.

Id. at 266, 900 S.W.2d at 207.

Appellant first argues that the trial court erred when it upheld the District's decision to terminate him. Specifically, Appellant alleges violations of the District's policies and section 6-17-1507, which sets forth the involuntary termination procedures under the Act:

> (a) A teacher may be terminated during the term of any contract for any cause which is not arbitrary, capricious, or discriminatory.
>
> (b) The superintendent shall notify the teacher of the termination recommendation.
>
> (c) The notice shall include a simple but complete statement of the grounds for the recommendation of termination and shall be sent by registered or certified mail to the teacher at the teacher's residence address as reflected in the teacher's personnel file.

The trial court specifically found that Appellant had resigned and thus expressly declined to make a ruling on the involuntary termination procedures; hence, this argument fails on its face. In its letter opinion dated February 13, 1995, the trial court wrote:

> Last, there is the argument that defendant did not comply with the statute and its own policies in terminating plaintiff. This issue cannot be fully addressed because of the circumstances of the case . . . . *Defendant considered plaintiff to have resigned and, therefore, did not initiate termination proceedings.* Plaintiff was no longer available to receive any counseling or paperwork associated with the termination process. The primary purpose of the hearing was to act on plaintiff's request to withdraw his resignation . . . . *No finding is made as to the termination procedure as that was not developed due to plaintiff's resignation.* [Emphasis added.]

Clearly, the trial court did not rule on the termination procedures provided in section 6-17-1507 and, in fact, expressly declined to rule on this issue. Appellant's failure to obtain a ruling below bars review of this issue on appeal. *Morrison v. Jennings*, 328 Ark. 278, 943 S.W.2d 559 (1997).

Furthermore, the facts of this case support the trial court's conclusion that Appellant resigned. Appellant testified that he resigned, reported in writing that he resigned when applying for unemployment benefits, and wrote and signed his resignation across the December 19, 1994 letter prepared by Kelly. Kelly testified that Appellant stated that he did not want to be there if he was not wanted. McGaha testified that Appellant told her he resigned. Accordingly, we cannot say that the trial court's conclusion that Appellant resigned was clearly erroneous, and we affirm on this issue.

Likewise, we conclude that Appellant's reliance on Act 625 of 1989, now codified at section 6-17-1503, as applied to the involuntary termination procedures, is misplaced. That section provides in relevant part:

> A nonrenewal, termination, suspension, or other disciplinary action by a school district shall be void unless the school district *strictly complies with all provisions of this subchapter* and the school district's applicable personnel policies. [Emphasis added.]

Appellant correctly states that this court has consistently interpreted section 6-17-1503 to require strict compliance with the termination procedures set forth in section 6-17-1507. *Spainhour v. Dover Pub. Sch. Dist.*, 331 Ark. 53, 958 S.W.2d 528

(1998); *Hannon v. Armorel Sch. Dist. #9*, 329 Ark. 267, 946 S.W.2d 950 (1997); *Lester v. Mount Vernon-Enola Sch. Dist.*, 323 Ark. 728, 917 S.W.2d 540 (1996); *Hamilton*, 321 Ark. 261, 900 S.W.2d 205; *Western Grove Sch. Dist. v. Terry*, 318 Ark. 316, 885 S.W.2d 300 (1994). The substantial-compliance standard no longer controls proceedings under the Teacher Fair Dismissal Act. *Spainhour*, 331 Ark. 53, 958 S.W.2d 528. Act 625 is unequivocal. *Id.* This standard of strict compliance does not, however, aid Appellant in his argument on appeal, as he was not involuntarily terminated from his position, but instead, resigned.

Appellant next argues that the trial court erred when it upheld the District's decision to deny his request to withdraw his resignation. Specifically, Appellant argues that he retracted his resignation on December 20, 1994, through his letters to the District and by reporting back to work on December 22, 1994. Appellant further argues that the delivery of his resignation was not effective because the board did not formally vote to accept it.

Section 6-17-1506 provides in relevant part:

> (a) Every contract of employment made between a teacher and the board of directors of a school district shall be renewed in writing on the same terms and the same salary, unless . . . *during the period of the contract* or within ten (10) days after the end of the school year, *the teacher shall deliver or mail by registered mail to the board of directors his or her resignation as a teacher,* or unless such contract is superseded[.] [Emphasis added.]

The trial court based its ruling on this court's interpretation of section 6-17-1506 in *Teague v. Walnut Ridge Sch.*, 315 Ark. 424, 868 S.W.2d 56 (1993). In that case, Teague, who was employed as a band director, hand-delivered his resignation to the principal, who in turn delivered it to the superintendent, after the board had already renewed his contract for the following year. The resignation was addressed to the principal, superintendent, and board of education. Teague later attempted to withdraw his resignation on the basis that the school board had not yet accepted it. This court rejected Teague's argument and held that the resignation was effective before the board officially accepted it. This court held:

> [S]ection 6-17-1506 does not require the board to take any official action in response to a teacher's resignation. Had the legislature intended to require a school board to officially accept a teacher's resignation, it could have so provided. It did not.

Id. at 427-28, 868 S.W.2d at 57-58. This court ultimately concluded that substantial compliance was met; thus, the appellant's resignation was effective. This court emphasized:

> [O]ur holding is based in part on the facts that appellant delivered his resignation to the principal with full intent that it make its way to the school board and that knowledge of the resignation made its way to the school board prior to appellant's attempt to revoke his resignation.

Id. at 428, 868 S.W.2d at 58.

Although the holding in *Teague* may be distinguished on the grounds that Teague's resignation was after his contract was renewed and was decided under the substantial-compliance standard, we observe that the General Assembly has not amended the Act to require a school district's board of directors to formally accept a teacher's resignation, nor has the Act been amended to require a school board to allow a teacher to withdraw his or her resignation. *Teague* still controls the issue of delivery, which is effective upon receipt by the superintendent. We hold that receipt of a resignation by the superintendent satisfies the requirement of delivery under section 6-17-1506 and constitutes strict compliance under the Act.

Moreover, Ark. Code Ann. § 6-12-108(b) (1987) defines the superintendent of schools "as the executive officer of a school district board of directors directing the affairs of the school district[.]" It follows that the superintendent serves as the agent for the board. Thus, Appellant's resignation was effective when delivered to Superintendent Kelly in writing. Appellant testified that he was aware that his resignation would make its way to the school board via Kelly before he attempted to retract it.

A more complicated issue arises as to whether Appellant's resignation, which Kelly requested, is equivalent to a firing, which would necessarily require strict compliance with section 6-17-1507. Although Appellant asserts that he resigned under

duress, a resignation made in order to avoid termination proceedings is not necessarily involuntary. *See generally* 78 C.J.S. *Schools and School Districts* § 253 (1995). *See also Alexander v. Alabama State Tenure Comm'n*, 358 So. 2d 1032 (Ala. Civ. App. 1978). Similarly, a school official's request to a teacher for that teacher's resignation, as Kelly made here to Appellant, does not render a resignation involuntary. 78 C.J.S. *Schools and School Districts* § 253. *See also Williams v. Lafayette Parish Sch. Bd.*, 533 So. 2d 1359 (La. Ct. App. 1988).

This court has held that in order to prove duress, the plaintiff must prove that he involuntarily accepted the defendant's terms, that there were no alternatives, and that the defendant created the circumstances by coercion. *Cox v. McLaughlin*, 315 Ark. 338, 867 S.W.2d 460 (1993). Here, Appellant voluntarily chose to resign rather than be fired and was fully aware of his alternatives. Kelly not only gave Appellant his alternatives verbally, but also presented them in writing in the December 19, 1994 letter, on which Appellant wrote and signed his resignation. Kelly did not use wrongful or oppressive conduct; rather, he presented Appellant's options to him.

We conclude that the trial court's finding that Appellant resigned is not clearly erroneous, nor was the District's vote to formally accept Appellant's resignation. Testimony by Kelly and McGaha, support the trial court's finding that Appellant admitted he resigned. Additionally, Appellant admitted that he stated in his application for Missouri unemployment benefits that he resigned. Therefore, the board's decision to accept his resignation was not arbitrary, capricious, or discriminatory. A cause for termination is arbitrary and capricious if it has no rational basis. *Hannon*, 329 Ark. 267, 946 S.W.2d 950. The trial court correctly concluded that Appellant was not under duress at the time he resigned because he was aware of his alternatives. The statements Appellant made immediately after he tendered his written resignation to Kelly, in which he said he was not going to fight him on it, also show that Appellant was aware that Kelly would deliver the document to the school board who would act on it. The individual school board members testified that Kelly contacted them by

telephone on December 19, 1994, and informed them of Higginbotham's resignation.

We recognize that strict compliance is now the standard for determining if Appellant's resignation was proper according to the language found in section 6-17-1506. Under the facts as stated in this case, the District strictly complied with the Teacher Fair Dismissal Act when it voted to accept Appellant's resignation, which was effective upon delivery to Kelly.

Moreover, we are not willing to foreclose a teacher's right to resign by choice when confronted with the options of resignation and involuntary termination. Appellant testified that he was aware of his rights under the Act and the District's policies. He stated that he chose to resign because he did not need a termination on his record. Certainly, we believe it benefits the individual teacher to have the choice of resignation, and we will not deprive teachers of that choice in future cases. Nothing in the Act prohibits a school district from presenting these options to a teacher before initiating termination procedures.

We construe the General Assembly's silence as tacit approval of our interpretation of section 6-17-1506's delivery requirement as set forth in *Teague*, 315 Ark. 424, 868 S.W.2d 56. *See, e.g., Ragar v. Brown*, 332 Ark. 214, 964 S.W.2d 372 (1998). We will therefore defer any departures from the plain language of the Act to that legislative body. *Small v. Cottrell*, 332 Ark. 225, 964 S.W.2d 383 (1998).

Affirmed.

NEWBERN, J., not participating.

Fred RAHAT and Mary Rahat *v.* Akbar GOLMIRZAIE

97-832 966 S.W.2d 883

Supreme Court of Arkansas
Opinion delivered April 16, 1998

Kit Williams, for appellant.

Pearson and Chadwick, by: *C. Thomas Pearson, Jr.*, and *Charles R. Chadwick*, for appellee.

DONALD L. CORBIN, Justice. Appellants Fred and Mary Rahat appeal the judgment of the Washington County Chancery Court awarding attorney's fees to C. Thomas Pearson Jr., Appellee Akbar Golmirzaie's attorney in this partition suit, pursuant to Ark. Code Ann. § 18-60-419 (1987). Appellants' sole argument on appeal is that the trial court abused its discretion in awarding an attorney's fee of five percent (5%) of the total sales price of the property. Appellants ask this court to abolish the practice of allowing the trial court to award a fee on the basis of a percentage of the sales price and to overrule any precedent to the contrary. Our jurisdiction of this appeal is pursuant to Ark. Sup. Ct. R. 1-2(a)(17), as it raises an issue of significant public interest. We find no error and affirm.

The record in this case reveals the following facts. Appellee co-owned three parcels of land with Appellants. On June 9, 1995, Appellee petitioned the chancery court for partition of the land, which he asserted was not divisible in kind, and requested attorney's fees. Appellants answered on June 20, 1995, asking for consideration of a division in kind. Appellants also indicated that they would not oppose attorney's fees awarded within the discretion of the trial court. The partition action was dismissed for want of prosecution on December 11, 1995, but reinstated on December

21, 1995. On that date, the trial court entered a partition decree, finding that the properties were not capable of a division in kind and should be sold, with the proceeds of the sale to be divided and apportioned among the parties, after payment of costs and attorney's fees.

The properties were sold at auction on January 25, 1996. Tracts A and C were subsequently purchased by Appellants for $51,600 and $24,000, respectively, while Tract B was purchased by third parties for $80,000. On March 12, 1996, the trial court awarded Appellee's attorney a fee in the amount of $7,780, which was five percent (5%) of the total sales price of $155,600. Appellants objected to the amount of the attorney's fees and asked the trial court to reconsider the award. They argued that the amount of the fees failed to reflect the simplicity of the case, the dearth of pleadings, and the small amount of time needed to complete the uncontested litigation. The trial court overruled Appellants' objection, determining that the award of $7,780 was not per se unreasonable.

On February 12, 1997, per Appellants' request, the trial court conducted a hearing on the issue of attorney's fees. Walter Niblock, a practicing attorney and member of the local bar for thirty-five years, testified for Appellee. Niblock stated that he had experience in bringing foreclosure and partition cases, for which he had received attorney's fees in the amount of five percent (5%) to ten percent (10%) of the sales price of the properties. He also stated that in assessing attorney's fees in partition cases, the court should consider the amount of the partition and the pleadings involved.

Appellee's next witness, Lamar Pettus, a local attorney who had practiced in the area for twenty-two years, also testified that he had considerable experience with partitions and foreclosures. He stated that normally the attorney's fees awarded for both partitions and foreclosures is a percentage of the sales price of the property. He stated that a fee of five percent (5%) of the sales price was a reasonable fee, and that he had seen awards ranging from three percent (3%) to ten percent (10%). He stated that the factors to consider in this type of case were the amount of time and labor,

the difficulty of the case, and the experience of the attorney. He indicated that even in an uncontested partition action, however, the custom and practice in that area was that the actual work required had no real bearing on the amount of attorney's fees awarded; rather, such fees were treated in the same manner as a real estate commission or an auctioneer's fee. He further stated that the amount of attorney's fees awarded should be based upon a percentage of the total sales price, as opposed to the net gain to the parties.

Appellant presented the testimony of David Morris, a local attorney, who had practiced in the area for fifteen years. He stated that he had reviewed the pleadings in this case, and that it was his belief that the case was not unusual or difficult and did not require a high level of legal skill to accomplish. He stated that an experienced attorney such as Appellee's attorney should receive an hourly rate between $90 and $150. He stated further that such an experienced attorney should not have had to devote a lot of labor to finish this partition case and distribute the proceeds. He stated that the fee awarded in this case was high. On cross-examination, however, he agreed that attorney's fees in partition and foreclosure cases are not normally awarded upon an hourly rate. He indicated that some of his fees in partition cases were based upon a percentage of the sales price, and that in light of the factors enunciated by this court, a fee of five percent (5%) of the sales price is not per se unreasonable.

Appellant Fred Rahat testified that he did not believe that he had benefitted from the partition and sale of all three parcels of land. He contended that because he had purchased Tracts A and C and had thereby increased his debt, he had not actually benefitted from the partition of those parcels. Conversely, on rebuttal, Appellee, who is responsible for his proportionate share of the attorney's fees pursuant to section 18-60-419, testified that he thought the amount of attorney's fees was fair.

The trial court ruled that in awarding attorney's fees of $7,780, it had considered the various factors submitted by Appellants, namely the ability of the practitioner, the results obtained, and the amount of work required, as well as the total sales price

involved. The trial court found that Appellee's attorney was a lawyer of long standing in that court and was at least a reasonably average, competent attorney. (The trial court noted that Appellants did not raise any question of the attorney's competency.) The court found that the results obtained in this case were those specifically envisioned by the statute providing for fees in partition suits, as all parties to the suit had benefitted from the partition of the land. The trial court found that Appellants had actually received a benefit from the partition of the entire property, despite the fact that their debt had increased on the two parcels that they purchased. The trial court reasoned that it was their choice to assume the additional debt.

The trial court found further that the lack of evidence as to the amount of time Appellee's attorney actually spent on this case was of little consequence to its decision. The court reasoned that although an attorney's time was one factor to consider in awarding attorney's fees, it was not a decisive factor in this case, weighed along with the requisite skill, knowledge, and expertise required to take such a case to a successful conclusion. The court explained that because all attorneys do not work at the same rate of speed to obtain similar results, the particular hourly rate of an attorney was not a true measure of the work involved. The trial court additionally observed that this court's prior decisions regarding attorney's fees in partition suits have viewed the amount of the fee in relation to the value of the property in determining whether such fee was reasonable. Accordingly, the trial court ruled that the award of $7,780 in attorney's fees was not unreasonable on its face, nor was it unreasonable in light of the factors that this court has established.

Appellants argue on appeal that the amount of attorney's fees awarded by the trial court was not reasonable, given the simplistic nature of the partition action, which was not contested and did not result in any litigation except that regarding the award of attorney's fees. Appellants further ask this court to abolish the practice of awarding fees in such partition actions based upon a percentage of the sales price or fair market value of the property. Instead, they urge us to consider only those factors set out in Rule 1.5 of

the Model Rules of Professional Conduct, particularly the time and labor required by the attorney.

Section 18-60-419 provides in pertinent part:

> (a) In all suits in any of the courts of this state for partition of lands when a judgment is rendered for partition in kind, or a sale and a partition of the proceeds, the court rendering the judgment or decree shall allow a reasonable fee to the attorney bringing the suit. The attorney's fee shall be taxed as part of the costs in the cause and shall be paid pro rata as the other costs are paid according to the respective interests of the parties to the suit in the lands so partitioned.

Section 18-60-419 makes the awarding of attorney's fees in partition actions mandatory. *Graham v. Inlow*, 302 Ark. 414, 790 S.W.2d 428 (1990). In assessing a reasonable fee award, the court is to consider only those services performed by the attorney requesting the fee which are of common benefit to all parties. *Id.* This provision mandates the taxing of the fee as part of the costs of the cause, to be assessed and taxed proportionately against all parties. *McElhaney v. Cox*, 257 Ark. 934, 521 S.W.2d 66 (1975). There is no fixed formula for assessing attorney's fees in partition actions; such determination lies within the broad discretion of the trial court. *Padgett v. Haston*, 279 Ark. 367, 651 S.W.2d 460 (1983). To prevail on appeal, the appellant bears the burden of demonstrating that the trial court abused its discretion in awarding the attorney's fees. *Id.*; *Cole v. Scott*, 264 Ark. 800, 575 S.W.2d 149 (1979). "The test necessarily remains whether the fee awarded is reasonable in view of the services rendered." *Id.* at 803, 575 S.W.2d at 151.

In *Johnston v. Smith*, 248 Ark. 929, 454 S.W.2d 649 (1970), this court discussed the reasoning behind the statutory provision for attorney's fees:

> Justification for these statutes has been found in the importance of painstaking preparation before filing of the suit and the necessity for meticulous compliance with procedural requirements thereafter in order to assure that all parties in interest are before the court and that there are no unnecessary impediments to a proper conclusion of the proceeding. These measures obviously inure to the benefit of those owning any share of the prop-

> erty. To require the cotenant who institutes the action to bear more than his proportionate share of this burden is inequitable.

Id. at 933, 454 S.W.2d at 652.

In *Robinson v. Champion*, 251 Ark. 817, 475 S.W.2d 677 (1972), this court recited the pertinent considerations for determining the reasonableness of an award of attorney's fees: (1) the attorney's judgment, learning, ability, skill, experience, professional standing, and advice; (2) the relationship between the parties; (3) the amount or importance of the subject matter of the case; (4) the nature, extent, and difficulty of services in research, collection, and estimation of evidence and potential defenses, as well as advice given before any pleadings are filed or other visible steps are taken; (5) the preparation of pleadings; (6) the proceedings actually taken and the nature and extent of the litigation; (7) the time and labor devoted to the client's cause; (8) the difficulties presented in the course of the litigation; (9) the results obtained; and (10) other factors beside the time visibly employed. This court subsequently recognized that these factors were pertinent in determining the reasonableness of attorney's fees in partition suits. *Cole*, 264 Ark. 800, 575 S.W.2d 149. Both the trial court's and this court's experience and knowledge of the character of such services may be used as a guide, with considerable weight being given to the ruling of the trial court. *Robinson*, 251 Ark. 817, 475 S.W.2d 677.

In light of the foregoing testimony and the reasoning employed by the trial court, we hold that the trial court did not abuse its discretion in awarding to Appellee's attorney a fee of five percent (5%) of the total sales price of the three partitioned parcels. We agree that both parties to this suit benefitted from the partition of the land; it is of no consequence that Appellants incurred more debt after the sale, as they chose to purchase two of the three parcels.

We are not persuaded by Appellants' argument that the trial court completely ignored the factor of the attorney's time spent working on the case. Appellants contend that the trial court viewed the amount of time spent preparing such a case to be unimportant. In their attempt to support this contention, Appellants' abstract depicts the court's ruling as follows:

> There is nothing in the record to show how much time Mr. Pearson worked, but that is unimportant.

This is not, however, a correct or complete recitation of the trial court's ruling, which is:

> There is no evidence in the record to show how much time Mr. Pearson spent. But this is unimportant *as a decisive factor. It is important as being one of the factors that may be considered.* But in so doing, this has to be counter-balanced or at least weighed along with the skill and knowledge and expertise required to carry a case to a successful conclusion. [Emphasis added.]

It is clear from the trial court's ruling that time expended on a case is a factor it considers when awarding attorney's fees. Thus, Appellants' argument that the trial court ignored the allegedly small amount of time that Appellee's attorney spent on the case clearly misconstrues the trial court's ruling.

Furthermore, we are unwilling to hold that any award of attorney's fees pursuant to section 18-60-419 that is based upon a percentage of the total sales price of the partitioned property is per se unreasonable. We are persuaded by the trial court's reasoning that the amount of attorney's fees awarded will always be capable of being reduced to a percentage of the total sales price of the property, and that the use of a percentage fee is simply a matter of convenience to the trial court. Moreover, we see no valid reason, nor have Appellants presented us with any such reason, to overrule our prior cases favoring the trial court's discretion over a fixed formula when determining the amount of attorney's fees in partition suits. It is implicit that when using such discretion, the trial court must consider those factors stated in *Robinson*, 251 Ark. 817, 475 S.W.2d 677, and *Cole*, 264 Ark. 800, 575 S.W.2d 149, along with any other factors the court may find pertinent to the award of attorney's fees. That is precisely what was done in this case, and we therefore affirm the trial court's decision.

NEWBERN, J., not participating.

CITY of NORTH LITTLE ROCK and North Little Rock Airport Commission *v.* PULASKI COUNTY, Arkansas and B.A. McIntosh, Pulaski County Assessor

97-714 968 S.W.2d 582

Supreme Court of Arkansas
Opinion delivered April 16, 1998

Timothy Davis Fox, for appellants.

Karla M. Burnett, Ass't County Att'y and *Amanda Mankin*, Staff Att'y, for appellees.

ROBERT L. BROWN, Justice. Appellants City of North Little Rock and the North Little Rock Airport Commission (jointly referred to in this opinion as North Little Rock) filed an amended appeal in circuit court from a decision of the Pulaski County Court that affirmed the assessment for *ad valorem* tax purposes of

eleven parcels of real property located within the domain of the North Little Rock Municipal Airport. North Little Rock claimed that Act 438 of 1995 designated the eleven parcels as public property and, thus, the parcels should be exempt from taxation under Ark. Const. art. 16, § 5, and removed from the County tax rolls. North Little Rock also requested that the property tax assessments for the years 1992 through 1995 be declared null and void.

Appellees, Pulaski County and the County Assessor (County), answered and moved for a declaratory judgment on the grounds (1) that Act 438 of 1995 should not be given retroactive effect; and (2) that Act 438 violated Ark. Const. art. 16, § 6, which renders void any law exempting property from taxation other than as provided in the Arkansas Constitution.

The circuit court agreed with the County and entered an order declaring that the General Assembly had violated the separation-of-powers doctrine when it enacted Act 438 of 1995. *See* Ark. Const. art. 4, § 2. It did so, according to the court, by usurping the judicial fact-finding function and by declaring through legislation that airport property is acquired and held exclusively for public purposes. The circuit court further determined that because Act 438 established that certain airport property was *per se* exempt as being used exclusively for public purposes under Ark. Const. art. 16, § 5(b), this violated the proscription against laws exempting property from taxation other than as provided in the Arkansas Constitution. *See* Ark. Const. art. 16, § 6. The matter then went to hearing before the court on the issues of whether the eleven parcels were exempt after this court's opinion in *City of Little Rock v. McIntosh*, 319 Ark. 423, 892 S.W.2d 462 (1995), and whether the County's revaluation efforts complied with Ark. Code Ann. § 26-26-1011 (Repl. 1997), which requires assessments to occur between the first Monday in January and July 1 of a given year.

At the hearing before the circuit court, Judy Wheeler, manager of the North Little Rock Municipal Airport, testified that the airport is a general aviation airport that owns land and provides

service to single and twin-engine planes but not for commercial air traffic. She testified that the airport enters into leases with individuals and private entities to use its land to house hangars, fuel stations, repair stations, and the like, with the lessees being responsible for the construction of their own improvements. She explained that in the past the leases were silent on who was required to pay county *ad valorem* taxes on real property because there had never before been a county assessment. However, the leases were changed in 1992 to require that the lessee pay those taxes.

Ms. Wheeler testified that the North Little Rock Airport received a "Notice of Property Revaluation" dated July 11, 1993, that purported to notify North Little Rock of the assessment of the entire amount of airport property, including runways, taxiways, and common areas. She explained that North Little Rock then went before the County Equalization Board to complain about the entire property's being assessed. On September 9, 1993, the Equalization Board determined that only the eleven parcels which were leased to private entities should be assessed.

The crux of Ms. Wheeler's testimony on direct examination was that hangars and other improvements by lessees were an integral part of the operation and maintenance of a municipal airport and that North Little Rock could ill afford to construct the improvements itself. Furthermore, FAA regulations did not require North Little Rock to construct hangars and terminal facilities. Rather, the FAA only required that suitable space and reasonable prices be made available for those who wished to do so. On cross-examination, Ms. Wheeler admitted that although the "Notice of Property Revaluation" reflected the date July 11, 1993, she did not know when the assessment of *ad valorem* taxes actually occurred.

Following the hearing, the circuit court entered its order, finding the following: (1) any issues regarding 1992 *ad valorem* taxes were moot; (2) taxes for the year 1993 were assessed in com-

pliance with § 26-26-1011; and (3) the eleven parcels were not exempt under Ark. Const. art. 16, § 5, and *City of Little Rock v. McIntosh, supra.*

North Little Rock now appeals from both orders of the circuit court and urges, first, that the circuit court erred in declaring Act 438 unconstitutional. We disagree. In reviewing the constitutionality of legislative acts, we start with a presumption of constitutional validity. *Board of Trustees v. City of Little Rock*, 295 Ark. 585, 589, 750 S.W.2d 950, 952 (1988). Statutes will not be struck down unless they conflict with the constitution "clearly and unmistakably." *Id., citing Board of Trustees of Municipal Judges and Clerks Fund, City of Little Rock v. Beard*, 273 Ark. 423, 620 S.W.2d 295 (1981); *Buzbee v. Hutton*, 186 Ark. 134, 52 S.W.2d 647 (1932).

The Arkansas Constitution specifically exempts from *ad valorem* taxes "public property used exclusively for public purposes." Ark. Const. art. 16, § 5(b). In the past, we have declined to give a judicial definition to the phrase "public purpose" because its meaning is not exact, nor is it prone to a static definition. *Holiday Is. Suburban Improvement Dist. #1 v. Williams*, 295 Ark. 442, 749 S.W.2d 314 (1988). *See Murphy v. Epes*, 283 Ark. 517, 678 S.W.2d 352 (1984). Instead, we look to legislative language for such pronouncements. *See Murphy v. Epes, supra*; *Kerr v. East Central Arkansas Housing Authority*, 208 Ark. 625, 187 S.W.2d 189 (1945). The Act must prevail unless there is something in the Arkansas Constitution which restrains the legislature from saying that a designated course of conduct or a policy is for the public welfare, or unless the thing authorized is so demonstrably wrong that reasonable people would not believe that this was the legislative intent. *Murphy*, 283 Ark. at 525, 678 S.W.2d at 357. We reverse a legislative public-purpose declaration only if the legislature acted arbitrarily, unreasonably, or capriciously. *Id.* at 525-26. 678 S.W.2d at 357.

In *City of Little Rock v. McIntosh, supra,* this court held that certain tracts of property at the Little Rock Municipal Airport leased to private entities were not exempt from *ad valorem* taxation under Ark. Const. art. 16, § 5. Our holding was based on the fact

that the City of Little Rock had failed to prove that the tracts leased to private businesses, which were conceded to be "public land," were being used "exclusively" for public purposes. In doing so, we focused on the actual use of the land and whether that use was solely for public purposes. The private businesses involved in *McIntosh* included four car rental companies, one aircraft modification company, two aircraft service companies, and three fixed-based operators.

Eleven days after the *McIntosh* decision, the General Assembly passed Act 438 of 1995, with an emergency clause. The Act provided in pertinent part:

> (a) The ownership, operation, and management of municipal airports . . . and their related properties and facilities, including without limitation runways, hangars, terminal facilities, and suitable areas or space which are made available to those who are willing and otherwise qualified to offer transportation services to the public or support services to aircraft operators, all as may be necessary or desirable for the servicing of aircraft in commercial or general aviation or for the comfort and accommodation of air travelers traveling in commercial or general aviation, are vital to the economic welfare of the state of Arkansas and its people and such airports and their related properties and facilities are declared and confirmed to be used exclusively for public purposes.
>
> (b) All airport property and related properties and facilities owned by a municipality, county, or other public agency for the purposes enumerated in this section are declared to be acquired and used exclusively for public and governmental purposes and as a matter of public necessity and shall be exempt from ad valorem taxation to the same extent as other property used exclusively for public purposes.

1995 Ark. Acts 438, now codified at Ark. Code Ann. § 14-356-102 (Supp. 1997).

In its appeal, North Little Rock agrees with the circuit court that the General Assembly violated the doctrine of separation of powers by declaring various uses involved in the operation of an airport to be exempt from *ad valorem* taxation. Despite that acknowledgment, North Little Rock contends that the General Assembly did have the authority to declare what property falls into

the category of property used for public purposes and that the circuit court erred in not recognizing that fact. Thus, North Little Rock urges this court to cut and paste and salvage that portion of subsection (a) of Act 438 which declares that certain activities are used for public purposes. In doing so, North Little Rock also urges that we strike the word "exclusively" in subsection (a).

In determining whether the invalidity of part of an act is fatal to the entire legislation, this court looks to (1) whether a single purpose is meant to be accomplished by the act, and (2) whether the sections of the act are interrelated and dependent upon each other. *U.S. Term Limits, Inc. v. Hill*, 316 Ark. 251, 872 S.W.2d 349 (1994); *Wenderoth v. City of Ft. Smith*, 251 Ark. 342, 472 S.W.2d 74 (1971); *Faubus v. Kinney*, 239 Ark. 443, 389 S.W.2d 887 (1965).

The purpose of Act 438 can be garnered from its title:

> AN ACT to Amend Title 14, Subtitle 22, Chapter 356 of the Arkansas Code for the Purpose of Declaring That Airports Owned by Municipalities, Counties, or Other Public Agencies are Used Exclusively for Public Purposes and Therefore Exempt From Ad Valorem Taxation; Declaring an Emergency; and for Other Purposes.

1995 Ark. Acts 438. This theme of tax exemption is repeated in subsection (b) and the Act's Emergency Clause, and the test for exemption — exclusively used for public purposes — is repeated in subsection (a) as well. The clear purpose of the Act is to undertake a function which is reserved to the judiciary, that is, the declaration of property exempt from *ad valorem* taxes because of its exclusive use for public purposes.

Furthermore, it is obvious that the provisions of the act, only two in number, and both of which contain language conceded to be infirm by North Little Rock, are dependent upon each other and interrelated and evince the General Assembly's intent to pass the act as a whole or not at all. *U.S. Term Limits, Inc. v. Hill, supra*; *Wenderoth v. City of Fort Smith, supra.* Although a severability clause is included in Act 438, that factor alone is not determinative. *U.S. Term Limits, Inc. v. Hill, supra.* Under the circumstances, we are loath to strike subsection (b) of Act 438 as

unconstitutional and strike the word "exclusively" in subsection (a), when that same word is used in the Act's title. Were we to do so, it would smack of legislative drafting on our part.

In short, we draw a clear distinction between the General Assembly's declaration of what is a public purpose on the one hand, which is entirely legitimate, and a *per se* determination by the General Assembly that certain private property is actually used exclusively for public purposes, and thus exempt from tax, on the other. The latter, as the circuit court correctly observed, is a judicial function performed only after appropriate fact-finding by the trial court. For the foregoing reasons, we conclude that Act 438 must be struck in its entirety.

The dissent emphasizes our holding in *Hogue v. The Housing Authority of North Little Rock*, 201 Ark. 263, 144 S.W.2d 49 (1940), where we held the Housing Authorities Act (Act 298 of 1937) to be constitutional. In doing so, we discussed in *Hogue* whether property acquired by the housing authorities would be exclusively used for public purposes pursuant to Article 16, § 5, of the Arkansas Constitution. We concluded that the purpose of Act 298 was slum clearance, which is a public purpose, and that the property acquired by the housing authorities was exclusively used for public purposes and, thus, exempt from *ad valorem* taxes. Absent in our analysis in *Hogue* was any discussion of separation of powers or any consideration of whether the General Assembly had overstepped its bounds in *declaring* a tax exemption. Accordingly, because the separation-of-powers issue was not reached, or even considered in *Hogue*, we do not deem it to be governing authority for the case at hand.

For its second point, North Little Rock contends that the 1993 tax was illegal because it was not assessed before July 1, 1993, as required by Ark. Code Ann. § 26-26-1101 (Repl. 1992). Because North Little Rock received a "Notice of Property Revaluation" dated July 11, 1993, it contends that the assessment could not have been timely. As further evidence, North Little Rock claims that the initial assessment was improper because it covered the entire airport and was later reassessed in either August or September 1993 by the County Board of Equalization with respect to

the eleven parcels at issue. North Little Rock also shows us that the July 11, 1993 notice included an appraised land value of $0, which would not have resulted in any tax liability.

The County responds that North Little Rock failed to satisfy its burden of proving when the appraisal and assessment occurred because notice of assessment is not proof of when the assessment actually occurred. The County is correct. North Little Rock appears to believe that it can make this allegation of an untimely assessment without following up with proof. Surely, the date of a notice of revaluation is not conclusive proof of when the assessment actually took place. Because North Little Rock has not met its burden in this regard, there is no basis for reversal.

Affirmed.

CORBIN and THORNTON, JJ., concur in part and dissent in part.

RAY THORNTON, Justice, concurring in part and dissenting in part. The majority has correctly determined that the city of North Little Rock did not prove that the 1993 tax assessment on airport property was invalid because of Pulaski County's failure to timely make an assessment. As pointed out by the majority, the allegation of an untimely assessment by the county must be supported by proof, and the trial court did not err in determining that the city had not met the burden of proof. I concur with the majority's conclusion that, under well established principles of law, the General Assembly does not have the power to exempt property from taxation. *See, e.g., Little Rock & Fort Smith Ry. Co. v. Worthen*, 46 Ark. 312 (1885); *Tedford v. Vauix*, 183 Ark. 240, 35 S.W.2d 346 (1931). I further agree that, in deciding this case, we should "draw a clear distinction between the General Assembly's declaration of what is a public purpose on the one hand, which is entirely legitimate, and a per se determination by the General Assembly that certain private property is . . . exempt from tax, on the other." However, because I believe the interpretation of this statute affords the court the opportunity of drawing that distinction between the provisions of the statute that are void, and those provisions that legitimately and properly articulate public-policy

considerations, I respectfully dissent from the majority's conclusion that the entire act must be invalidated.

In accordance with the well-established presumption of constitutional validity of a legislative enactment, we have specifically held that a statutory provision that is virtually identical to the provisions of subsection (a) of Act 438 of 1995 is constitutional. *Hogue v. The Housing Authority of North Little Rock*, 201 Ark. 263, 144 S.W.2d 49 (1940). In 1937, the General Assembly adopted Act 298, which authorized the creation of housing authorities in certain cities and in all counties for the stated public purpose of clearing slums and building housing projects. Section 23 of that Act provided in part as follows:

> Section 23. Tax Exemption and Payments in Lieu of Taxes. The property of an authority is declared to be public property used for essential and exclusively public and governmental purposes, and not for profit, and such property and an authority shall be exempt from all taxes and special assessments of the State or any State Public Body thereof."

This provision of the Act was attacked because it contained language that declared such property to be used for exclusive public purposes, and declared that such property should be exempt from taxes. In *Hogue*, we considered section 5 of Article 16 of our constitution, which provides in part:

> All property subject to taxation shall be taxed according to its value . . . . Provided, further, 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.

We further considered section 6 of Article 16 of our constitution, which provides that "All laws exempting property from taxation other than as provided in this Constitution shall be void." The argument was vigorously presented to us that the statute was void in attempting to extend an exemption from taxes, and we determined that the statute was not unconstitutional, reasoning as follows:

> The point is made and insisted upon that the property of the Housing Authority is not exclusively used for public or charitable

> purposes and that before it may be exempted from taxation such property must be exclusively used for this purpose. We think a fair construction of the act is that all the property acquired by [the Housing Authority] is to be used and will be used in the clearance of slum areas and the furnishing of safe and sanitary dwelling accommodations free from conditions of overcrowding and want of air and light prevailing in slum areas.

Hogue, 201 Ark. at 272, 144 S.W.2d at 54. After citing cases from Tennessee and Texas interpreting similar statutory and constitutional provisions, we stated:

> We, therefore, hold that the act in question is not vulnerable because it exempted the property of the Housing Authority from all taxes and special assessments by the state or any public body thereof.

Id. at 274, 144 S.W.2d at 55.

The issue of the constitutionality of Act 298 of 1937 was presented to us again in *Kerr v. East Central Arkansas Regional Housing Authority*, 208 Ark 625, 187 S.W.2d 189 (1945), where we said:

> Public policy is declared by the General Assembly; not by courts. Unless there is something in the Constitution restraining the Legislature from saying that a designated course of conduct or a policy is for the public welfare, or unless the thing authorized is so demonstrably wrong that reasonable people would not believe that such was the legislative intent, the Act must prevail.
>
> Since essentials of Act 298 were sustained in the *Hogue* case, subsequently adhered to, and since the distinction to be drawn is not susceptible of being measured, graded, or determined by ratio or known formula, it must again be held that the legislative finding is binding and that the purpose to be served is a public one.

Id. at 630, 187 S.W.2d at 192.

The principle that the General Assembly should declare the public policy of the State and that its declarations as to public purpose will prevail unless the legislature acted arbitrarily, unreasonably, or capriciously has been firmly established. *See, e.g., Murphy v. Epes*, 283 Ark. 517, 678 S.W.2d 352 (1984). Based on that

principle, the legislature has adopted a number of definitions of "public property used exclusively for public purposes." A few examples are illustrative:

> (a) It is hereby found and determined by the Seventy-Eighth General Assembly that all property owned by the Arkansas State Highway Commission or the Arkansas State Highway and Transportation Department is public property used exclusively for public purposes.

Ark. Code Ann. § 26-3-308 (Repl. 1997).

> All tollway projects, and all the properties thereof, are legislatively determined and declared to be public properties used exclusively for public purposes and the legislative intent is that tollway projects, and all properties thereof, shall be exempt from ad valorem taxes under and pursuant to the provisions of Arkansas Constitution, Article 16, Section 5.

Ark. Code Ann. § 14-303-104 (1987).

> (a) All transit systems formed under this chapter, and all the properties thereof, are declared to be public properties used exclusively for public purposes. (b) The legislative intent of this section is that these transit systems, and all property thereof shall be exempt from: (1) Ad valorem taxes under and pursuant to the provisions of Arkansas Constitution, Article 16, § 5[.]

Ark. Code Ann. § 14-334-106 (1987).

Similar declarations of legislative intent to define uses of property as being for public purposes are found in Ark. Code Ann. §§ 14-164-701 (1987) (industrial facilities); 14-169-804 (1987) (urban renewal); 27-71-104 (Repl. 1994) (turnpikes); and § 26-3-301 (Repl. 1997), which lists more than a dozen uses of property that are legislatively declared to be used for public purposes, and consequently, exempted from taxation.

Until Act 438 of 1995 was adopted, the General Assembly had not established the considerations of public policy with respect to the public purpose of airport operations. Without the benefit of such a legislative declaration of public purpose, we reached a decision in *Little Rock Municipal Airport v. McIntosh*, 319 Ark. 423, 892 S.W.2d 462 (1995), in which we concluded that a number of

airport-related operations were not exempt from ad valorem taxation as property used exclusively for public purposes. In that case, we decided that aircraft-service centers and fixed-base operators were among the operations that were not used exclusively for the public purpose of providing dependable and safe air travel. Without the benefit of a legislative declaration of public policy, we did not recognize that such operations are not only essential to providing fuel for aircraft so they can continue their journey, nor did we recognize that these operations are essential for public safety in providing, in most cases, the only radio communication between an aircraft and the airport.

It is not surprising that, promptly following our decision in *McIntosh*, the General Assembly sought, with Act 438, to inform the court of the public-policy considerations relating to the public purpose of maintaining safe and reliable facilities for those who travel by air. That declaration of public policy is a proper legislative action. However, the General Assembly also exceeded its authority by declaring that certain legislatively defined airport properties are used "exclusively" for public purposes, and exempt from ad valorem taxation. This violates principles of separation of powers, and is therefore unconstitutional and void.

Act 438 contains a severability clause providing that if any part of the act were determined to be unconstitutional, the other provisions of the act should remain valid. The policy pronouncements of Act 438 are not significantly different from the provision of Act 286 of 1937 that we have held to be constitutional, and are very similar to provisions in numerous other statutes.

Where part of an act is unconstitutional, but other provisions are valid, we have recognized the efficacy of severability clauses, and have had no difficulty in removing words or phrases, or even, entire sections from statutes when those provisions offended constitutional limitations upon legislative action. *Levy v. Albright*, 204 Ark. 657, 163 S.W.2d 529 (1942).

If an act is constitutional in part, the valid portion will be sustained if complete in itself and capable of being executed in accordance with the apparent legislative intent. *Id.* at 659, 163 S.W.2d at 531. The constitutional and unconstitutional provisions

may even be contained in the same section. *Id.* If a statute attempts to accomplish two or more objects, and is void as to one, it may still be in every respect complete and valid as to the other. *Id.* at 660, 163 S.W.2d at 531.

In *Levy*, we struck the words "The Supreme Court" from a list of courts granted original jurisdiction when the grant of jurisdiction to the supreme court exceeded constitutional limitations, but sustained the constitutionality of the act as it related to other courts, and to its general purposes.

In my opinion, Act 438 was drafted to accomplish two discrete purposes: (1) a declaration of public policy, and (2) a legislative declaration of tax exemption. We should sustain as constitutional, the public-policy declarations contained in the Act. There is only one word in Act 438 that can be interpreted as overstepping the authority of the General Assembly. The word "exclusively" is used once in section (a) and twice in section (b). I would strike the offending word "exclusively" from the Act, or, alternatively, rely on *Hogue* as authority for determining that the use of that word does not invalidate the act.

I also write to encourage legislative enactment of a more precisely drawn statute declaring that the operation of a publicly owned airport, with its runways, hangars, taxiways, instrument approach systems, terminal buildings, aircraft service and repair centers, flight training programs and facilities, and fixed-base operators, together with radio communications and other facilities necessary and essential to reliable and safe air travel for the public is declared to be public property used for a public purpose. This court should welcome legislative action to establish public policy. The application of that public policy to a particular set of facts under constitutional constraints will of course remain a judicial function.

CORBIN, J., joins.

CENTRAL EMERGENCY MEDICAL SERVICES, INC. *v.* STATE of Arkansas

97-811 966 S.W.2d 257

Supreme Court of Arkansas
Opinion delivered April 16, 1998
[Petition for rehearing denied May 21, 1998.]

Davis, Cox & Wright, PLC, by: *William Jackson Butt, II* and *David L. McCune*, for appellant.

No response.

ANNABELLE CLINTON IMBER, Justice. The appellant appeals from an order finding it in contempt of court for failing to deliver certain documents in its possession in response to a prosecutorial subpoena. We dismiss the appeal as moot because the record demonstrates that the appellant purged its contempt.

On November 19, 1996, an information was filed in Washington County Circuit Court charging Duane Allan Faulkenbury with attempted murder, later amended to a charge of first-degree

battery. The record then shows that the prosecutor served the appellant, Central Emergency Medical Services, Inc., an emergency medical care and transportation provider, with two subpoenas duces tecum ordering CEMS's keeper of records to produce all of its records pertaining to Robert French. Although it is not clear from the record, it appears that French was Faulkenbury's victim. CEMS had rendered professional services to French.

CEMS filed a Motion to Quash Subpoena Duces Tecum. In its motion CEMS claimed both French's right of privacy in medical records generated by it with respect to his medical care, as well as French's physician-patient privilege under Ark. R. Evid. 503. Following a hearing on February 18, 1997, the trial court found that the State was entitled to the information with the understanding that it would not be disseminated to the public. From the bench, the trial court ordered CEMS to produce the information, and announced that it would "issue a standing protective order that if [counsel] can agree on the language of that order which basically provides that in this case and any cases in the future, that [CEMS] is obligated to produce that information to the State, the Prosecuting Attorney in this circuit, and the State is ordered not to disseminate it to the public in any form or fashion pending further orders of the Court." Counsel for both parties responded that this arrangement was agreeable.

On March 3, 1997, the trial court entered an order of contempt for CEMS's failure to comply with its bench ruling of February 18, 1997. The trial court announced that CEMS could purge its contempt finding by presenting the records to the court no later than February 25, 1997. The order concludes with the following language, "Should CEMS fail to deliver these documents to this Court by said time and date, a fine shall be imposed upon CEMS in the amount of $100.00." The next day, CEMS filed its notice of appeal from the March 3 contempt order. A letter from counsel for CEMS, dated March 12, 1997, to the Clerk of the Washington County Circuit Court enclosed a check in the amount of $100 for the fine imposed by the trial court's March 3 contempt order.

While this is an appeal from a contempt order, the essence of CEMS's brief (the State has failed to file a brief in response) is that the trial court erred in declining to find that its medical records

pertaining to French were privileged under the physician-patient privilege found at Ark. R. Evid. 503. Specifically, CEMS contends that a paramedic may be considered a "physician" as that term is used in Rule 503(a)(2). We are precluded from reaching this novel issue due to the mootness of CEMS's case.

We initially note that CEMS did not file it notice of appeal from the trial court's order denying its motion to quash, but instead from the contempt order. A order of contempt is a final, appealable order. *See Young v. Young*, 316 Ark. 456, 872 S.W.2d 856 (1994). In a case with a similar procedural history as the present case, *In re Subpoena of Badami*, 309 Ark. 511, 831 S.W.2d 905 (1992), we plainly held that an order denying a protective order to quash a subpoena was not a final, appealable order. In *Badami* this court expressed some concern as to the possibility of multiple appeals, given that the appellant there could have been found in contempt following an affirmance of the trial court's order denying the motion to quash, resulting in yet another appeal. There is no such problem in this case.

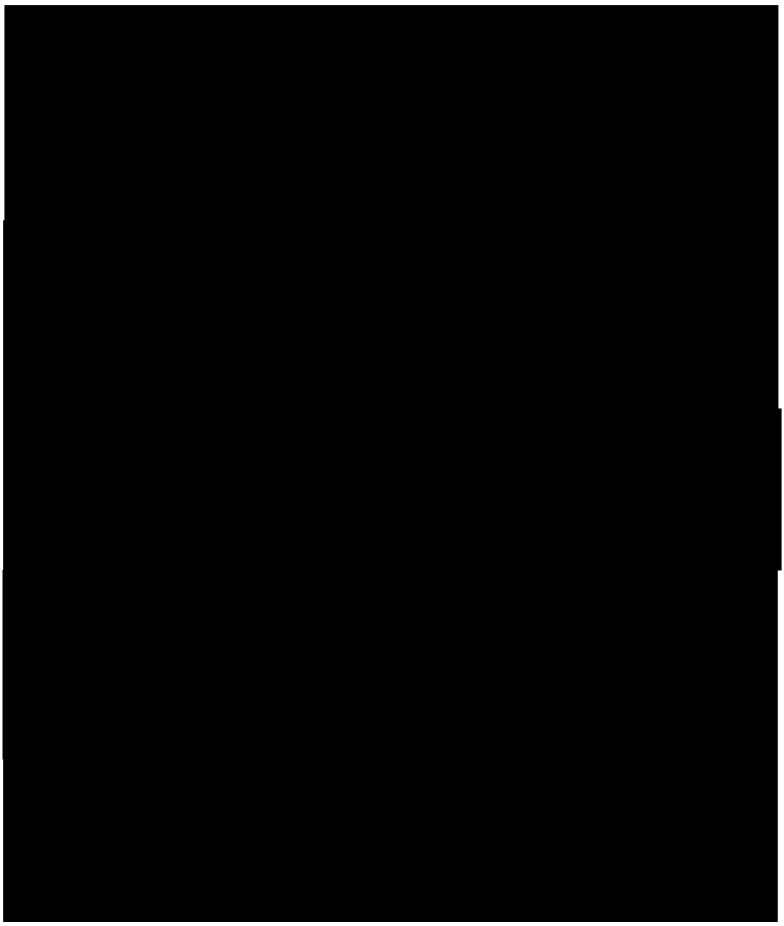
However, the record reflects that CEMS paid the fine which was imposed by the trial court for not producing the records. Given the manner in which the trial court couched its order, CEMS had two choices — either deliver the records to the prosecutor or be found in contempt resulting in the imposition of a fine. CEMS chose the latter option, paid the fine, and in doing so purged its contempt. Once CEMS purged its contempt, it rendered the propriety of the contempt order moot. *See Minge v. Minge*, 226 Ark. 262, 289 S.W.2d 189 (1956) ("Appellant purged himself of the contempt by paying the delinquent support money, and was released from jail; hence, the question of whether the court erred in holding him in contempt is moot."). Given that the case is moot, the appellant asks us for an advisory opinion. This court does not render advisory opinions. *See Johnson v. State*, 319 Ark. 3, 888 S.W.2d 661 (1994). Accordingly, we dismiss the appeal. In doing so, we note that the issue presented in this appeal does not appear to be one that is likely to evade our review in the future.

Appeal dismissed.

Pearl Gennette ANTHONY *v.* STATE of Arkansas

CR 97-655 967 S.W.2d 552

Supreme Court of Arkansas
Opinion delivered April 16, 1998
[Petition for rehearing denied May 21, 1998.*]



* GLAZE, J., would grant.

Kiel & Goodson, by: *John C. Goodson*, for appellant.

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

RAY THORNTON, Justice. Appellant Pearl Gennette Anthony was convicted of two counts of delivery of a controlled substance, cocaine, and sentenced to two consecutive thirty-year terms of imprisonment in the Arkansas Department of Correction. She does not challenge the sufficiency of the evidence to support her convictions. Instead, she argues that the trial court erred by (1) allowing the State to introduce certain rebuttal testimony, (2) admitting a bus manifest as a business record, and (3) improperly commenting on the evidence. We agree with the first point and reverse and remand for a new trial.

In her first point of appeal, appellant contends that the trial court erred during the rebuttal phase by permitting the State to

introduce portions of her testimony from her first trial, which ended in a mistrial, and the testimony of Holly Scott. Appellant elected not to testify at her second trial, and she alleges the introduction of this testimony was improper in two respects: (1) the introduction of her testimony from the first trial was, in effect, a direct comment on her failure to testify in the second trial, in violation of her Fifth Amendment privilege against self-incrimination; and (2) both her testimony and that of Ms. Scott were improper rebuttal.

During its case in chief, the State presented the testimony of Johnny Alexander, a detective with the Pine Bluff Police Department, who testified that he bought cocaine from appellant on two separate occasions on the evening of October 19, 1995. Detective Alexander testified that he and a confidential informant purchased crack cocaine from appellant at her home around 7:48 p.m. He further testified that around 11:30 p.m., he returned to appellant's home to make a second buy.

After the State rested, appellant presented the testimony of Faye Walker. Ms. Walker testified that, on the evening of October 19, 1995, she saw appellant in Idabel, Oklahoma, at Choctaw Bingo, a bingo parlor. On cross-examination, Ms. Walker testified that she did not know whether appellant won any money that night or how appellant traveled to the bingo parlor.

Appellant also presented the testimony of her son, Edmund Colbert, who testified that she left their residence at approximately two or three o'clock on the afternoon of October 19, 1995. Mr. Colbert testified that appellant told him she was "going up town," and then she would "probably go to bingo." He also testified that he was home that evening and that appellant returned home "a little after one."

Before the defense rested, the court advised appellant of her Fifth Amendment rights, and she choose not to testify. During the rebuttal phase, the trial court allowed the State to introduce testimony from appellant's first trial where she had testified that she was playing bingo in Idabel, Oklahoma, on the night she allegedly sold cocaine to Detective Alexander, that she won two mini pots that night, and that she rode a Sue Long Corporation

bus to the bingo parlor. Appellant objected to the use of her prior testimony by asserting that it was improper rebuttal, that it violated her Fifth Amendment right against self-incrimination, and that it was misleading and confusing. The trial court ruled that appellant's prior testimony was admissible for the purpose of rebutting the defense of alibi.

After the State read portions of appellant's testimony from her first trial, the trial court then permitted the State to introduce the testimony of Holly Scott, co-manager of Choctaw Bingo. Ms. Scott testified that their records showed that appellant neither won two mini pots nor rode the Sue Long bus to the bingo parlor that night.

We begin our review by addressing appellant's contention that the admission of her prior testimony amounted to a direct comment on her election not to testify in violation of her Fifth Amendment rights. This argument is without merit.

In *Harrison v. United States*, 392 U.S. 219 (1968), the Supreme Court considered whether the defendant's former testimony was improperly admitted at his second trial, following a reversal of his conviction in the former trial. The Court held that because the defendant was compelled to testify in the earlier case to respond to illegally obtained confessions, his testimony in that case violated his Fifth Amendment right against self-incrimination and could not be introduced in the second trial. *Id.* at 224-25. However, the Court specifically noted:

> In this case we need not and do not question the general evidentiary rule that a defendant's testimony at a former trial is admissible in evidence against him in later proceedings. A defendant who chooses to testify waives his privilege against compulsory self-incrimination with respect to the testimony he gives, and that waiver is no less effective or complete because the defendant may have been motivated to take the witness stand in the first place only by reason of the strength of the lawful evidence adduced against him.

Id. at 222. *See also United States v. Houp*, 462 F.2d 1338 (8th Cir. 1972); *People v. Carlson*, 677 P.2d 390 (Colo. Ct. App. 1983); *Sherley v. Commonwealth*, 889 S.W.2d 794 (Ky. 1994); *State v.*

Hunt, 457 S.E.2d 276 (N.C. 1994); *Bryan v. State*, 837 S.W.2d 637 (Tex. Crim. App. 1992).

Based on the authorities cited above, we conclude that, by voluntarily testifying at her first trial, appellant waived her privilege against self-incrimination with respect to the testimony that she gave. The fact that appellant exercised her right to remain silent at the second trial does not preclude the use of her testimony given at the first trial, if it would otherwise be admissible. Accordingly, we turn to appellant's argument regarding the admissibility of the evidence during rebuttal.

Appellant contends that neither her prior testimony nor the testimony of Ms. Scott was proper rebuttal because it was not responsive to any evidence that she introduced in her second trial. Appellant argues that the rebuttal evidence did not contradict the testimony of Ms. Walker, the alibi witness; instead, Ms. Scott's testimony impeached appellant's prior testimony.

The State, however, asserts that the evidence was properly admitted as rebuttal in order to show that appellant's alibi was fabricated. The State relies primarily on *Kellensworth v. State*, 276 Ark. 127, 633 S.W.2d 21 (1982), in support of this proposition. In *Kellensworth*, the defendant did not testify, but his parents testified in his defense and established an alibi. *Id.* at 130, 633 S.W.2d at 23. The State called a rebuttal witness who admitted that he had testified about a false alibi during the defendant's previous trial, which had ended in a mistrial. *Id.* Defendant argued that the testimony of the rebuttal witness was inadmissible because it improperly put his character in issue and attacked the credibility of his parents upon a collateral issue. *Id.*

This court, noting that the defendant failed to cite any authority for his argument, held that the rebuttal testimony was "clearly admissible." *Id.* We stated:

> It is settled beyond question that a party's attempt to fabricate evidence is admissible, not merely as an admission under Uniform Evidence Rule 801(d)(2) but as proof relevant to show his own belief that his case is weak. As one court has said, in a case involving a fabricated alibi, "fabrication of evidence of innocence is cogent evidence of guilt." *Harvey v. United States*, 215

F.2d 330 (D.C. Cir., 1954). In a case similar to the present one, involving the recantation of previous testimony about a fabricated alibi, the court held that the testimony was admissible not merely in rebuttal but as part of the prosecution's case in chief, a point we do not reach. *State v. Thompson*, 71 S.D. 319, 24 N.W.2d 10 (1946).

Wigmore states the principle as being based upon one of the simplest of inferences:

> It has always been understood — the inference, indeed, is one of the simplest in human experience — that a party's *falsehood* or *other fraud* in the preparation and presentation of his cause, his fabrication or suppression of evidence by bribery or spoliation, and all similar conduct is receivable against him as an indication of his consciousness that his case is a weak or unfounded one; and from that consciousness may be inferred the fact itself of the cause's lack of truth and merit. The inference thus does not necessarily apply to any specific fact in the cause, but operates, indefinitely though strongly, against the whole mass of alleged facts constituting his cause.

Wigmore, Evidence, § 278 (Chadbourn Rev., 1979).

Kellensworth, 276 Ark. at 130-31, 633 S.W.2d at 23-24 (emphasis in original).

The State also cites *Flowers v. State*, 30 Ark. App. 204, 785 S.W.2d 242 (1990), where the court of appeals considered whether the trial court erred in admitting appellant's pretrial statement to police to rebut her plea of self-defense. The court of appeals upheld the admission of the evidence and stated that "[a]s a rule of general application, proof of an attempt to fabricate evidence of innocence, or other conduct amounting to an obstruction of justice, is admissible." *Id.* at 207, 785 S.W.2d at 243.

Under *Kellensworth* and *Flowers*, the evidence in question in the instant case was admissible during the State's case in chief. If the prosecution had presented appellant's prior testimony at that time, appellant would have had the opportunity to testify or to produce other evidence in support of her alibi. However, the State obtained an unfair advantage by introducing appellant's prior testimony after the defense had completed its presentation and appellant had waived her right to testify. Moreover, appellant's

prior testimony did not contradict any testimony offered by appellant in this proceeding.

We are mindful that the trial court has discretion to decide the propriety of evidence offered in rebuttal. *See Isbell v. State*, 326 Ark. 17, 931 S.W.2d 74 (1996); *Schalski v. State*, 322 Ark. 63, 907 S.W.2d 693 (1995). However, genuine rebuttal is evidence offered in reply to new matters, *Schalski*, 322 Ark. at 67-68, 907 S.W.2d at 696, and we have, on occasion, disallowed evidence presented as rebuttal where the evidence was not responsive to the defense evidence. *See Landrum v. State*, 320 Ark. 8, 894 S.W.2d 933 (1995) (concluding it was error for the trial court to allow rebuttal evidence on a collateral matter elicited by the prosecutor during cross-examination); *Birchett v. State*, 289 Ark. 16, 708 S.W.2d 625 (1986) (disallowing evidence presented as rebuttal where the testimony impeached responses extracted by the prosecutor on cross-examination).

We conclude that neither appellant's prior testimony nor the testimony of Ms. Scott was proper rebuttal evidence. As noted above, Ms. Walker testified that she saw appellant at the bingo parlor on October 19, 1995. However, when the prosecutor asked Ms. Walker whether she knew if appellant won anything that night, she testified that she did not, and she also testified that she did not know how appellant traveled to the bingo parlor. The testimony presented by the prosecution during rebuttal did not contradict Ms. Walker's testimony or any other evidence presented by appellant. By introducing appellant's prior testimony, the prosecution created an opportunity to present Ms. Scott's testimony, which was not otherwise appropriate as rebuttal, in an effort to discredit appellant's alibi. Under these circumstances, we conclude that the introduction of this testimony during rebuttal constituted an abuse of the trial court's discretion and prejudiced appellant.

Appellant's second point for reversal is that the trial court erred in admitting into evidence the bus manifest because the prosecutor did not lay a sufficient foundation to admit the manifest under Ark. R. Evid. 803(6), the business records exception to

the hearsay rule. Because we have held that Ms. Scott's testimony was improper rebuttal, we need not address this issue.

For her final point on appeal, appellant contends that the trial court commented on the evidence while instructing the jury that a witness, Faye Walker, had violated Rule 615 of the Arkansas Rules of Evidence, the witness-exclusion rule. Specifically, appellant argues that, by instructing the jury as to the purposes of the rule, the trial court commented on the credibility of Ms. Walker, which is prohibited by Art. 7, Sec. 23, of the Arkansas Constitution.

This argument was not presented to the trial court and was not preserved for appeal. We have repeatedly held that in order to preserve an argument for appeal, the objection below must be specific enough to apprise the trial court of the particular error about which appellant complains. *Gibson v. State*, 316 Ark. 705, 875 S.W.2d 58 (1994). Furthermore, a party is bound on appeal by the scope and nature of the objections and arguments presented at trial. *Brown v. State*, 326 Ark. 56, 931 S.W.2d 80 (1996).

When the trial court announced that it intended to instruct the jury concerning the purposes of Rule 615, as set out in *Fite v. Friends of Mayflower, Inc.*, 13 Ark. App. 213, 682 S.W.2d 457 (1985), the appellant made a general objection. She did not, however, apprise the trial court of the argument she now makes on appeal; therefore, we do not address it.

For the reasons stated above, this case is reversed and remanded for a new trial.

ARNOLD, C.J., and GLAZE and IMBER, JJ., dissent.

TOM GLAZE, Justice, dissenting. I take serious exception to the part of the majority opinion that holds the trial court erred in allowing State rebuttal witness Holly Scott to testify, and in permitting the State to use appellant's earlier trial testimony to show she lied. Appellant claimed she was playing bingo in Oklahoma on the evening of October 19, 1995. Contrary to appellant's version of events, two police officers and their informant testified that she twice sold them cocaine on the same night.

At appellant's first trial, she took the witness stand and testified that, on October 19, 1995, at about 7:00 p.m., she caught a bus at the State Line, rode to Choctaw where she played bingo, and won two mini pots. She said she returned to the State Line that night at 11:30 p.m. where her car had been parked and drove home. Appellant's alibi contradicted the State's case-in-chief wherein Officers Ervin Dennis and Johnny Alexander and informant Vercina Lindsey testified appellant twice sold them cocaine on the evening of October 19 — at 7:48 p.m. and 11:38 p.m.

At appellant's second trial, the State presented its same case against appellant, but appellant chose not to testify in her own defense. Instead, she put her alibi defense before the jury by calling Faye Walker and Edmund Colbert, her son. Walker related that she had seen appellant on the evening in question at the bingo parlor. Appellant's son, Colbert, who resided with appellant, also asserted his mother went to play bingo at Choctaw on the evening in dispute, but his story became questionable on cross examination. The prosecutor asked Colbert whose car was parked in appellant's front yard on the evening of October 19, 1995, and whose license number was YEW 523. Colbert's response was that the car would have been his, but he had paid no attention to his license plate. Colbert claimed appellant, on October 19, 1995, had left home driving her car and stated that she would probably play bingo in Oklahoma. The State, however, submitted that license plate YEW 523 was appellant's.

Obviously, details of appellant's alibi defense were in dispute — for example, (1) whose car was in appellant's yard at the time the drug sales took place? (2) did appellant drive her car to Oklahoma to play bingo or did she take a bus? (3) did appellant go to Oklahoma on October 19, or were the officers and their informant telling the truth when they testified she sold them cocaine twice on the evening in controversy?

Our case law is clear that the State is entitled to rebut appellant's alibi by showing that it was fabricated. *See McCree v. State*, 280 Ark. 347, 658 S.W.2d 376 (1983). Here, the trial court properly concluded that the State had a right to rebut appellant's alibi

defense and that a part of that rebuttal involved the credibility of the witnesses presented.

This court has held that it is within the trial court's discretion to decide the propriety of evidence offered in rebuttal. *Isbell v. State*, 326 Ark. 17, 931 S.W.2d 74 (1996). Because appellant's alibi conflicted with the State's case and with significant details of her son's testimony, it was well within the trial court's discretion to allow the jury to have all versions of what was said to have occurred on October 19. How else could the jury determine whose story to believe?

Accordingly, the trial court allowed the State to call Holly Scott, co-manager of Choctaw Bingo, who testified that her business had no record of appellant winning a mini pot on October 19, 1995, nor was appellant's name listed on the bus manifest showing she had been a passenger on the bus appellant claimed she rode that night. The trial court also allowed the State to read relevant portions of appellant's earlier trial testimony where appellant claimed she drove her car to the State Line to board the bus to Oklahoma even though a car bearing her license plate had been seen in her front yard at the time officers said she had sold them cocaine.

In conclusion, the majority's decision allows appellant to present the part of the alibi defense she thinks favors her, but to exclude those versions that draw her defense into serious question. Once appellant asserted alibi as a defense, all evidence touching on that defense was relevant. Again, the trial court clearly did not abuse its discretion when determining the propriety and admissibility of portions of appellant's prior trial testimony and that of Scott's. I would affirm.

ARNOLD, C.J., and IMBER, J., join this dissent.

Barbara S. MORSE *v.* SENTRY LIFE INSURANCE CO., Sentry Insurance of Alma, and Wilroy Lewis

97-831 967 S.W.2d 557

Supreme Court of Arkansas
Opinion delivered April 16, 1998

Phyllis Ann Atha, for appellant.

Bethell, Callaway, Robertson, Beasley & Cowan, for appellees.

RAY THORNTON, Justice. This case presents the question whether appellee Sentry Life Insurance Company (Sentry) was obligated to pay appellant Barbara Morse the proceeds of her late husband's life insurance policy. Wilroy Lewis, an agent for Sentry and a family friend of the Morses, approached Gary and Barbara Morse in 1993 about obtaining their insurance business. The Morses opted to transfer their home, automobile, business, and life insurance to Sentry. On December 21, 1993, Sentry issued a $60,000 life insurance policy to Gary Morse, naming Barbara Morse as the primary beneficiary. Mr. Morse transferred the cash value of two policies, a $40,000 Southern Farm Bureau Life Insurance policy and a $10,000 Central States Health and Life Insurance policy, to the Sentry insurance policy.

On May 9, 1995, Gary Morse committed suicide. Under the Sentry policy, if an insured commits suicide within two years from the policy date, Sentry's liability is limited to the premiums paid prior to the insured's death. Sentry refused to pay the proceeds of the policy to Mrs. Morse, citing the policy's suicide-exclusion provision; however, Sentry did refund to Mrs. Morse premiums paid on the policy in the amount of $11,644.97.

Mrs. Morse filed suit against Sentry, Sentry Life Insurance Company of Alma, and Wilroy Lewis. In her complaint, Mrs. Morse claimed that Sentry, through its agent, Mr. Lewis, misrepresented the benefits, advantages, conditions, and terms of the insurance policy that the Morses purchased. She alleged that Mr. Lewis led them to believe that the Sentry policy would be "a continuation of coverage" when they purchased the life insurance policy. Mrs. Morse claimed that these misrepresentations misled the Morses about the consequences of transferring their existing policy from Farm Bureau to Sentry.

Sentry filed two motions for summary judgment. The second motion included the deposition of Randy Bradley, a Farm Bureau agent, who testified that the Morses had been apprised of the adverse consequences of transferring a life insurance policy ten years earlier. The circuit court granted Sentry's second motion for summary judgment, and this appeal followed.

Mrs. Morse raises two issues for reversal. She asserts that the trial court erred in granting summary judgment because Mr. Lewis misrepresented the terms of the life insurance policy and because genuine issues of material fact existed, making summary judgment inappropriate. We are unable to reach either of these arguments because Mrs. Morse has failed to provide us with an abstract of the orders and documents essential to our understanding of the issues.

Our review of a case on appeal is limited to the record as abstracted in the briefs. *Hooker v. Farm Plan Corporation*, 331 Ark. 418, 419, 962 S.W.2d 353 (1998). The Arkansas Supreme Court Rules require that an abstract should contain "material parts of the pleadings, proceedings, facts, documents, and other matters in the record as are necessary to an understanding of all questions presented to the Court for decision." Ark. Sup. Ct. R. 4-2(a)(5) (1997). If an abstract fails to aid us in gaining an understanding of the issues on appeal, this court may affirm for noncompliance with the rule. Ark. Sup. Ct. R. 4-2(b)(2); *see also Hooker*, 331 Ark. at 419, 962 S.W.2d at 353. The judgment from which the appeal is raised, including relevant factual findings, is an essential part of the abstract. *National Enterprises., Inc. v. REA*, 329 Ark. 332, 947 S.W.2d 378 (1997). Failure to abstract a critical document precludes this court from considering any issues concerning it. *Id.*

Mrs. Morse has condensed a 160-page record into a four-page abstract. We note that the Sentry life insurance policy or policy application, upon which this case is based, is not abstracted. Only a small portion of the text of the insurance contract appears in the abstract of appellees' answer to Mrs. Morse's complaint. Also, the trial court set forth detailed findings of fact and conclusions of law in a seven-page order that Mrs. Morse condenses to less than one-half of a page, which fails to include any findings of fact.

From the abstract before the court, we cannot determine whether any genuine issues of material fact remained regarding the elements of misrepresentation, such as whether the Morses justifiably relied on Mr. Lewis's misrepresentations. Furthermore, we are left resorting to conjecture with respect to the trial court's specific factual findings. Specifically, in her briefs, Mrs. Morse

refers us to the record regarding matters both in the trial court's findings of fact and conclusions of law and in her affidavit that are not abstracted. Without an abstract of such pleadings and documents, we are unable to conduct a meaningful review of Mrs. Morse's assignments of error.

Because Mrs. Morse submitted a flagrantly deficient abstract, we affirm the circuit court's order granting summary judgment.

Harold ("Butch") SARGENT *v.* H. G. FOSTER, Prosecuting Attorney

97-810 966 S.W.2d 263

Supreme Court of Arkansas
Opinion delivered April 16, 1998

Appellant, pro se.

Winston Bryant, Att'y Gen., by: *Timothy Gauger*, Asst. Att'y Gen., for appellee.

RAY THORNTON, Justice. Appellant Harold ("Butch") Sargent, a citizen of Van Buren County, appeals the dismissal of his writ of mandamus to compel H. G. Foster, the Prosecuting Attorney, to oust Van Buren County Sheriff Mike Bridges from office. Mr. Sargent alleged that Sheriff Bridges, a candidate for reëlection, violated the election laws when he transported election ballots from the printer, in Clinton, to the Sheriff of Election for Union Precinct, Shirley, Arkansas. As a result, Mr. Sargent urges that the Prosecuting Attorney had a nondiscretionary duty to oust Sheriff Bridges from office. We find no merit in Mr. Sargent's arguments, and affirm.

In his petition for writ of mandamus, Mr. Sargent alleged that on November 5, 1996, Sheriff Mike Bridges, a candidate for

reëlection in a contested race for county sheriff, picked up voting ballots for the general election from the printer and, about forty minutes later, delivered the ballots to Glen Williams, Sheriff of Election at Shirley City Hall. Mr. Sargent further alleged that on November 11, 1996, he filed a complaint with the Prosecuting Attorney's Office and that Deputy Prosecutor Stephen James told Mr. Sargent that he had heard about the incident and was not going to pursue the matter. Mr. Sargent also alleged that the Prosecuting Attorney's Office did not take any action in the matter when he filed a second complaint regarding Sheriff Bridges's conduct.

Mr. Sargent attached two affidavits to his petition: one from Glen Williams, and one from Maurice Bonds Whillock, County and Circuit Clerk and Ex-Officio Recorder. In his affidavit, Mr. Whillock stated that he received a telephone call from Glen Williams, who was working at the Union Precinct in Shirley, informing him that the precinct was running out or had run out of ballots. Mr. Whillock further stated that he then attempted to call each of the Van Buren County Election Commissioners to notify them of the problem, but that they were all unavailable. Mr. Whillock stated that he called the Van Buren County Sheriff's Office to ask a deputy to pick up ballots at the print shop and deliver them to Shirley. Mr. Whillock stated that while he was on the telephone with the County Sheriff's dispatcher, Sheriff Bridges walked into his office and that he asked Bridges to pick up and deliver the ballots. In his affidavit, Mr. Williams affirmed his telephone call to Mr. Whillock, and stated that Sheriff Bridges personally delivered ballots into his hands. Following a hearing on Mr. Sargent's allegations, the trial court dismissed the petition for writ of mandamus pursuant to Ark. R. Civ. P. 12(b)(6).

Mr. Sargent claims that Sheriff Bridges violated Ark. Code Ann. § 7-5-211 (Repl. 1993) of the election laws. That section provides that the county board of election commissioners shall deliver ballots and other election supplies to the sheriff. However, section 7-5-211(b) states the following exception:

> (b) If the sheriff is a candidate for reelection in a contested race, it shall be the duty of the county board of election commissioners to appoint some suitable person or persons in each precinct to perform the duties of the sheriff. The sheriff and his deputies are disqualified to discharge those duties in such case.

Mr. Sargent contends that Sheriff Bridges violated the elections laws when, as a candidate for reëlection, he transported ballots from the printer to Union Precinct. Mr. Sargent further contends that this violation imposed a nondiscretionary duty on the Prosecuting Attorney to bring a usurpation action against Sheriff Bridges under Ark. Code Ann. § 16-118-105 (1987). Section 16-118-105 provides:

> (b)(2) A person who continues to exercise an office after having committed an act, or omitted to do an act, of which the commission or omission, *by law*, created a forfeiture of his office, shall be subject to be proceeded against for a usurpation thereof. (Emphasis added.)

> (b)(3)(A) It shall be the duty of the prosecuting attorney to institute the actions mentioned in this section against all persons who usurp county offices or franchises where there is no other person entitled thereto or the person entitled fails to institute the action for three (3) months after the usurpation.

To determine whether the Prosecuting Attorney has a duty to prosecute, we must first consider whether Mr. Sargent has pleaded facts showing that a usurpation action may lie against Sheriff Bridges. Whether the prosecutor's duty is discretionary or nondiscretionary does not become an issue until we determine that the pleaded facts show a usurpation action is appropriate.

The case Mr. Sargent cites in support of his position is not applicable to the facts of this case. *See Faulkner v. Woodward*, 203 Ark. 254, 156 S.W.2d 243 (1941). In *Faulkner*, the appellant filed suit against the appellee for usurpation of office and requested a judgment of ouster. We agreed with the appellant's contention that the appellee was not eligible to fill the office of justice of the peace when he acted as a judge of the election in violation of Article 3, section 10 of the Arkansas Constitution. Article 3, section 10, the law in *Faulkner* that created the forfeiture, reads as

follows: "Nor shall any election officer be eligible to any civil office to be filled at election at which he shall serve — save only to such subordinate municipal or local offices, below the grade of city or county officers, as shall be designated by general law."

Faulkner is distinguishable from the case before us. In that case, the law that the appellee violated dealt only with an office seeker's *eligibility* to hold public office. We said that because appellee's election was void, the appellant had the legal right to sue the appellant as a usurper. *Faulkner*, 203 Ark. at 257-58, 156 S.W.2d at 245 (quoting Pope's Digest § 14326; C. & M.'s Digest § 10326).

In the case before us, Ark. Code Ann. §§ 7-1-103(28) to -103(29) (misdemeanor offenses) and 7-1-104 (felony offenses) (Repl. 1993) govern punishment for violating the election laws. Without determining which section applies to the offense alleged here, we conclude that Mr. Sargent has not pleaded sufficient facts to show a usurpation action may lie. Both of these sections require a conviction. In his pleadings, Mr. Sargent did not claim that Sheriff Bridges was convicted of a misdemeanor offense under the elections laws. Because he has not alleged facts that, by law, created a forfeiture of office, we do not reach the issue of whether the Prosecuting Attorney has a nondiscretionary duty to bring a usurpation action.

Mr. Sargent petitioned the trial court to compel the Prosecuting Attorney to remove Sheriff Bridges from office. Mandamus is an appropriate remedy when a public officer is called upon to do a plain and specific duty, which is required by law and which requires no exercise of discretion or official judgment. *Saunders v. Neuse*, 320 Ark. 547, 550, 898 S.W.2d 43, 45 (1995). However, a writ of mandamus is a discretionary remedy that will be issued only when the petitioner has shown a clear and certain legal right to the relief sought and there is no other adequate remedy. *Id.* In this case, a conviction is necessary before a public-office holder can be ousted. Because Mr. Sargent has not pleaded sufficient facts to show that he has a clear and certain legal right to relief, the trial court did not err in denying his petition.

Affirmed.

Ronita Faith BELL *v.* STATE of Arkansas

CR 97-1004 962 S.W.2d 814

Supreme Court of Arkansas
Opinion delivered April 16, 1998

Steve Kirk, for appellant.

PER CURIAM. On March 26, 1998, we issued an order for Steve Kirk to appear before this court at 9:00 a.m., Thursday, April 9, 1998, to show cause why he should not be held in contempt of court for failure to file an appellant's brief after a final extension had been granted.

Steve Kirk appeared on April 9, 1998. At that time, he entered a plea of not guilty and requested a hearing. Therefore, we appoint the Honorable Jack Lessenberry 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 Steve Kirk should be held in contempt.

Henry Lee BRAZIL *v.* STATE of Arkansas

CR 98-109 962 S.W.2d 814

Supreme Court of Arkansas
Opinion delivered April 16, 1998

[redacted]

Robert N. Jeffery, for appellant.

No response.

PER CURIAM. Appellant Henry Lee Brazil, by his attorney, has filed a motion for rule on the clerk.

Appellant filed a notice of appeal and designation of record on October 17, 1997, following the entry on September 25, 1997 of terms and conditions of suspended imposition of sentence. Subsequently, on December 12, 1997, a judgment convicting appellant of burglary and theft of property was entered. Appellant did not timely file a notice of appeal after entry of the judgment on December 12, 1997.

Appellant's previous motion for rule on the clerk was denied because appellant's attorney failed to admit fault on his part. *See Brazil v. State*, 332 Ark. 74 (Feb. 26, 1998) (per curiam). Although a notice of appeal was filed on October 17, 1997, appellant's attorney, Robert N. Jeffrey, now admits that a notice of appeal following the entry of the judgment was not filed in a timely manner due to a mistake on his part.

[redacted] 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.

Nathan ELLIOTT *v.* STATE of Arkansas

CR 98-373 962 S.W.2d 815

Supreme Court of Arkansas
Opinion delivered April 16, 1998

Bruce J. Bennett, for appellant.

No response.

PER CURIAM. Appellant, Nathan Elliott, by his attorney, Bruce J. Bennett, has filed a motion for rule on the clerk. Mr. Bennett admits in the motion that the record was tendered late 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). Accordingly, the motion is granted. A copy of this opinion will be forwarded to the Committee on Professional Conduct. *Id.*

Ben Wesley HICKS *v.* STATE of Arkansas

CR 98-353 962 S.W.2d 813

Supreme Court of Arkansas
Opinion delivered April 16, 1998

[redacted]

Tamra Barrett, for appellant.

No response.

PER CURIAM. Appellant Ben Wesley Hicks, by his attorneys, Tapp Law Offices, by Tamra Barrett, has filed a motion for rule on the clerk. Appellant filed a timely notice of appeal from the denial of his petition for postconviction relief pursuant to Ark. R. Civ. P. 37. His attorney admits that the record of the postconviction proceedings was tendered late due to a mistake on her part.

[redacted] 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.

Marquis Dewayne JONES *v.* STATE of Arkansas

97-869 967 S.W.2d 559

Supreme Court of Arkansas
Opinion delivered April 23, 1998

Bill Luppen, for appellant.

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

W.H. "DUB" ARNOLD, Chief Justice. Appellant, Marquis Dewayne Jones, brings this interlocutory appeal pursuant to Ark. Code Ann. § 9-27-318(h) (Supp. 1997), challenging the Pulaski County Circuit Court's order denying his motion to transfer a Class B felony terroristic act charge to the juvenile court. Our jurisdiction is authorized pursuant to Ark. Sup. Ct. Rule 1-2(11) (1997) as the record in this appeal was lodged before September 1, 1997, the effective date of our appellate jurisdiction rule change. *See In Re: Supreme Court Rule 1-2*, 329 Ark. 656 (June 30, 1997) (per curiam). Finding that the trial court's decision was not clearly erroneous, we affirm.

On February 12, 1997, Marquis Jones was charged by information with committing a terroristic act and fleeing in violation of Ark. Code Ann. §§ 5-13-310, 5-54-125 (Repl. 1997). Because Jones was sixteen years old at the time of the alleged crimes, he requested that the circuit court conduct a hearing to determine whether to retain jurisdiction or to transfer the case to juvenile court. *See* Ark. Code Ann. § 9-27-318(d). On April 25, 1997, the circuit court held an omnibus hearing in accordance with sections 9-27-318(e)-(f) and, after reviewing the evidence, ordered the misdemeanor fleeing charge to be transferred to juvenile court and retained jurisdiction over the felony fleeing charge. From this order comes the instant appeal.

Upon a finding by clear and convincing evidence that a juvenile should be tried as an adult, a court shall enter an order to that effect. Ark. Code Ann. § 9-27-318(f). In making that decision, the court must 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 that 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 that reflects upon the juvenile's prospects for rehabilitation. Ark. Code Ann. § 9-27-318(e). Although the court must consider all of these factors, it need not give them equal weight. *Thompson v. State*, 330 Ark. 746, 958 S.W.2d 1 (1997); *Fleetwood v. State*, 329 Ark. 327, 947 S.W.2d 387 (1997). Moreover, we will not reverse the court's determination unless it is clearly erroneous. *Id.*

During the omnibus hearing, Detective Steve Moore, a homicide detective with the Little Rock Police Department, testified that on September 26, 1996, he investigated a shooting near 13th and Woodrow streets. Detective Moore reported that Dewayne Boone had related to the police that he was at 14th and Woodrow streets when a subject he knew as Jones pulled up to him on a bicycle. Jones allegedly said to Boone, "What's up?" He then pointed a gun at Boone and fired the gun two or three

times at Boone's car. The gunfire damaged the passenger window, the passenger door, and a rear window. Boone provided the police with Jones's name and address, and later positively identified Jones from a police photo-spread.

Dwayne Wilkins, Jones's juvenile-court "intensive supervision" probation officer, also testified at the omnibus hearing. According to Wilkins, an "intensive supervision" officer is assigned to more serious offenders and oversees compliance with stricter probation rules. Wilkins added that such officers have smaller caseloads and surveillance officers on staff due to the intensity of the program. Jones was assigned to Wilkins on November 13, 1995 for probation relating to a minor in possession of a handgun charge. Wilkins also reported that Jones was previously on probation in 1992 for two Class C felony counts of theft by receiving.

According to Wilkins, Jones completed some rehabilitation programs during his probation, including a program at Recovery Way, a drug and alcohol rehabilitation center, and individual and family counseling through Stepping Stone. Following the Recovery Way program, Jones was required to participate in drug screens. After testing positive during a drug screen, Jones was ordered to complete the C Step Program, a ten-week boot camp at Camp Robinson. Jones failed to report to C Step. As a result, the juvenile court issued a pickup order; simultaneously, Jones was in the county jail on another charge. Ultimately he was returned to the juvenile court and sent to training school, the last stop on the juvenile-court rehabilitation-program line.

Although Wilkins testified that he believed Jones would still benefit from the juvenile-court system, he indicated that Jones had expressed an unwillingness to attend the C Step program. Additionally, Wilkins testified that Jones had a "couple" of curfew violations, and that Jones's mother had reported probation violations when Jones had left home a "couple" of times without permission.

Jones also received a score of ten on a risk-assessment test, used to determine if a juvenile should be transferred to the Department of Youth Services. The assessment test is based on

factors including: (1) the type of offenses committed; (2) the number of felonies in the last three years; (3) the number of misdemeanors in the past year; (4) the age of the juvenile at his first adjudication; (5) prior out-of-home placements; and (6) incident offenses (a) related to drug use, (b) involving weapons, (c) resulting in personal injury to a victim, and (d) involving gang or peer-group activity. Commitment to the Department of Youth Services is recommended for a score of ten points or higher. Notably, one risk point is assessed for juveniles less than thirteen years old at the time of their first offense; Jones was twelve years old when he first entered the juvenile-court system.

Tina Jones, the appellant's mother, was the final witness in the trial court proceeding. She indicated that, at the time of the trial, Jones had completed the eighth grade but was too old to return to school and too young to pursue a GED. Ms. Jones suggested that a Job Corps program out of this geographic area might benefit her son but that Jones had told her that he believed he could not complete the C Step program. She also explained that Jones was unable to attend the C Step program because he had broken his arm twice prior to two opportunities to attend C Step. We can dispense with Jones's rehabilitation argument by referring to his age. *See Rice v. State*, 330 Ark 257, 954 S.W.2d 216 (1997). Jones's birthday is May 17, 1980. As initial commitment to the Division of Youth Services cannot commerce after the eighteenth birthday of the youth under Ark. Code Ann. § 9-28-209(d) (Supp. 1995), Jones will be beyond the age when he can be rehabilitated in the juvenile system on May 17, 1998, when he turns eighteen.

We must note that some of the evidence considered by the trial judge may have constituted inadmissible hearsay. However, there was no objection to such evidence, and hearsay, admitted without objection, may constitute substantial evidence to support a ruling. *Sanders v. State*, 326 Ark. 415, 932 S.W.2d 315 (1996) (citing *Clemmons v. State*, 303 Ark. 265, 795 S.W.2d 927 (1990)).

In light of the three factors outlined in section 9-27-318(e), the trial court had clear and convincing evidence to sup-

port its denial of the appellant's motion. First, the terroristic act charge involved firing a gun at an occupied vehicle, unquestionably an offense involving violence. Pursuant to section 5-13-310, the offense of committing a terroristic act results when a person, while not in the commission of a lawful act, shoots, or in any manner projects an object, with the purpose of causing injury to persons or property, at a conveyance that is being operated or that is occupied by passengers. The mere fact that gunfire causes only property damage when aimed at an occupied vehicle cannot negate the violent nature of the offense.

Second, Jones's current charge appears to be part of a repetitive pattern of adjudicated offenses, increasing in seriousness. Moreover, he has received the extent of treatment offered by existing juvenile-court rehabilitation programs, including Recovery Way, Stepping Stone counseling, and training school. Regardless of the reason, Jones twice failed to attend the final court-ordered alternative, C Step boot camp. Jones having exhausted the juvenile-court programs, the circuit court could conclude that past efforts at his rehabilitation have not been successful and do not justify referring him back to juvenile court.

Third, Jones's prior history, including a minor-in-possession-of-a-handgun and two felony theft charges, curfew violations, and a positive drug screen, demonstrates that Jones's prospects for rehabilitation are remote. Reviewing the evidence presented to the trial court under the section 9-27-318(e) factors, we find that the circuit's order was not clearly erroneous and that its decision to try Jones as an adult was based on clear and convincing evidence. Accordingly, we affirm.

Anthony Wayne FULTZ *v.* STATE of Arkansas

CR 97-1129 966 S.W.2d 892

Supreme Court of Arkansas
Opinion delivered April 22, 1998

Pearson & Chadwick, by: *Charles R. Chadwick*, and *Christopher F. Woomer*, for appellant.

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

TOM GLAZE, Justice. Appellant Anthony Wayne Fultz was charged and convicted of (1) possession of a controlled substance with the intent to deliver methamphetamine; (2) simultaneous possession of controlled substances and firearms; (3) conspiracy to deliver the controlled substance methamphetamine; (4) criminal use of a prohibited weapon; and (5) possession of drug paraphernalia. He was sentenced to a total of seventy years and fined $35,000.00. Fultz appeals only from his convictions of simultaneous possession of controlled substances and firearms and criminal use of a prohibited weapon. He challenges the warrantless search of his car and his home and the seizure of the firearms found as a result of those searches. Fultz does not challenge the seizure of any of the controlled substances found, resulting from the searches.

Police officers conducted the disputed warrantless searches when they arrested Fultz at his residence on September 5, 1996. On September 3, 1996, Fultz had voluntarily met with Federal

Drug Enforcement Officer Sam Martin and Arkansas State Police Sergeant Rodney Combs at the Harrison Police Department. During that meeting, Fultz admitted to having traveled to California to purchase methamphetamine for resale in Arkansas. Fultz agreed to cooperate with the police in investigating individuals involved in selling methamphetamine in the area, and agreed to report to Officer Martin on a daily basis. When Fultz failed to report, Officers Martin, Combs, and others obtained an arrest warrant and went to arrest Fultz at his house. Upon their arrival, Fultz was requested to come outside, which he did. The officers arrested Fultz while they stood in Fultz's carport, where Fultz's car was parked.

In searching Fultz incident to his arrest, officers found a small canister of marijuana in his pocket. Officers then asked if he had any guns or drugs, and Fultz said he had a service revolver and a derringer. Fultz mentioned the derringer might be in the car. The officers searched the car and found a MAK-90 rifle and an illegal sawed-off shotgun in the hatchback portion of Fultz's Pontiac Firebird. When asked if he had other weapons, Fultz said that he did. Fultz was handcuffed and placed in the back seat of a police unit. Mrs. Fultz subsequently consented to the officers' search of the house, and she led them to a bedroom, where the service revolver was seen and seized from underneath a mattress. When officers discovered in Mrs. Fultz's purse some plastic, square, clear boxes which appeared to have a white residue in them, Mrs. Fultz withdrew her consent to any further search. Mrs. Fultz was then arrested and placed in her husband's Pontiac, which had been seized by the officers, and she was taken to the police station. Mr. Fultz was taken to the station in a police car. Two officers stayed at Fultz's house while Officer Martin obtained a search warrant. Upon Martin's return to the house, the officers completed their search of the house, an outbuilding, and a second car. The derringer previously mentioned by Fultz, a .22 caliber semi-automatic rifle, telephone records, and a rolling machine were found in the master bedroom, and the search of the outbuilding produced 46.928 grams of methamphetamine, $1,400.00 in cash, seven glass jars containing chemical and methamphet-

amine residue, coffee filters, acetone, denatured alcohol, and two packages of latex gloves.

In his challenge of the officers' search of his Pontiac vehicle parked in the carport, Fultz argues the officers violated Ark. R. Cr. P. 14.1, 12.2, 12.4, 12.6, and the Fourth Amendment. He also asserts his car search violated the Fourth Amendment tenets as set out by the Supreme Court in *Coolidge v. New Hampshire*, 403 U.S. 433 (1971). There, Coolidge was questioned by officers about a murder, and about two weeks later he was arrested at his house for the murder. At the time of arrest, Coolidge's car was parked in his driveway and subsequently searched pursuant to a warrant which was later found defective. The legal issue then became whether the officers' search of Coolidge's vehicle could be justified as a warrantless search. In this respect, the Supreme Court mentioned the basic constitutional rule that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment — subject only to a few specifically established and well-delineated exceptions. The Court added that the exceptions are jealously and carefully drawn, and there must be a showing by those who seek exception that the exigencies of the situation made that course imperative and that the burden is on those seeking the exception to show the need for it. *Id.* at 454-455.

The Court in *Coolidge* first considered the exception and principle that a warrantless search incident to a lawful arrest may generally extend to the area that is considered to be in the possession or under the control of the person arrested. The Supreme Court held that the search-incident doctrine had no applicability to the circumstances in Coolidge's situation because Coolidge was arrested inside his house while his car was outside in his driveway. In other words, Coolidge had no access to the car. In rejecting the validity of the officers' search of Coolidge's car, the Court adhered to the standards earlier announced in *United States v. Rabinowitz*, 339 U.S. 56 (1950), that a search may be incident to an arrest only if it is substantially contemporaneous with the arrest and is confined to the immediate vicinity of the arrest. *Id.* at 56; *see also Chimel v. California*, 395 U.S. 752 (1969).

Ark. Rule 12.4(a) and (b) of the Rules of Criminal Procedure sets out the search-incident doctrine as follows:

> (a) If, at the time of the arrest, the accused is in a vehicle or in the immediate vicinity of a vehicle of which he is in apparent control, and if the circumstances of the arrest justify a reasonable belief on the part of the arresting officer that the vehicle contains things which are connected with the offense for which the arrest is made, the arresting officer may search the vehicle for such things and seize any things subject to seizure and discovered in the course of the search.
>
> (b) The search of a vehicle pursuant to this rule shall only be made contemporaneously with the arrest or as soon thereafter as is reasonably practicable.

Here, unlike the circumstances in *Coolidge*, the accused Fultz was outside his house in his carport where his car was parked when he was arrested, searched, and was found with marijuana in his pocket. When asked if he had any guns, he said yes and said he thought a derringer might be in his car. At this stage of Fultz's arrest, officers had found marijuana on Fultz's person, knew he probably had a gun in his nearby parked car, and also had two-day-old information that Fultz used his car to transport drugs into the state. Consequently, these circumstances reasonably justified a belief on the part of the officers that the car contained things which were connected with the offense for which the arrest was made.

We simply do not agree with Fultz's contention that, even though he may have been standing close to his car when he was arrested, it is not reasonable to conclude that the interior of his car was within his immediate control. The rule, of course, required him to be in the "immediate vicinity" of his vehicle of which he was in "apparent control." The evidence reflects these factors were met, along with proof showing the arresting officers had a reasonable belief justifying Fultz's car contained drugs and a gun, since they knew Fultz used the car to transport drugs and he told the officers he thought one of his guns — a derringer — was in the parked car.

Finally, we again point out that Fultz does not question the validity of his arrest or the State's search and seizure of a large amount of illegal drugs found in his possession. He only attacked the validity of the officers' warrantless search that produced Fultz's firearms, which were used to convict him of the two charges of simultaneous possession of controlled substances and criminal use of a prohibited weapon. Because we hold the trial court was correct in finding the officers' warrantless search of Fultz's car, producing an illegal sawed-off shotgun, valid, we necessarily conclude the evidence was sufficient to sustain the two convictions challenged in this appeal. Accordingly, we affirm.

Billy Richard MARTS II *v.* STATE of Arkansas

CR 97-1212 968 S.W.2d 41

Supreme Court of Arkansas
Opinion delivered April 23, 1998

John Wesley Hall, Jr., for appellant.

Winston Bryant, Att'y Gen., by: *Mac Golden*, Asst. Att'y Gen., for appellee.

DONALD L. CORBIN, Justice. Appellant Billy Richard Marts II appeals the judgment of the Sebastian County Circuit Court convicting him of possession of a contr olled substance (methamphetamine) with intent to deliver, a Class Y felony, and possession of drug paraphernalia, a Class C felony, and sentencing him to concurrent terms of life and three years' imprisonment, respectively. Our jurisdiction of this appeal is pursuant to Ark. Sup. Ct. R. 1-2(a)(2). Appellant raises three points for reversal, contending that the trial court erred (1) in admitting into evidence a statement given by Appellant and a notebook seized from him at the time of his arrest; (2) in allowing an officer to testify as to the ultimate issue of whether Appellant had possessed the drugs with the intent to deliver them; and (3) in denying Appellant's motion for directed verdict on the issue of the weight of the drugs. We find no error and affirm.

The record reflects that on December 13, 1996, Detective Wayne Barnett of the Fort Smith Police Department, Narcotics Division, received a tip from a confidential informant (CI) that a person named "Bo" was going to make a trip to Dallas, Texas, to pick up a large quantity of methamphetamine, and that he would be returning to Fort Smith either that night or the following morning. The following day, Barnett received information from the CI that "Bo" was back in town, that he was in possession of a large quantity of methamphetamine, and that he was on his way to

a tire shop located on 6th Avenue in Fort Smith. The CI told the officer that "Bo" would be carrying the drugs in the inside pocket of his coat, and that he would be driving a red extended-cab GMC pickup truck that had a big blue air compressor on the back of it. The CI also gave the officer the license plate number of the truck. Barnett then informed other officers to be on the lookout for the vehicle. Shortly thereafter, one of the other officers spotted the vehicle and stopped it.

When Barnett arrived, he told the suspect, later identified as Appellant, that he had reason to believe that he was in possession of a large quantity of methamphetamine. Barnett observed that Appellant's coat was sagging down on one side, as if something heavy was in the pocket. Barnett reached inside the pocket and pulled out a Payless Cashways sack that contained a large amount of suspected methamphetamine and a glass pipe with burnt residue on it. When Barnett asked Appellant how much was in the bag, Appellant replied, "about a pound." Appellant was subsequently charged with and convicted of possession of methamphetamine with intent to deliver and possession of drug paraphernalia and was sentenced to life imprisonment.

Discovery Violations

For his first point for reversal, Appellant argues that the trial court erred by admitting into evidence an oral statement given by him and a notebook seized from him on the date of his arrest. Appellant contends that he was not provided discovery of this evidence prior to trial, despite the fact that he had filed a motion pursuant to A.R.Cr.P. Rule 17.1. We do not reverse on this point, as Appellant did not raise this issue at the first opportunity, nor has he demonstrated that he was prejudiced by the evidence.

A party who does not object to the introduction of evidence at the first opportunity waives such an argument on appeal. *Wilburn v. State*, 317 Ark. 73, 876 S.W.2d 555 (1994). The policy reason for this rule is that a trial court should be given an opportunity to correct any error early in the trial, perhaps before any prejudice occurs. *Id.* Similarly, objections to discovery violations must be made at the first opportunity in order to pre-

serve them for appeal. *Turner v. State*, 325 Ark. 237, 926 S.W.2d 843 (1996); *Clark v. State*, 323 Ark. 211, 913 S.W.2d 297 (1996).

Here, Appellant filed a pretrial motion to suppress the evidence, including any and all statements made by him at the time of his arrest. A suppression hearing was conducted on the morning of the trial, during which Detective Barnett testified that he had read Appellant his *Miranda* rights and had proceeded to interview him about the possibility of cooperating with police in drug investigations. Barnett stated that Appellant indicated that he would consider working with the police if Barnett would agree to (1) shred the statement-of-rights form and all other paperwork on Appellant's case, (2) return the pound of "crank" to Appellant, and (3) release Appellant without filing any charges against him. Barnett stated that he did not agree with those conditions; he then terminated the interview and booked Appellant. At no point during direct examination of Barnett, or at any other time during the suppression hearing, did Appellant object to the statement on the ground that he had not been provided discovery of it. To the contrary, Appellant's sole argument for suppression of the evidence was the lack of reliability of the confidential informant.

Likewise, when the officer took the stand during trial, Appellant only objected to the alleged discovery violations after some prodding from the trial court. That colloquy is as follows:

> MR. WATSON:
>
> Q. Okay. Detective Barnett, did you read him his rights?
>
> A. Yes, I did.
>
> Q. And did he go over the rights form with you?
>
> A. Yes, I [sic] did. I have it here.
>
> Q. Did he sign that?
>
> A. No, he initialed beside each one of them, which is kind of — goes into what he said to me and why he said it or how he said it to me. With this — with an Interrogation, Advice of Rights Form, that I read to somebody, whenever I sit down and read them their rights, I ask them several questions or a couple of questions —
>
> THE COURT: Let's come up just a moment.

. . . .

THE COURT: Why are we going into this when there weren't any statements made?

MR. WATSON: Well, he did make some statements, after initialling, you know, that he would cooperate with the police if they would, in turn, give him the drugs back and —

THE COURT: Oh, okay.

MR. WATSON: — and remove all evidence that he was being arrested.

THE COURT: Mr. Settle, you didn't move to strike any statements he made or suppress, I mean?

MR. SETTLE: Well, of course, I moved to suppress all evidence seized, and that would include the statement, Your Honor —

THE COURT: All right.

MR. SETTLE: — because it was seized following the arrest, which we have contended was —

THE COURT: All right.

MR. SETTLE: — illegal.

THE COURT: All right. Okay.

MR. SETTLE: See what I'm saying.

THE COURT: Well, I didn't get that from your motion, but that's fine.

MR. SETTLE: It would have to be, Your Honor, because the initial stop is illegal.

THE COURT: Well, you're not saying there was anything wrong with the advice of rights, you're just saying they just should never should have stopped him, to begin with?

MR. SETTLE: Right. *But since you brought it up, Your Honor, I would notice you that I have not seen a copy of this*; it's not in the prosecutor's file, and there's a lot of information that is not in the prosecutor's file, if I'm not mistaken, and I believe I filed my motion for discovery several weeks ago.

THE COURT: Well, Mr. Settle, you didn't follow up on it.

MR. SETTLE: I don't believe that's my responsibility. I believe that, you know, the State takes great pride in having an open-file policy. That's just wonderful, but if it's not in their file, then it's not available to defense counsel. Again, these files —

THE COURT: I didn't call you up here to discuss discovery, Mr. Settle. I called you up here to find out, I didn't think any —

MR. SETTLE: I understand that, Your Honor, but I just want to tell the Court that I'm going to object to the statement of rights form because it was not in the prosecutor's file. It's not been made available to me.

MR. WATSON: Your Honor, any documents or police reports, that I'm going to refer to, today, the Advice of Rights Form, to my knowledge, has been in the State's file for at least a period of two months.

MR. SETTLE: I didn't see it yesterday among the things that I —

THE COURT: Mr. Settle, if you want to make a discovery objection about it, you may be [sic] so, but I'm going to hold that you weren't diligent.

. . . .

MR. SETTLE: Your Honor, let me put it to you this way, in all candor, it's not so much that I care about the right's form, but there may be other items, that I know were not in the State's file, and that's what I'm concerned about, and that may be coming down the pike, and that's what I'm concerned with, if the Court really wants to know.

MR. WATSON: If you'd like to take a recess, I can show him everything I have, just to make sure.

THE COURT: Let's move along. [Emphasis added.]

It is thus apparent that Appellant's discovery objection was that the statement-of-rights form was not in the State's file prior to trial; Appellant did not argue that he had no knowledge or notice of the statement itself. It is equally apparent that his objection was actually directed to making sure that the State's file did

not contain any surprises that may have been brought up at a later time. Moreover, when asked by the trial court if he wanted a hearing on the issue, defense counsel did not indicate that such a hearing was necessary.

■ ■ We are persuaded by the trial court's reasoning that a defendant must be diligent in raising objections to alleged discovery violations. The fact that Appellant chose to wait until trial to make an objection, and then only in response to inquiries made by the trial court, demonstrates that he was not diligent in bringing the matter to the court's attention. Although we do not necessarily agree with the trial court's holding that Appellant had the duty to seek a motion to compel discovery from the State, we do agree that Appellant had the duty to bring such alleged discovery violations to the court's attention at the first opportunity. Here, the objection should have been made during the suppression hearing, prior to the beginning of the trial, so that the trial court would have had the opportunity to take such measures to protect Appellant's right to access to the State's evidence. The objection was thus not timely. The same can be said for the objection to the notebook.

Appellant argued below that the notebook, along with a printout from a calculator, seized from him at the time of his arrest was not present in the State's file prior to trial and, as such, he claimed he had no notice of the evidence. The notebook contained documentation of various dollar figures, some of which had been reduced, with initials beside them. Similarly, the calculator tape contained persons' initials written beside each one of the printed dollar figures. The State contended that the notebook was evidence on the issue of Appellant's intent to deliver the methamphetamine, as some of the initials corresponded to persons that Detective Barnett had previously arrested. As with the rights form, Barnett testified during the suppression hearing that he had seized the notebook and tape from Appellant at the time of his arrest. Barnett also described their contents during the suppression hearing. Appellant did not object to the evidence at any time during the hearing.

At trial, the State argued that, although the notebook itself was not contained in the State's file, its receipt was referred to in the police reports as "other papers." The trial court responded that defense counsel could have gone to the police evidence locker and looked at the papers had he wanted to do so, since he was put on notice that the police had recovered "other papers" from Appellant. As with the rights form, defense counsel again responded that it was not Appellant's duty to investigate such evidence, but that it was the sole responsibility of the prosecutor to provide that evidence as discovery. Again, the trial court ruled that Appellant had not been diligent in bringing the evidentiary deficiency to the court's attention, such that the trial court could have compelled disclosure of this item. The trial court ruled that because the reports indicated that such evidence had been seized, Appellant had a duty to inspect it.

For the reasons stated above with regard to the rights form, we conclude that the trial court did not abuse its discretion in allowing the State to present this evidence, as Appellant failed to object at the first opportunity. A defendant cannot rely on discovery as a total substitute for his or her own investigation. *Donihoo v. State*, 325 Ark. 483, 931 S.W.2d 69 (1996); *Heard v. State*, 316 Ark. 731, 876 S.W.2d 231 (1994). This is particularly true where, as here, Appellant was notified that the police had recovered some papers from him at the time of his arrest.

Notwithstanding the procedural defect in Appellant's argument, we would still affirm the trial court's ruling, as Appellant has failed to demonstrate that he was prejudiced by it. When evidence is not disclosed pursuant to pretrial discovery procedures, the burden is on the appellant to establish that the omission was sufficient to undermine confidence in the outcome of the trial. *Burton v. State*, 314 Ark. 317, 862 S.W.2d 252 (1993). If the prosecutor fails to comply with discovery requirements, the trial court may order compliance, grant a continuance, exclude the evidence, or order any other appropriate relief. *Id.* Though information held by police officers is imputed to the prosecuting attorney, a failure to disclose that information will not warrant a reversal of a conviction absent a showing of prejudice. *Esmeyer v. State*, 325 Ark. 491, 930 S.W.2d 302 (1996). Prejudice does not exist when

the defendant already has access to the information that the State did not disclose. *Id.*

Because there was other substantial evidence to convict him of the charges, Appellant has failed to demonstrate that he was prejudiced by the admission of the evidence in question. In determining whether there was substantial proof of a defendant's intent to deliver, we need look no further than the amount of the drug recovered from the defendant's possession. *Owens v. State*, 325 Ark. 110, 926 S.W.2d 650 (1996). The chemist from the state crime lab testified that the aggregate weight of the methamphetamine was 431.9 grams. Appellant admitted to Detective Barnett that there was "about a pound" of the substance seized from him on the morning of his arrest. Possession of more than two hundred milligrams of methamphetamine gives rise to a presumption of intent to deliver. Ark. Code Ann. § 5-64-401(d) (Repl. 1997); *Owens*, 325 Ark. 110, 926 S.W.2d 650. The jury was instructed that they could consider the quantity of the drug possessed in determining Appellant's intent. Thus, because the jury determined that Appellant possessed methamphetamine in an amount in excess of the statutory presumption, the evidence is sufficient to support his conviction. *Id.*

Accordingly, we cannot say that the admission of Appellant's statement and the notebook and calculator tape prejudiced his case to the extent that they undermined the confidence in the outcome of the case. Moreover, we cannot say that Appellant had no knowledge of the existence of this evidence, as both the statement and the notebook were taken from him. Appellant has thus failed to demonstrate that the trial court committed reversible error in permitting Detective Barnett to testify about the contents of the oral statement and the documents.

Opinion Testimony

For his second point for reversal, Appellant argues that the trial court erred in allowing two of the State's witnesses to testify concerning the delivery and sale of methamphetamine generally and the significance of the way in which the drugs seized from Appellant were packaged. Specifically, Appellant asserts that this

testimony was improperly elicited by the prosecutor as opinion testimony on the ultimate issue of the case — whether Appellant intended to sell the drugs.

During Detective Barnett's direct examination, the prosecutor asked him if, through his experience in the narcotics unit, he was familiar with how methamphetamine is normally bought and sold on the street. Defense counsel stated: "Objection, Your Honor." The trial court responded that the witness could testify as to how the drug is packaged whenever he finds it. Barnett then proceeded to discuss the various ways in which the drug was packaged, including common quantities in which methamphetamine is sold, with no further objection from Appellant.

Detective Paul Smith, a narcotics officer with the Fort Smith Police Department and a task force officer with the federal Drug Enforcement Administration (DEA), testified as to the significance of the quality and quantity of the drugs seized from Appellant. Specifically, the prosecutor asked Smith whether, in his experience, it is unusual to find methamphetamine sixty-seven to sixty-eight percent pure, to which Smith responded "Yes." After Smith answered the question, defense counsel stated: "Your Honor, I'm going to object to that line of questioning." The trial court overruled the objection. Later on, during Smith's direct examination, the following exchange occurred:

> MR. WATSON:
>
> Q. Mr. Smith, what is the — based on your experience, your training as a narcotics officer, what is the significance to you of a quantity of fifteen ounces or a little bit more of methamphetamine?
>
> MR. SETTLE: Objection, Your Honor.
>
> THE COURT: Be overruled.
>
> MR. SETTLE: Note my exceptions, please.
>
> A. This quantity of methamphetamine would indicate an individual, who is trafficking in methamphetamine.
>
> . . . .

MR. WATSON:

Q. What leads you to that conclusion?

A. I'm led to that conclusion based upon two factors: one, the amount of drugs that were found or seized, and the other is the quality of the methamphetamine recovered.

Appellant now argues that it was error for the trial court to allow these officers to give such opinion testimony. In both instances, however, Appellant only generally voiced objections, without ever having offered any authority or specific grounds for them. In *Isbell v. State*, 326 Ark. 17, 931 S.W.2d 74 (1996), this court made clear that a specific objection is necessary in order to preserve an issue on appeal:

> When the testimony was presented, counsel for the defense merely said "objection." The Prosecutor responded that he did not know of any basis for the objection other than that the defense did not want to hear the evidence. The Court said "overruled," and counsel did not mention a ground of objection or any authority for it. The Trial Court was thus not informed as to the nature of the objection. Absent a specific objection informing the Trial Court of the nature of the error alleged on appeal, we do not reverse. *Reams v. State*, 322 Ark. 336, 909 S.W.2d 324 (1995); *Childress v. State*, 322 Ark. 127, 907 S.W.2d 718 (1995).

Id. at 24, 931 S.W.2d at 78.

Because Appellant failed to make a specific objection to the officers' testimony, we will not reverse. We are not persuaded by Appellant's contention on appeal that the grounds for the objections are obvious from the context in which they arose. Appellant urges that, with regard to Detective Smith's testimony, the only ground upon which he could have been objecting was that the testimony impermissibly went to the ultimate issue of the case — whether Appellant had intended to sell the drugs. It is not apparent that this argument is well taken, given the expert nature of the officer's testimony; the objection could have easily been construed to have been directed at the lack of foundation of the officer's credentials or qualifications to testify to such an opinion at all.

Furthermore, even if this point had been preserved for our review, we would nonetheless affirm the trial court's decision to admit the testimony. The decision whether to admit relevant evidence, opinion testimony or otherwise, rests in the sound discretion of the trial court, and our standard of review of such a decision is abuse of discretion. *Nooner v. State*, 322 Ark. 87, 907 S.W.2d 677 (1995), *cert. denied*, 116 S. Ct. 1436 (1996). Rule 704 of the Arkansas Rules of Evidence provides that "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." This court has recognized that the trend of authority is not to exclude opinion testimony because it amounts to an opinion on the ultimate issue. *See, e.g., Davlin v. State*, 320 Ark. 624, 899 S.W.2d 451 (1995); *Long v. State*, 284 Ark. 21, 680 S.W.2d 686 (1984). Such opinion testimony is admissible provided that it does not mandate a legal conclusion. *Id.* This court has previously drawn the fine distinction between an admissible opinion that "touches upon the ultimate issue" and an opinion, not admissible, that "tells the jury what to do." *Salley v. State*, 303 Ark. 278, 283, 796 S.W.2d 335, 338 (1990) (citing *Gramling v. Jennings*, 274 Ark. 346, 625 S.W.2d 463 (1981)).

Here, the two officers testified about their experience in the way in which methamphetamine is normally packaged and sold. Detective Smith stated that based upon his experience as a narcotics officer, the quantity of the drugs (in excess of fifteen ounces) and their quality (sixty-seven to sixty-eight percent pure methamphetamine) indicated to him an individual who was trafficking in narcotics. Such testimony was proper given that the State bore the burden of proving that Appellant had possessed the methamphetamine with the intent to deliver it. In *Heritage v. State*, 326 Ark. 839, 936 S.W.2d 499 (1996), this court upheld the trial court's decision to allow the officer's testimony concerning the normal level of purity of narcotics on the streets in that area and the market value of the drugs recovered from the defendant. This court held:

> A trial judge's ruling on relevancy issues will not be disturbed absent an abuse of discretion. *Sasser v. State*, 321 Ark.

> 438, 902 S.W.2d 773 (1995). It is true that the weight of the drugs creates a presumption of intent to deliver. However, since the presumption is not conclusive, the State may offer additional evidence on the issue of intent to deliver. *See also Hoback v. State*, 286 Ark. 153, 689 S.W.2d 569 (1985).

Id. at 847, 936 S.W.2d at 504.

The testimony did not mandate a legal conclusion, nor did it tell the jury what to do. It was thus within the trial court's learned discretion to allow the State to present testimony from the two officers, who were experienced in the investigation of narcotics, as to the significance of the evidence seized from Appellant.

Directed-Verdict Motion

For his last point for reversal, Appellant argues that the trial court erred in denying his motion for a directed verdict on the issue of the weight of the methamphetamine. Appellant contends that because the chemist mistakenly testified that 111.1 grams of the total 431.9 grams was *cocaine* hydrochloride, as opposed to methamphetamine hydrochloride, the trial court erred in submitting to the jury the issue of whether the aggregate weight of the controlled substances was between 200 and 400 grams or exceeded 400 grams.

The State presented testimony from Jerry Buck, a chemist at the Arkansas State Crime Laboratory. Buck stated that he weighed and tested the drugs seized from Appellant, which were contained in three separate packages. One package weighed 220.9 grams and contained methamphetamine hydrochloride (sixty-five percent pure) and nicotinamide, a cutting agent used to make the drugs go further. Another package weighed 99.9 grams and contained methamphetamine hydrochloride (sixty-eight percent pure) and nicotinamide. The last package, with which Appellant takes issue, weighed 111.1 grams and contained methamphetamine hydrochloride (sixty-seven percent pure) and nicotinamide. The drugs had an aggregate weight of 431.9 grams. Regarding the package in question, Buck testified as follows:

> A. Okay. Then, the next thing I did, after removing my sample from it, was to do a screen test on it, which is just to give me an indication of what the drug in here might be. That indicated that it was possibly either methamphetamine or amphetamine.
>
> The next step I did on this exhibit was to do a thin-layer chromatography, which is a test where I compare known standards to my unknown, to — to see how they compare. The thin-layer showed that it was methamphetamine and that there was some nicotinamide with the methamphetamine.
>
> The next test I did was the infra-red, which showed that — it also showed that it was methamphetamine hydrochloride with some nicotinamide present.
>
> I then performed the mass spectra test, which is a specific test that identified methamphetamine and nicotinamide.
>
> The next test I performed on this exhibit was the quantitative analysis, which the results, it was sixty-seven percent *cocaine* hydrochloride. [Emphasis added.]

At the conclusion of Buck's direct examination, the prosecutor asked the chemist to state the total weight of the methamphetamine, to which Buck responded that it was 431.9 grams.

Appellant moved for a directed verdict on the issue of the aggregate weight of the controlled substance. Appellant reasoned that because Buck stated, albeit mistakenly, that 111.1 grams of the drugs contained sixty-seven percent cocaine hydrochloride, there could be no question of fact that the total weight of the drugs was between 200 and 400 grams. The trial court denied the motion, stating, "I heard him say that, but I think he corrected himself later." Appellant now contends that the trial court erred in submitting the issue of the aggregate weight of the drugs to the jury. We disagree.

Variances and discrepancies in the proof go to the weight or credibility of the evidence and are, therefore, matters for the factfinder to resolve. *State v. Long*, 311 Ark. 248, 844 S.W.2d 302 (1992). Accordingly, when there is evidence of a defendant's guilt, even if it is conflicting, it is for the jury as factfinder to resolve any conflicts and inconsistencies; it is not for the court to resolve on a directed-verdict motion. *Id.* Here, Buck stated no

less than three times that the substance in the package in question was methamphetamine. The fact that on one occasion he mistakenly referred to the substance as cocaine does not warrant a directed verdict on the issue of the aggregate weight of the drugs. It was thus proper for the trial court to deny the motion and submit the issue to the jury.

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.

COUNTRY CORNER FOOD AND DRUG, INC. *v.* FIRST STATE BANK and TRUST COMPANY of Conway, Arkansas, Tommy Watson and Virgil C. Shannon

97-608 966 S.W.2d 894

Supreme Court of Arkansas
Opinion delivered April 23, 1998

Streett & Coutts, by: *Alex G. Streett*, for appellant.

Graddy & Adkisson, P.A., by: *William C. Adkisson*, for appellee First State Bank & Trust Co.

Brazil, Adlong, Murphy & Osment, by: *Matthew W. Adlong*, for appellees Watson and Shannon.

ROBERT L. BROWN, Justice. This case arises out of a business loan for operating capital made by appellee First State Bank and Trust Company of Conway, Arkansas (Bank) to appellant Country Corner Food and Drug, Inc. (Country Corner). In 1987, Charles Pitman and Douglas Horton and appellees Tommy

Watson and Virgil C. Shannon were all shareholders in two corporations. The corporations owned and operated two grocery stores named Perry County Food & Drug and Country Corner Food & Drug. The corporations were named Perry County Food & Drug, Inc., and Country Corner Food & Drug, Inc. A swap agreement was made among the shareholders to divide the shares of the two corporations, where Watson and Shannon would become sole shareholders in Perry County Food & Drug, Inc., while Pitman and Horton would be the sole shareholders of Country Corner Food & Drug, Inc. Country Corner would lease the property for its grocery store from Watson and Shannon.

In furtherance of the swap agreement, on March 17, 1988, Country Corner obtained a loan from the Bank for one year in the amount of $194,734 for the purpose of financing inventory. Because Country Corner and Pitman and Horton were unable to obtain this financing on their own, Watson and Shannon and their spouses signed the promissory note as guarantors. When the promissory note came due on March 17, 1989, Watson and Shannon refused to sign the new note as guarantors, and the Bank declined to renew the note. Country Corner failed to satisfy the debt in accordance with the terms of the note, and the Bank foreclosed on the note and collateral.

On July 18, 1989, Watson and Shannon filed a suit in chancery court against Country Corner and prayed that the court appoint a receiver to prevent Pitman and Horton from selling off the inventory of Country Corner and, thus, depleting the collateral for the Bank loan. The Bank intervened claiming an interest in the same property. Country Corner then filed an action in circuit court against the Bank and Watson and Shannon and asserted several causes of action in tort.[1] On August 17, 1989, the chancery court appointed a receiver who ultimately sold the Country Corner store and its assets. Watson and Shannon next paid the balance due under the note pursuant to their guaranty agreement. What remained to be litigated in circuit court were

[1] By order of October 23, 1989, Country Corner's tort action was transferred and consolidated with the action filed by Watson and Shannon in chancery court. On May 3, 1991, Country Corner's action was transferred back to circuit court.

the causes of action in tort filed by Country Corner against the Bank and Watson and Shannon.

On August 6, 1992, the circuit court granted a motion to dismiss Country Corner's complaint against all appellees on the grounds that Country Corner had failed to plead sufficient facts to state a claim under Ark. R. Civ. P. 12(b)(6). On August 20, 1992, Country Corner filed an amended complaint, and appellees again moved to dismiss. By order dated October 1, 1992, the circuit court granted the Bank's motion to dismiss but denied the motion with respect to Watson and Shannon. Following more than a year of discovery, Watson and Shannon filed a motion for summary judgment. On December 4, 1996, the circuit court entered its order granting summary judgment. Country Corner now appeals from the two orders.

I. Bank's Dismissal Under Rule 12(b)(6)

For its first point, Country Corner argues that its amended complaint sufficiently alleged facts to state claims against the Bank. The Bank counters that the amended complaint against it was properly dismissed because it was not timely filed, and even if it was, Country Corner failed to plead sufficient facts under Ark. R. Civ. P. 12(b)(6).

We conclude that Country Corner's amended complaint was timely filed within the ten days allowed by the circuit court. Rule 6 of the Arkansas Rules of Civil Procedure states that "[w]hen the period of time prescribed or allowed is less than eleven (11) days, intermediate Saturdays, Sundays, or legal holidays shall be excluded in the computation." The order of dismissal was filed on August 6, 1992, and the amended complaint was filed on August 20, 1992, exactly 10 days later, excluding weekend days. We will, as a result, review the appeal on the merits.

This court has often stated the standards to be applied in reviewing a dismissal order under Rule 12(b)(6):

> In reviewing a trial court's decision on a motion to dismiss under 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. *Neal v. Wilson*, 316 Ark. 588, 873 S.W.2d

> 552 (1994); *Gordon v. Planters & Merchants Bancshares, Inc.*, 310 Ark. 11, 832 S.W.2d 492 (1992); *Battle v. Harris*, 298 Ark. 241, 766 S.W.2d 431 (1989). In deciding dismissal motions, the trial court must look only to the allegations in the complaint. *Neal v. Wilson, supra; Wiseman v. Batchelor*, 315 Ark. 85, 864 S.W.2d 248 (1993); *Deitsch v. Tillery*, 309 Ark. 401, 833 S.W.2d 760 (1992). In order to state a cause of action, the complaint must allege facts and not mere conclusions. Ark. R. Civ. P. 8; *see also Hollingsworth v. First Nat'l Bank & Trust Co.*, 311 Ark. 637, 846 S.W.2d 176 (1993); *Rabalaias v. Barnett*, 284 Ark. 527, 683 S.W.2d 919 (1985). When a complaint is dismissed without prejudice, the plaintiff has the option of pleading further or appealing. *Hollingsworth v. First Nat'l Bank & Trust Co., supra.* If the plaintiff appeals, the option to plead further is waived in the event of an affirmance by the appellate court. *Id.*

Hunt v. Riley, 322 Ark. 453, 457, 909 S.W.2d 329, 331-32 (1995).

Arkansas is a fact-pleading state, and this court looks to the underlying facts supporting an alleged cause of action to determine whether the matter has been sufficiently pled. *Brown v. Tucker*, 330 Ark. 435, 954 S.W.2d 262 (1997). Country Corner contends that its amended complaint included sufficient facts to support six causes of action in tort against the Bank: fraud, tortious interference with the contractual relationship or business expectancy, breach of fiduciary duty, duty to act in good faith, duress, and punitive damages. We will consider the claims *seriatim*.

a. Fraud

Country Corner first urges that it properly pled fraud by the Bank. We have stated that actual fraud is established by proving the existence of the following five elements: (1) a false representation, usually of a material fact; (2) knowledge or belief by the defendant that the representation is false; (3) intent to induce reliance on the part of the plaintiff; (4) justifiable reliance by the plaintiff; and (5) resulting damage to the plaintiff. *Wiseman v. Batchelor*, 315 Ark. 85, 864 S.W.2d 248 (1993). In order to prevail over a Rule 12(b)(6) motion, Country Corner must plead sufficient facts to support all five elements.

In paragraphs 27 through 31 of its amended complaint, Country Corner alleges that Bank representatives made false representations by stating that the 1988 promissory note in the amount of $194,734 would be renewed. In paragraph 22 of the complaint, Country Corner further alleges that the Bank informed it that the renewal note was being prepared in 1989 and that Country Corner should only pay interest on the note until the renewal note was executed.

Assuming that these allegations are true, the statements by the Bank representatives do not support an action for fraud. First, there are no facts alleged supporting an allegation that these statements by the Bank were false at the time they were made. The Bank could well have been in the process of renewing the note but decided that additional security in the form of a Watson/Shannon guaranty on the new note was warranted. Secondly, even assuming that the Bank knew the statements were false, there are no facts pled by Country Corner to show justifiable reliance on its part. In fact, there was no reason for Country Corner to rely on these statements to its detriment. The statements allegedly made by the Bank merely lessened Country Corner's immediate financial burden in the interim by requiring it only to pay interest. And, again, Country Corner had to be aware that the Bank could require additional security.

Finally, even if the Bank made these statements with the intent that Country Corner rely on it, the Bank had the right to refuse to renew the loan. Country Corner pled no facts which would show that the Bank was obligated to renew the loan without the guarantee of Watson and Shannon on the new note.

b. Tortious Interference

Country Corner also claims that it has sufficiently pled a claim for tortious interference with contractual relationship or business expectancy against the Bank. Paragraphs 32 and 33 of Country Corner's amended complaint relate to its allegations of tortious interference. Paragraph 32 incorporates the previous paragraphs of the complaint, and paragraph 33 merely states that the Bank interfered with Country Corner's "contract advantage"

by giving "assurances" and then refusing to renew the loan. Reference to the "assurances" apparently refers back to the allegations that the Bank representatives stated that the note would be renewed. Neither this section nor the previous incorporated sections indicates with what contract or with what business expectancy the Bank intended to interfere. It is elementary that some precise business expectancy or contractual relationship be obstructed by the Bank's actions. *See United Bilt Homes, Inc. v. Sampson,* 310 Ark. 47, 832 S.W.2d 502 (1992). That lapse is fatal to this cause of action.

c. Breach of Fiduciary Duty

Next, Country Corner claims breach of fiduciary duty by the Bank. In paragraph 38 of the amended complaint, Country Corner alleges that a fiduciary duty was created by the fact that the Bank's attorney claimed to represent both Country Corner and the Bank in the creation of the loan. Country Corner contends that the duty was breached by the Bank's representative maintaining that it did not need separate counsel and by the Bank's providing a loan for such a large sum of money on a one year balloon note to an unsophisticated borrower.

This court has emphasized the necessity of factual underpinnings to establish a relationship of trust and confidence between a bank and its customers which is more than a debtor/creditor relationship. *Milam v. Bank of Cabot,* 327 Ark. 256, 937 S.W.2d 653 (1997); *J.W. Reynolds Lumber Co. v. Smackover State Bank,* 310 Ark. 342, 836 S.W.2d 853 (1992). *See also, Marsh v. National Bank of Commerce,* 37 Ark. App. 41, 822 S.W.2d 404 (1992). We do not agree that the allegations in this case meet that essential threshold. Lack of sophistication and the alleged advice not to seek independent counsel at best may have resulted in Country Corner's being misled, but these facts do not create a fiduciary relationship. We find no merit to this point.

d. Good Faith

Paragraphs 40 through 43 of the amended complaint deal with Country Corner's claim that there was a tortious breach of

the implied covenant of good faith and fair dealing. Only paragraph 41 pertains to the actions of the Bank, and that allegation, once more, is that the Bank made representations to Country Corner that the note would be renewed each year but that the Bank had no intention of doing so.

Country Corner relies on *Gordon v. Planters & Merchants Bankshares*, 326 Ark. 1046, 935 S.W.2d 544 (1996), to establish the tort of a breach of a duty to act in good faith. Yet, in *Gordon,* this court considered the duty of good faith as set out by Ark. Code Ann. § 4-1-203 (Repl. 1991), only in terms of considering whether punitive damages were allowable in that case. Furthermore, this court has recognized the affirmative tort of bad faith only against insurance companies. *See, e.g., Affiliated Foods Southwest, Inc. v. Moran*, 322 Ark. 808, 912 S.W.2d 8 (1995); *American Health Care Providers, Inc. v. O'Brien*, 318 Ark. 438, 886 S.W.2d 588 (1994); *Quinn Cos. v. Herring Marathon Group, Inc.*, 299 Ark. 431, 773 S.W.2d 94 (1989); *Aetna Casualty & Surety Co. v. Broadway Arms Corp.*, 281 Ark. 128, 664 S.W.2d 463 (1983).

Country Corner concedes that the tort of bad faith only applies to insurance companies but argues that this case is not a bad-faith case but rather is one for breach of the duty to act in good faith. The corporation claims that this duty is created by Ark. Code Ann. § 4-1-203 (Repl. 1991) and § 4-1-201(19) (Supp. 1997):

> 4-1-203. *Obligation of good faith.*
>
> Every contract or duty within this subtitle imposes an obligation of good faith in its performance or enforcement.
>
> 4-1-201. *General definitions.*
>
> (19) "Good faith" means honesty in fact in the conduct or transaction concerned.

The fact that every contract imposes an obligation to act in good faith does not create a cause of action for a violation of that obligation, and, as discussed above, this court has never recognized a cause of action for failure to act in good faith. Country Corner adduces no authority or argument for why this court

should now recognize a new tort for failure to act in good faith or how such a recognition can be reconciled with our previous case law which only recognizes the tort of bad faith against insurance companies. Without a cogent reason supported by convincing authority for taking this step, we decline to recognize this new tort in Arkansas. *J. & J. Bonding, Inc. v. State*, 330 Ark. 599, 955 S.W.2d 516 (1997) (holding that when a party does not cite authority or make a convincing argument and it is not apparent without further research that the point is well taken, this court will affirm).

e. Duress

We also refuse to recognize an independent tort for duress. Here, Country Corner appears to claim that the duress or coercion exercised by the Bank forced it to fail to stock the grocery store properly. Although it cites *Cox v. McLaughlin*, 315 Ark. 338, 867 S.W.2d 460 (1993), as providing the basis for the tort of duress, Country Corner concedes that duress is "not ordinarily recognized as an offensive doctrine." Country Corner cites no cases to support our recognition of the tort of duress, nor does it present a valid argument for why this court should now recognize the tort.

In addition, the facts pled by Country Corner in support of a new cause of action for duress do not meet its own definition. This court in *Cox* stated that in order to show duress, one must show that the duress resulted from the "wrongful and oppressive conduct, and not by his own necessity." If the Bank had the right to deny the renewal, such an action cannot have been wrongful and oppressive. Again, Country Corner pleads no facts to show that the Bank was required to renew the note or that the failure to renew it was an attempt to force Country Corner to do or refrain from doing a particular act. Thus, even if we were of a mind to recognize this new tort, which we are not, facts showing coercion have not been pled. There is no factual basis for this cause of action.

f. Punitive Damages

Finally, Country Corner claims to have stated a claim for punitive damages. However, all parties agree that such a claim is dependent on the existence of an underlying compensatory claim. *Hale v. Ladd*, 308 Ark. 567, 826 S.W.2d 244 (1992). The trial court correctly dismissed this claim due to the absence of any viable compensatory claims.

II. Summary Judgment

Country Corner's second point is that the circuit court erred in finding that there were no material issues of fact in its case against appellees Watson and Shannon. It maintains that if any material fact question exists with respect to any element of any tort alleged, the case must be tried. *See Renfro v. Adkins*, 323 Ark. 288, 914 S.W.2d 306 (1996). We first emphasize that allegations in a complaint are not proof for summary judgment purposes. *See Wheeler v. Phillips Development Corp.*, 329 Ark. 354, 947 S.W.2d 380 (1997); *Porter v. Harshfield*, 329 Ark. 130, 948 S.W.2d 83 (1997); *Guthrie v. Kemp*, 303 Ark. 74, 793 S.W.2d 782 (1990). We fail to glean a material fact issue with respect to any of the claims asserted against Wilson and Shannon, and we affirm on this point as well.

In its order for summary judgment, the trial court first found that Country Corner's allegations were predicated on Watson's and Shannon's failure to guarantee a new note and that the two guarantors had paid the Bank the balance due on the note which was the subject of the guaranty agreement. The court then concluded that Watson and Shannon had no obligation to guarantee a new note in 1989 for two reasons. First, guarantors are favored in the law and the terms of any guaranty agreement should be strictly construed in their favor. *Arkansas Industrial Dev. Comm'n v. Fabco*, 312 Ark. 26, 847 S.W.2d 13 (1993). Secondly, the language of the Loan and Guaranty Agreement between the parties dated February 20, 1987, placed no obligation on Watson and Shannon to *sign* a renewal note. Indeed, the pertinent language of that agreement contemplated that the guarantors would be liable for any renewals of the note:

> This guaranty is and shall remain unqualified and unconditional, and shall apply to any and all obligations owed or to be owed by Country Corner, and any and all renewals and/or extensions thereof, with or without notice unto guarantors, and shall in all things remain unaffected by the occurrence or non-occurrence of any event of any nature other than payment in full of all indebtedness owed by Country Corner to bank.

We agree with the trial court. The above-quoted language makes it clear that Watson and Shannon were liable for the debt evidenced by a renewal note irrespective of whether they actually sign a renewal note as guarantors. Thus, there was no need for them to sign one. Nevertheless, the Bank was perfectly within its rights to request their guarantee on the renewal note as additional security and to refuse to renew the note in the absence of a new guaranty agreement.

The only evidence presented by Country Corner to show that Watson and Shannon had an obligation to sign a renewal note as guarantors was the deposition testimony of two Bank officers who testified that in accordance with the original agreement, the Bank would not extend the note without the guarantee of Watson and Shannon. But all this testimony does is underscore the fact that the Bank required a new guarantee of Watson and Shannon in order to extend the note. It does not prove that Watson and Shannon had a duty or an obligation to sign a renewal note under any written agreement with Country Corner, even though they may well have been liable for any note renewals under the terms of the Loan and Guaranty Agreement. In sum, there is no written document or other proof that Watson and Shannon ever agreed with Country Corner to guarantee a renewal note. Nor do we give any credence to Country Corner's assertion that there is a material fact question about whether Watson and Shannon acted in good faith.

Finally, Country Corner urges that Watson's and Shannon's failure to guarantee the renewal note was motivated by an effort to force Country Corner to pay a debt to a third party and that this constitutes fraud and intentional interference with the loan. However, if Watson and Shannon had no duty or obligation

by agreement with Country Corner to sign the new note as guarantors, their motives for refusing to do so are irrelevant.

We hold that the circuit court did not err in its order of summary judgment.

Affirmed.

NEWBERN, J., not participating.

Nelson MURDERS, Jr., Lester Bates, Vernon Blake, and James Stark *v.* GARLAND COUNTY, Arkansas, and Larry Williams, as Garland County Judge

97-871 966 S.W.2d 900

Supreme Court of Arkansas
Opinion delivered April 23, 1998
[Petition for rehearing denied June 4, 1998.]

Hurst Law Office, P.A., by: *Q. Byrum Hurst*, for appellant.

Ralph C. Ohm, for appellee.

ANNABELLE CLINTON IMBER, Justice. At the center of this appeal are a number of ordinances enacted by the Garland County Quorum Court creating and implementing a new solid waste collection system for unincorporated areas of the county. The County excluded Hot Springs Village from required participation in the system. Following the initiation of a declaratory judgment action by the appellants, the trial court granted summary judgment to the County, upholding the constitutionality of the ordinances. Among other things, appellants now contend that the exclusion of Hot Springs Village constitutes a denial of equal protection of the laws. Appellants also argue that the trial court erred in granting summary judgment in that material facts were in dispute and that summary judgment was premature as they were entitled to more discovery. Pursuant to Ark. Sup. Ct. R. 4-2(b), we affirm due to appellants' flagrantly deficient abstract.

In their brief, appellants purport to challenge the constitutionality of five separate ordinances, yet have failed to abstract any of them. *See Blount v. Hughes*, 292 Ark. 166, 728 S.W.2d 519 (1987) (appellants sought mandamus challenging statutory validity of municipal ordinances — abstract was flagrantly deficient due to failure to abstract ordinances despite portions of ordinances contained in appellants' brief). Only two sentences from an ordinance can be found in the abstract (contained in the abstract of appellants' complaint), although the specific ordinance is not identified.

The other remarkable deficiency of appellants' abstract, considering that this is an appeal from the grant of summary judgment, is the failure to abstract *any* of the evidence in the case, including affidavits that were submitted by parties on both sides. Without the benefit of such evidence, it is impossible for the court to determine if genuine issues of material fact exist, or if summary judgment was granted prematurely.

■ ■ The reason for our rule is one of practicality in that there is only one transcript to be spread among seven members of the court. *See Oliver v. Washington County*, 328 Ark. 61, 940

S.W.2d 884 (1997). It is impossible for each of the seven judges to examine the one transcript. *Id.* Given the state of appellants' abstract, we are precluded from an understanding of the issues on appeal. *See Porter v. Porter*, 329 Ark. 42, 945 S.W.2d 376 (1997).

Affirmed.

Casey MATTHEWS *v.* STATE Of Arkansas

CR 97-461 966 S.W.2d 888

Supreme Court of Arkansas
Opinion delivered April 23, 1998

Gardner Law Firm, by: *Charles J. Gardner*, for appellant.

Winston Bryant, Att'y Gen., by: *Darnisa Evans Johnson*, Asst. Att'y Gen., for appellee.

PER CURIAM. In 1990, the appellant, Casey Matthews, pleaded guilty to one count of burglary and one count of theft of property. He was sentenced to twenty years with thirteen years suspended on the burglary charge, and ten years with ten years suspended on the theft of property charge. The court ran the sentences concurrently. In 1995, he was charged with aggravated assault after he allegedly threatened his girlfriend with a butcher knife. The filing of the aggravated assault charge caused the prosecutor to seek a revocation of the suspended sentence that Matthews received for the burglary conviction. The suspended sentence was revoked, and Matthews was sentenced to ten years on the burglary conviction from 1990.

In 1990, when Matthews pleaded guilty to the burglary charge, Arkansas Criminal Procedure Rule 37 had been abolished and replaced with Arkansas Criminal Procedure Rule 36.4. Under Rule 36.4, claims of ineffective assistance of counsel had to be raised in a motion for a new trial within thirty days of the judgment. Matthews apparently did not file such a motion, but sought habeas corpus relief pursuant to 28 U.S.C. § 2254 in federal court. The Federal District Court for the Eastern District of Arkansas ordered that a writ of habeas corpus would issue unless Matthews was given an opportunity to pursue his ineffective assistance of counsel claim in state court.

Pursuant to the federal court order, Matthews filed a motion to vacate his guilty plea in the Circuit Court of Mississippi County. In the motion, Matthews alleged that he did not receive effective assistance of counsel at the time he entered his guilty plea. The Circuit Court denied relief. Matthews now appeals that order.

Matthews's court-appointed counsel has filed a motion to withdraw and a brief stating there is no merit to the appeal.

Counsel has filed the motion and brief pursuant to *Anders v. California,* 386 U.S. 738 (1967), and Arkansas Supreme Court Rule 4-3(j). Under the Rule, a court-appointed attorney who wishes to withdraw from an appeal must abstract and brief all of the rulings that were adverse to his client. Although such a "no-merit" brief is typically filed in a direct appeal from a judgment, we have also allowed the filing of no-merit briefs in postconviction appeals. *See Riley v. State*, 298 Ark. 292, 766 S.W.2d 921 (1989).

After the filing of a no-merit brief, the appellant has thirty days to raise additional arguments in a *pro-se* brief. Ark. Sup. Ct. R. 4-3(j). Matthews has not filed a brief. The State agrees that there is no merit to the appeal.

In this case, the only ruling that is adverse to Matthews is the denial of his motion to vacate his guilty plea. In the written order that was filed, the Circuit Court denied relief on the basis that Matthews's counsel was effective, and that in any event, Matthews had not proven that he was prejudiced by the alleged deficient performance. In the no-merit brief, counsel argues that the Circuit Court's order was not clearly erroneous. We agree.

■ ■ To prevail on a claim of ineffective assistance of counsel, the petitioner must show first that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the petitioner by the Sixth Amendment. Second, the petitioner must show that the deficient performance prejudiced the defense, which requires showing that counsel's errors were so serious as to deprive the petitioner of a fair trial. 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. A court must indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. The petitioner must show there is a reasonable probability that, but for counsel's errors, the factfinder would have had a reasonable doubt respecting guilt, i.e., the decision reached would have been different absent the errors. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. In making a determina-

tion on a claim of ineffectiveness, the totality of the evidence before the judge or jury must be considered. *Strickland v. Washington*, 466 U.S. 668 (1984). A circuit court's order denying postconviction relief will not be reversed unless it is clearly erroneous. *Catlett v. State*, 331 Ark. 270, 962 S.W.2d 313 (1998).

Matthews was originally charged with a total of six counts of burglary and theft of property, and the prosecutor petitioned to revoke the probation that Matthews received for the conviction in 1989. According to his defense counsel, Matthews gave a full confession to each of the charges in 1990, and a portion of the stolen property was found in his possession. The outcome of Matthews's case, even under these circumstances, was a guilty plea to only two of the charges; an agreement with the prosecutor to withdraw the application for a revocation; and concurrent sentences for each conviction with a majority of the sentences suspended. If he fulfilled the conditions of his suspended sentences, Matthews faced only seven years in prison.

It does not appear that Matthews had any complaints about his attorney's performance until his suspended sentence was revoked in 1995. In the motion to vacate the guilty plea that was subsequently filed, Matthews alleged that his counsel was ineffective because he failed to request a psychiatric evaluation; because he failed to investigate character witnesses; because he failed to fully investigate the State's case; and because he failed to move for a continuance.

The mental evaluation

During the postconviction hearing, Matthews testified that problems within his family caused him to be depressed during the time period spanning from the filing of the charges to the entry of his guilty plea. He stated that he told his attorney that he was depressed, and that he had previously been under the care of a psychologist. He did not, however, specifically request that his attorney seek a mental evaluation. Matthews added that he received a mental evaluation in 1995 in connection with the aggravated assault charge, and that the diagnosis at that time was dissociative disorder and "major depression."

According to Matthews, the depression from which he suffered in 1990 was "much worse" than in 1995, and that a mental evaluation in 1990 was necessary because he was not sufficiently competent to assist his lawyer. Matthews testified that if he had received the mental evaluation, he would have insisted on going to trial once his competency was restored.

Matthews's defense counsel testified that he represented Matthews in 1989, when he pleaded guilty and received a sentence of five years' probation. Also, defense counsel testified that the only indication that Matthews had any kind of physical or mental disability was Matthews's response to a question on a standard personal history questionnaire. Apparently, Matthews originally responded that he had no prior mental or physical disabilities, but that response was later corrected to "drug-related, '86 and '87."

We conclude that Matthews's defense counsel was not ineffective for failing to request a mental evaluation. We have previously held that a petitioner who asserts his incompetence for the first time in a petition for postconviction relief has the heavy burden of demonstrating with facts that he was not competent at the time of trial, or, as in this case, at the time of his guilty plea. *Henry v. State*, 288 Ark. 592, 708 S.W.2d 88 (1986). Other than Matthews's testimony, the only indication that he suffered from any mental disability appeared on the personal history questionnaire, where it was indicated that Matthews, at least two years prior to the filing of the charges in 1990, had a "drug-related" disability. Defense counsel, moreover, testified that he had no other indication that a mental evaluation was warranted.

The character witnesses

Matthews testified that he told his attorney about several people, most of whom were family members, who could testify about his character. Matthews did not explain, during either his testimony or in his petition, what the contents of their testimony would have been and most importantly, how it would have affected his defense. Therefore, even if we assume that counsel performed deficiently by failing to investigate these witnesses,

Matthews has failed to demonstrate prejudice under the two-pronged *Strickland* standard.

Counsel's investigation of the State's case

Defense counsel testified that during plea negotiations, he was aware that Matthews had confessed to all six burglary and theft of property charges, and that he had given the police the names of two juveniles who also participated in the crimes. Those juveniles, in turn, identified Matthews as their accomplice. Defense counsel also testified that he was aware that a portion of the stolen property was found in Matthews's possession.

When asked if he was satisfied with the plea negotiations and the sentence that his client received, the attorney responded that he was pleased because a trial might have resulted in a ninety-year prison term on the six charges in 1990, and a revocation of the probation Matthews received in 1989. According to defense counsel, the revocation could have resulted in an additional thirty-year sentence.

It is clear that counsel was well aware of both the evidence the State intended to use against Matthews as well as the full extent of the punishment that his client could receive if the case went to trial. Consequently, Matthews did not sustain his burden of proving that his defense counsel did not fully investigate the State's case.

Lastly, we note that while the failure to move for a continuance was included among the grounds for relief in Matthews's motion to vacate his guilty plea, he did not allege how he was prejudiced by such a failure. Furthermore, Matthews did not introduce any evidence about the alleged failure to move for a continuance during the postconviction hearing. Consequently, no postconviction relief on this claim is warranted. *Strickland v. Washington, supra.*

Affirmed.

Charles Laverne SINGLETON *v.* Larry NORRIS, Director, Arkansas Department of Correction

CR 98-218 964 S.W.2d 366

Supreme Court of Arkansas
Opinion denying rehearing delivered April 23, 1998

Jeff Rosenzweig, for appellant.

Winston Bryant, Att'y Gen., by: *Kelly K. Hill*, Deputy Att'y Gen., and *Todd L. Newton*, Asst. Att'y Gen., for appellee.

PER CURIAM. Respondent Larry Norris petitions for a rehearing of this court's decision to stay the execution of Charles Laverne Singleton pending resolution of his petition for a declaratory judgment and all necessary writs to enforce that judgment. Because the execution scheduled for March 11, 1998, was in fact stayed by this court's order, the issue is now moot. We choose, however, to address issues of significant public interest raised in the rehearing petition that may well reoccur in the future. *See Wilson v. Pulaski Ass'n of Classroom Teachers*, 330 Ark. 298, 954 S.W.2d 221 (1997); *Thomas v. Board of Correction and Community Punishment*, 324 Ark. 6, 918 S.W.2d 156 (1996).

Contrary to Norris's assertion, we consider this case to be categorically different from the cases of *Pickens v. Tucker*, 316 Ark. 811, 875 S.W.2d 835 (1994), *Fairchild v. Norris*, 314 Ark. 221, 861 S.W.2d 111 (1993), and *Rector v. Clinton*, 308 Ark. 104, 823 S.W.2d 829 (1992). In those cases, the issue raised was either not apposite to the *Singleton* facts or had already been decided. In *Pickens*, the point at issue solely related to executive clemency and whether the governor, who had represented the State as attorney general in Pickens's appeal, was impartial. The period of time following our decision was sufficient for a clemency decision by the chief executive prior to the execution date. In *Fairchild*, we concluded that the federal district court had adequately addressed and decided the mental retardation issue, using the same definition employed in Act 420 of 1993. In *Rector*, we said that we could not disagree with the circuit court's finding that there had been no change in Rector's mental condition since his evaluation by federal authorities in 1989. Thus, we found no violation of the standard set in *Ford v. Wainright*, 477 U.S. 399 (1986).

We discount the State's position that under our *Singleton* decision, stays of execution would now be warranted in those cases. Here, the point raised in Singleton's petition for a stay was: Can the State forcibly medicate him for a legitimate reason when a side effect of that medication is to render him legally sane for purposes of execution? That question had not been addressed or decided in this case or in any analogous case. We concluded that the issue presented was *bona fide* and not frivolous, and, thus, the proceeding in circuit court was "competent." *See* Ark. Code Ann. §16-90-506(a)(1) (Supp. 1997). We also concluded that the question had to be resolved prefatory to any execution. Under those unique facts, the stay was granted.

Petition denied.

ARNOLD, C.J., and GLAZE and CORBIN, JJ., dissent.

TOM GLAZE, Justice, dissenting. The Attorney General correctly points out that the majority opinion staying Mr. Singleton's execution is contrary to three of this court's earlier cases where the court denied stays. *See Pickens v. State*, 316 Ark. 811, 875 S.W.2d 835 (1994) (court denied stay where Pickens raised constitutional

issue asserted to be pending before the U. S. Supreme Court); *Fairchild v. Norris*, 314 Ark. 221, 861 S.W.2d 111 (1993) (court denied stay where Fairchild argued a constitutional claim of first impression concerning his incompetence to be executed; court held Fairchild was barred by doctrine of collateral estoppel from reasserting his mental retardation); and *Rector v. Clinton*, 308 Ark. 104, 823 S.W.2d 829 (1992) (court denied stay where Rector raised new issue pertaining to constitutionality of Ark. Code Ann. § 16-90-506(d)(1) (1987), and decision denying stay rested also on the fact that his mental condition had not changed since federal authorities previously found he was aware of the punishment about to be inflicted upon him). In each of the three prior cases — like Singleton — the petitioner requested a stay of execution, and argued a last-minute constitutional issue of first impression. Only in Singleton's case did this court grant a stay, holding a "competent judicial proceeding" under § 16-90-506(a)(1) should be conducted because a "constitutional issue of first impression" was "ripe" for decision.

The Attorney General's point is that death-row inmates have commonly raised last-minute constitutional issues of first impression, but, until now, have been rejected. Section 16-90-506 relied upon in the majority opinion is clear that the General Assembly intended stays of execution to be strictly limited by granting a reprieve to be given by the Governor, the Arkansas Supreme Court via a writ of error, or by any competent judicial proceeding. Here, the Governor had issued no reprieve, nor had this court issued a writ of error. Instead, this court has engrafted an expansive meaning to the words "any competent judicial proceeding" which will permit attorneys for inmates to frame constitutional issues that will compel stays. If the court would have taken the view it takes now of § 16-90-506, Pickens, Fairchild, and Rector would likely still be in court presenting legal arguments for their release. As this court stated in *Rector v. State*, "[E]ven death cases must come to an end." Death sentence cases are always difficult to decide, but this case is no more unique or different than Rector's, except this case has been in the court system longer — twenty years. I agree with the Attorney General's position and would deny any further stay.

Marcel Wayne WILLIAMS *v.* STATE of Arkansas

CR 97-949 963 S.W.2d 221

Supreme Court of Arkansas
Opinion delivered April 23, 1998

Show-Cause Order issued.

Herbert T. Wright, Jr., for appellant.

No response.

PER CURIAM. Counsel for appellant Marcel Wayne Williams, who is Herbert T. Wright, Jr., moves for a "continuance" of three months in which to file appellant's brief in a case where Williams received a sentence of death by lethal injection. In reviewing the history of this case, we note where on September 9, 1997, we granted counsel's motion for a six-month extension in which to file appellant's brief. When the clerk of this court, Leslie Steen, advised counsel of the extension, he noted in bold letters that this was the final extension. Under this extension, appellant's brief was due on March 23, 1998. The State objects to any additional extension of time in which to file the appellant's brief.

We grant the appellant an extension of thirty days from date of this order to file his brief.

Because counsel has failed to meet the deadline under a final extension for filing appellant's brief, he is ordered to appear before this court at 9:00 a.m. on May 7, 1998, and show cause why he should not be held in contempt.

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