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Jack Harold JONES, Jr. *v.* STATE of Arkansas

CR 98-1091 8 S.W.3d 482

Supreme Court of Arkansas
Opinion delivered January 6, 2000
[Supplemental opinion on denial of rehearing issued February 10, 2000.*]

* SMITH, J., not participating.

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

Mark Pryor, Att'y Gen., by: *Teena L. Watkins*, Ass't Att'y Gen. and *Darnisa Evans Johnson*, Sr. Ass't Att'y Gen., for appellee.

DONALD L. CORBIN, Justice. Appellant Jack Harold Jones Jr. was convicted in the White County Circuit Court of the capital murder and rape of Mary Phillips and the attempted

capital murder of Lacy Phillips. Jones was sentenced to death by lethal injection, life imprisonment, and thirty years' imprisonment, respectively, for the crimes. This court affirmed the convictions and sentences in *Jones v. State*, 329 Ark. 62, 947 S.W.2d 339, *cert. denied*, 522 U.S. 1002 (1997). Jones filed a petition for postconviction relief pursuant to Ark. R. Crim. P. 37. The trial court denied the petition. On appeal, Jones raises four points for reversal, three involving the submission of various aggravating circumstances and one pertaining to the admission of expert testimony. Our jurisdiction of this appeal is pursuant to Rule 37 and Ark. Sup. Ct. R. 1-2(a)(8). We affirm.

The facts surrounding these crimes were set out in great detail in this court's previous decision, and we see no need to repeat them here. Suffice it to say that on June 6, 1995, thirty-four-year-old Mary Phillips and her eleven-year-old daughter Lacy were at an accounting office in Bald Knob, where Mary worked as a bookkeeper. Jones entered the business and robbed them at gunpoint. Jones then anally raped and murdered Mary and severely beat and strangled Lacy, leaving her for dead. Lacy lost consciousness for a period of time. She later awakened when police, apparently believing she was dead, were taking photographs of her. The police found Mary's body nude from the waist down, with a cord from a nearby coffee pot wrapped around her neck. Additionally, she had sustained blunt-force head injuries, as well as bruises on her arms and back.

[redacted] Before discussing the points raised on appeal, we note that to prevail on a claim of ineffective assistance of counsel, the petitioner must show first that counsel's performance was deficient. *Weaver v. State*, 339 Ark. 97, 3 S.W.3d 323 (1999). 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.* at 99, 3 S.W.3d at 325. Petitioner must also show that the deficient performance prejudiced the defense; this requires a showing that counsel's errors were so serious as to deprive the petitioner of a fair trial. *Id.* On appeal, this court indulges in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Id.* We have repeatedly held that we will not reverse the denial of postconviction relief unless the trial court's findings are clearly erroneous or clearly against the preponderance of the evidence. *See, e.g., Norman v. State*,

339 Ark. 54, 2 S.W.3d 771 (1999) (*per curiam*); *State v. Dillard*, 338 Ark. 571, 998 S.W.2d 750 (1999).

I. Aggravating Circumstance of Especially Cruel or Depraved Manner

For his first point for reversal, Jones argues that trial counsel was ineffective for failing to object to the submission of the aggravating circumstance that the capital murder was committed in an especially cruel or depraved manner. He asserts that the evidence was insufficient to support such a finding. He also argues that despite trial counsel's failure to object, appellate counsel was ineffective for not pursuing the issue on appeal. *See Bowen v. State*, 322 Ark. 483, 911 S.W.2d 555 (1995), *cert. denied*, 517 U.S. 1226 (1996). Jones concedes that neither argument was raised in his Rule 37 petition. He nevertheless asserts that this point is not procedurally barred pursuant to this court's holding in *Johnson v. State*, 321 Ark. 117, 900 S.W.2d 940 (1995).

In *Johnson*, the appellant raised an issue on appeal that he had not raised in his Rule 37 petition. Moreover, the issue was not argued during the postconviction hearing, nor did the trial court rule on it. Because the appellant had received the death penalty, however, this court determined that it was possible to reach the issue on appeal. This court explained:

> This is an appeal from the trial court's denial of the Rule 37 petition, and our general rule is that specific allegations of ineffectiveness of counsel must be pleaded, and specific issues of ineffectiveness of counsel cannot be raised for the first time on appeal. *Tisdale v. State*, 311 Ark. 220, 227, 843 S.W.2d 803, 807 (1992). *However, in death penalty cases we will consider errors argued for the first time on appeal where prejudice is conclusively shown by the record and this court would unquestionably require the trial court to grant relief under Rule 37. Hill v. State*, 275 Ark. 71, 628 S.W.2d 284, *cert. denied*, 459 U.S. 882 (1982). In *Sumlin v. State*, 273 Ark. 185, 617 S.W.2d 372 (1981), we said *an error may be argued for the first time on appeal in a death case only when it is "of such magnitude that it would require us to take note of an error which involved a fundamental deprivation of the right to a fair trial."* *Id.* at 192, 617 S.W.2d at 376.

Id. at 137, 900 S.W.2d at 951 (emphasis added). Accordingly, in death cases, this court may address issues raised for the first time on appeal from a denial of a Rule 37 petition, where prejudice is

conclusively shown by the record. Such prejudice is shown only when there is an error of such magnitude that it deprived the defendant of the fundamental right to a fair trial. Conversely, where prejudice is not conclusively shown, the issue is procedurally barred and we may not reach the merits. After reviewing the record in this case, we conclude that it does not conclusively show that Jones was prejudiced by the submission of this aggravating circumstance to the jury.

Arkansas Code Annotated § 5-4-604(8)(A) (Repl. 1997) provides for the aggravating circumstance that the "capital murder was committed in an especially cruel or depraved manner." Section 5-4-604(8) defines the relevant terms as follows:

> (B) For purposes of this subdivision (8), *a capital murder is committed in an especially cruel manner when, as part of a course of conduct intended to inflict mental anguish, serious physical abuse, or torture upon the victim prior to the victim's death, mental anguish, serious physical abuse, or torture is inflicted.* "Mental anguish" is defined as the victim's uncertainty as to his ultimate fate. "Serious physical abuse" is defined as physical abuse that creates a substantial risk of death or that causes protracted impairment of health, or loss or protracted impairment of the function of any bodily member or organ. "Torture" is defined as the infliction of extreme physical pain for a prolonged period of time prior to the victim's death.
>
> (C) For purposes of this subdivision (8), *a capital murder is committed in an especially depraved manner when the person relishes the murder, evidencing debasement or perversion, or shows an indifference to the suffering of the victim and evidences a sense of pleasure in committing the murder*[.] [Emphasis added.]

[redacted] This court has consistently held that whenever there is evidence of an aggravating or mitigating circumstance, however slight, the matter should be submitted to the jury for consideration. *See Willett v. State*, 335 Ark. 427, 983 S.W.2d 409 (1998); *Kemp v. State*, 324 Ark. 178, 919 S.W.2d 943, *cert. denied*, 519 U.S. 982 (1996); *Dansby v. State*, 319 Ark. 506, 893 S.W.2d 331 (1995). Once the jury has found that an aggravating circumstance exists beyond a reasonable doubt, this court may affirm only if the State has presented substantial evidence in support of each element therein. *McGehee v. State*, 338 Ark. 152, 992 S.W.2d 110 (1999). To make this determination, we review the sufficiency of the evidence in the light most favorable to the State to determine whether any rational

trier of fact could have found the existence of the aggravating circumstance beyond a reasonable doubt. *Kemp*, 324 Ark. 178, 919 S.W.2d 943.

Here, the evidence showed that Jones held Mary and her eleven-year-old daughter Lacy at gunpoint and took them to a back room. He told them to lie down on the floor, with Lacy on top of her mother. While they were on the floor, Jones took the money out of the business's cash register and asked if there was any more. Jones then tied up Mary with stereo-speaker wire and put her in a closet. Next, he tied Lacy to a chair in the bathroom. Jones left Lacy for some time and then returned to her. The intervening time is apparently when Jones raped and murdered Mary.

The medical examiner testified that Mary died as a result of a combination of strangulation and blunt-force head wounds. He testified that the application of force to the neck was in all likelihood relatively prolonged, taking approximately four minutes. Additionally, the evidence indicated that Mary had a number of wounds that appeared defensive in nature and consistent with some type of struggle taking place. The evidence also indicated that the blunt-force injuries to Mary's head likely occurred prior to the time she was strangled, due to the amount of blood around the brain, and that it was possible that she could have sustained consciousness throughout much of her injuries.

From these facts, there was substantial evidence that Jones committed the murder in an especially cruel manner. As she was bound with speaker wire, Mary was bludgeoned, anally raped, and strangled, while her young daughter sat, bound to a chair, in an adjoining room. Clearly, Mary was the victim of serious physical abuse. There was also substantial evidence that Mary suffered mental anguish at the hands of her killer, not only as the victim of the ordeal, but also as the mother of the next likely recipient of the same fate. Accordingly, the record does not show conclusively that trial counsel performed deficiently in failing to object to the submission of this aggravating circumstance to the jury. Nor does the record conclusively show that appellate counsel performed deficiently by not pursuing the issue on appeal. Indeed, from this record, it is not apparent that Jones was deprived of any right, much less the fundamental right to a fair trial.

II. Aggravating Circumstance of Avoiding or Preventing Arrest

For his second point for reversal, Jones argues that both trial and appellate counsel were ineffective for failing to object to the State's use of the aggravating circumstance that the capital murder was committed for the purpose of avoiding or preventing arrest. Jones again concedes that this issue was not raised in his Rule 37 petition. The order, however, reflects a ruling on this issue. Specifically, the trial court found that the submission of this aggravating circumstance was proper, and that appellate counsel's failure to argue otherwise did not meet the test of ineffective assistance of counsel. Accordingly, we will address the merits of this argument.

Jones relies primarily on this court's holding in *Kemp*, 324 Ark. 178, 919 S.W.2d 943, that although a consequence of every murder is the elimination of the victim as a potential witness, the motive is not necessarily to avoid arrest. From the record in this case, however, it is clear that there was sufficient evidence to support the jury's conclusion that Jones murdered Mary Phillips for the purpose of avoiding arrest for aggravated robbery. According to Lacy Phillips, Jones came to her mother's business twice on the date of the murder. The first time, Jones asked to borrow a book. Mary gave him the book. Later, Jones returned and informed Mary that she had given him the wrong book. When Mary went to get the other book, Jones pulled out a gun and said "I'm sorry I'm going to have to do this, but I'm going to have to rob you." After Jones had restrained both victims, he opened up the cash register and took all the money. Lacy indicated that she was able to get a good look at Jones. She remembered that Jones had black hair, tattoos on his arms, and a teardrop-shaped tattoo on his face. Lacy was able to describe her assailant to the police. She also clearly identified Jones at trial.

[redacted] Based on the foregoing evidence, the jury could have concluded that Jones murdered Mary for the purpose of avoiding or preventing his arrest for the crime of aggravated robbery. The distinctiveness of Jones's appearance, including the many tattoos on his face and arms, as well as the fact that Mary had two separate opportunities to observe him, raises an inference that had she lived, Mary could have identified Jones as the man that robbed her and her daughter at gunpoint. *See Porter v. State*, 321 Ark. 555, 905 S.W.2d 835 (1995), *cert. denied*, 517 U.S. 1108 (1996) (holding that

the jury could have found beyond a reasonable doubt that Porter killed the victim to avoid being arrested for robbery, because of the nature of the victim's head wound and the fact that he had spoken to Porter outside the restaurant and could have identified him as one of the robbers); *Sanders v. State*, 308 Ark. 178, 824 S.W.2d 353 (1992), *cert. denied*, 513 U.S. 1162 (1995) (holding that the evidence showed beyond a reasonable doubt that the murder was committed for the purpose of avoiding or preventing arrest based on the evidence that the victims could have identified Sanders, because he had previously worked for them and had even been in their home). Accordingly, Rule 37 relief is not warranted on this point.

III. Aggravating Circumstances Inconsistent with a Charge of Premeditated Murder

For his third point for reversal, Jones argues that trial counsel was ineffective for failing to object to the submission of the aggravating circumstances that the capital murder was committed (1) for pecuniary gain and (2) for the purpose of avoiding arrest. He argues that counsel should have objected on the ground that those aggravating circumstances were inconsistent with the charge that he committed the murder with premeditation and deliberation.

In his appeal brief, Jones concedes that he has found no authority to support his argument on this point. This alone is sufficient basis to affirm the judgment. *See McGehee*, 338 Ark. 152, 992 S.W.2d 110. Nevertheless, he contends that the submission of these aggravating circumstances amounted to a denial of due process. There is no merit to this contention. We agree with the State that the prosecution's theory of premeditation and deliberation during the guilt phase did not lead to a due-process violation when these aggravating circumstances were sought during the sentencing phase. The record reflects that the defense was made aware of all the aggravating circumstances that the State sought to prove during sentencing. Accordingly, Jones cannot now claim that he was misled by the State's theory of premeditation and deliberation. We thus affirm the trial court's denial of Rule 37 relief on this point.

IV. Expert Testimony on Hair Analysis

Finally, Jones argues that the trial court erred in denying his petition on the ground that trial counsel was ineffective for failing to object to the State's introduction of expert testimony on the subject of hair analysis. The testimony in question was from Chantell Beckett, a criminalist with the Arkansas State Crime Laboratory. Beckett testified that she had examined one head hair, one head-hair fragment, and one pubic hair taken from Mary Phillips's body and compared them to known samples from Jones. She testified that the hairs were "microscopically similar." Jones contends that her testimony was both irrelevant and incompetent. We affirm because Jones has failed to demonstrate that his defense was prejudiced by this evidence.

[redacted] Jones candidly concedes that counsel's failure to object to Beckett's testimony did not prejudice him during the guilt phase, ostensibly because the jury heard evidence of his confession to police, as well as the testimony of the surviving victim. He contends, however, that had this testimony been excluded, his sentence could have turned out differently. The fact that his sentence *could* have been different is not the standard. To prevail on a claim of ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and that counsel's deficient performance prejudiced his defense. *Dillard*, 338 Ark. 571, 998 S.W.2d 750. Prejudice is shown only when the decision reached *would* have been different absent the errors. *Id.* We thus affirm the trial court's denial of postconviction relief.

Affirmed.

SMITH, J., not participating.

SUPPLEMENTAL OPINION ON DENIAL OF REHEARING
FEBRUARY 10, 2000

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

Mark Pryor, Att'y Gen., by: *Darnisa Evans Johnson*, Senior Ass't Att'y Gen., and *Teena L. Watkins*, Ass't Att'y Gen., for appellee.

DONALD L. CORBIN, Justice. Our decision affirming the trial court's order was delivered on January 6, 2000. Appellant filed a petition for rehearing on January 24, 2000. In the petition, Appellant asserts that we erred as a matter of law by applying the wrong standard for showing prejudice on a claim of ineffective assistance of counsel. Our opinion reflects in part:

> Jones candidly concedes that counsel's failure to object to Beckett's testimony did not prejudice him during the guilt phase, ostensibly because the jury heard evidence of his confession to police, as well as the testimony of the surviving victim. He contends, however, that had this testimony been excluded, his sentence could have turned out differently. The fact that his sentence *could* have been different is not the standard. To prevail on a claim of ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and that counsel's deficient performance prejudiced his defense. *Dillard*, 338 Ark. 571, 998 S.W.2d 750. Prejudice is shown only when the decision reached *would* have been different absent the errors. *Id.*

See Jones v. State, 340 Ark. 1, 10, 8 S.W.3d 482 (2000). Appellant asserts that the test under *Strickland v. Washington*, 466 U.S. 668 (1984), is not that the outcome would have been different, but that there is a reasonable probability that the outcome would have been

different. Appellant is correct in his recitation of the standard established in *Strickland*. His argument, however, misses the point of our holding.

Our decision affirming the trial court's denial of relief under Ark. R. Crim. P. 37 was not based on the degree to which Appellant failed to show that the outcome of his case would have been different. Rather, we affirmed because Appellant did not even use the word "would" in his argument to this court. He merely argued that "[i]n this case the proceeding could have turned out differently[.]" His argument was thus nothing more than a contention that the result *might possibly* have been different. This is insufficient under *Strickland*, as the Court observed that "not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding." 466 U.S. at 693.

Accordingly, we deny rehearing of this case. We issue this supplemental opinion for the purpose of clarifying for future cases that the standard for showing prejudice on an ineffective-assistance-of-counsel claim is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

SMITH, J., not participating.

Darrell HAIRE *v.* STATE of Arkansas

CR 98-1438 8 S.W.3d 468

Supreme Court of Arkansas
Opinion delivered January 6, 2000

James Law Firm, by: *William Owen James, Jr.*, *Kimberly D. Webb*, and *Steven R. McNeely*, for appellant.

Mark Pryor, Att'y Gen., by: *Vada Berger*, Asst. Att'y Gen., for appellee.

ROBERT L. BROWN, Justice. Appellant Darrell Haire appeals his judgment of conviction for capital murder and attempted aggravated robbery. He was sentenced to life imprisonment without parole and fifty years, with the fifty years to run consecutively with the life term. His grounds for appeal are: (1) insufficient evidence when the hearsay statements of Brodrick Jones are excluded; (2) error by the trial court in admitting evidence of prior bad acts; and (3) a discovery violation by the State in failing to disclose a leniency agreement with a State witness. We hold that none of these issues has merit, and we affirm.

The evidence at trial disclosed the following scenario. On February 11, 1996, Haire and Brodrick Jones were together in a white car and pulled into a Texaco Service Station on Highway 10 west of Little Rock. At the time, the Texaco employee, Janice Johnson, was at the station alone and outside by the gas pumps

picking up the trash. She asked the passenger in the car whether he wanted gas. The passenger, whom Johnson identified as Brodrick Jones, said "no" but asked if there was food in the store which was part of the service station complex. Jones followed Johnson into the store, and he asked to buy beer, which Johnson refused to sell him because it was Sunday. She also told him that the Subway outlet "right down the street" had "better food." Jones persisted about buying beer. Johnson testified: "And I kept saying, no. And he had his hands in his pocket, it's like a pouch in his coat, and I started getting nervous."

Johnson then told Jones that she would check with the manager in the back. She knew the manager was not on the premises, but she came back and told Jones that the manager said beer could not be sold. She added that there was a surveillance camera and "you're not going to get out of here without getting on the camera." The driver, whom Johnson identified as Haire, then came inside and asked what was taking so long. Jones answered "[T]here's nothing here for us. Let's go." Jones walked over to Haire and whispered something. Then they left. This occurred at about 1:15 p.m.

At approximately 11:33 p.m. on that same evening, Moses Waiters received a telephone call from Letitia Rummel, with whom he shared an apartment in Little Rock and whom he was engaged to marry. Rummel worked at the Subway store at the Riverdale Shopping Center on Cantrell Road. Rummel told Waiters that a man named Brodrick wanted to speak to him. Waiters knew Brodrick by the name of Sean and testified that Jones asked him "to set up a robbery of the store for him." Waiters begged off saying that there was not enough money and Rummel was asthmatic and might get hurt. Jones then asked about free sandwiches, and Waiters agreed to talk to Rummel. When he did so, he told her to push the robbery button and call the police. Waiters testified that Jones kept saying "we," and he asked Rummel if anyone else was there. At that point, she described another man coming through the door. Immediately after that, she responded that there was "a guy standing there with a gun to my head." Next, Waiters heard a struggle for the telephone, and the telephone was hung up. Waiters called 911 about what had happened. At 11:56 p.m. that same night, homicide detective Steve Moore of the Little Rock Police Department found

Rummel, who had been killed by a single gunshot wound to the head.

Cynthia Polk, the ex-wife of Jones, testified at trial that between midnight on February 11, 1996, and one o'clock the morning of February 12, 1996, Jones and Haire came to her house in Little Rock in a white car. Polk stated that Jones told her that Haire had shot somebody. Haire did not deny the allegation. When Polk asked what they got, Haire answered: "We didn't even get a cookie." When asked why he shot the woman, Haire said: "I don't know." Haire left after about five minutes. Jones spent the night at Polk's house. Polk told the jury that she had been convicted of burglary and theft by receiving and her parole had been revoked due to a positive drug test. She further admitted that she had two additional charges currently pending against her. She testified that the prosecutor had not attempted to sway her testimony.

The jury found Haire guilty of capital murder and attempted aggravated robbery, and he was sentenced accordingly. Following entry of the judgment and commitment order, Haire moved for a new trial on the basis that after the trial the prosecutor had dropped the two charges against Polk, which were felon in possession of a firearm and cocaine possession. According to Haire's motion, had the jury known that by testifying Polk was avoiding a mandatory prison sentence, it would have discounted her testimony. The motion was deemed denied because the trial court did not rule on it within thirty days. The trial court, however, subsequently denied the motion in writing and stated that both the State and defense counsel had inquired about the charges pending against Polk at trial and that *nolle prossing* those charges posttrial did not entitle Haire to a new trial.

I. Hearsay Testimony

Haire first contends on appeal that the trial court erred in denying his motion *in limine* to exclude Waiters's testimony concerning Jones's statements made to him. This was inadmissible hearsay, according to Haire, and without this testimony, he claims that the evidence for conviction was insufficient. We conclude that the testimony was properly allowed and that no error was committed by the trial court.

The crux of Haire's hearsay argument is that there was no independent evidence of a conspiracy other than Jones's statements to Waiters, which Waiters related to the jury at trial. Haire accurately points out that statements by a co-conspirator in furtherance of a conspiracy are not hearsay. *See* Ark. R. Evid. 801(d)(2)(v). He argues, however, that a conspiracy cannot be proved solely by the hearsay statements sought to be excluded. Rather, he contends, the State must prove the conspiracy by independent evidence.

The trial court admitted Jones's statements to Waiters for two reasons. He found them to be statements of a co-conspirator which are admissible under Rule 801(d)(2)(v) but also statements which fell within the hearsay exception for a declarant's existing state of mind. *See* Ark. R. Evid. 803(3). The trial court was correct on both counts. The State met its burden of proving a conspiracy by Jones's statements to Waiters which were corroborated by independent evidence, including the testimony of Cynthia Polk and Janice Johnson. *See Bourjaily v. United States*, 483 U.S. 171 (1987); Ark. R. Evid. 104(a). When asked by Cynthia Polk what Haire and Jones "got" from the Subway outlet, Haire answered: "*We* didn't even get a cookie." Moreover, Janice Johnson testified that at the Texaco station Jones persisted in asking for beer, and he was fidgety with his hands in the pouch of his coat which made her nervous. She told him that the manager was in the back and that she could not sell the beer because the security cameras were everywhere and they would pick up the transaction. When Haire came into the store, the two men whispered and left. The jury could have reasonably inferred from this rendition of the events that the two men were exploring the possibility of robbing the Texaco station.

In addition, Jones's statements to Waiters were unquestionably probative of his existing state of mind which the State contended was an intent to commit robbery. The statements, therefore, fell within the hearsay exception set out under Rule 803(3).

II. Prior Bad Act

Haire next claims that it was error for the trial court to admit the testimony of Janice Johnson, which, he maintains, was for the purpose of proving a prior bad act by Haire in contravention of Ark. R. Evid. 404(b). He also cites us to Ark. R. Evid. 403, but he

does not develop the Rule 403 argument on appeal. Nor did he do so before the trial court. We will not consider an argument that has not been properly developed. *See Munnerlyn v. State*, 292 Ark. 467, 730 S.W.2d 895 (1987).

Turning then to his Rule 404(b) argument, Haire admits that an exception to bad character evidence exists to prove the motive, plan, and intent of the perpetrator. He contends, however, that those prior acts must exhibit the same or a strikingly similar methodology, which is one so unique that only one person could have perpetrated both the prior act and the present crime. We disagree. Haire has cited the test for proving *modus operandi*. That test is different from the proof required for a Rule 404(b) exception such as intent. *See Diffee v. State*, 391 Ark. 669, 894 S.W.2d 564 (1995) (both *modus operandi* and proof of intent as an exception under Rule 404(b) were examined and discussed). Simply stated, proof of *modus operandi* is not the same as proof of a Rule 404(b) exception to other bad acts. The two evidentiary concepts are different.

The test for establishing motive, intent, or plan as a Rule 404(b) exception is whether the evidence of the other act has independent relevance. *Bragg v. State*, 328 Ark. 613, 946 S.W.2d 654 (1997). Evidence is indisputably relevant if it proves a material point and is not introduced solely to prove that the defendant is a bad person. *Hernandez v. State*, 331 Ark. 301, 962 S.W.2d 756 (1998). The decision to admit evidence under a Rule 404(b) exception is discretionary with the trial court. *Bragg v. State, supra.*

The intent to commit a crime is a state of mind that is not ordinarily capable of proof by direct evidence, and so it must be inferred from circumstances. *Gillie v. State*, 305 Ark. 296, 808 S.W.2d 320 (1991). As has already been discussed in this opinion, the actions of Jones and Haire at the Texaco station could reasonably have been construed by the jury as evidence of surveillance with intent to rob, especially when the men's actions are coupled with what transpired at the Subway store only minutes later. We conclude that there was no abuse of discretion in admitting this circumstantial evidence of intent to rob. *See Weaver v. State*, 324 Ark. 290, 920 S.W.2d 491 (1996).

III. Failure to Disclose a Prior Agreement

For his final point, Haire contends that the prosecutor dropped the charges against Cynthia Polk two weeks after her testimony at his trial, thus evidencing a prior agreement of leniency for testimony. He directs our attention to *Giglio v. United States*, 405 U.S. 150 (1972), where the Court held that any agreement of leniency for testimony must be disclosed to the defense prior to trial. Otherwise, the defendant's due process rights are violated.

In the instant case, there was no proof that such an agreement was made by the prosecutor with Polk. She testified that there was no agreement, and nothing was offered by Haire to counter that. The mere fact, standing alone, that the charges were dropped after the trial does not establish a *Giglio* violation. *See, e.g., United States v. Ramirez*, 608 F.2d 1261 (9th Cir. 1979) (fact that witness for government pled guilty to lesser offense three days after trial not enough to establish a prior agreement). Furthermore, as the trial court noted, the fact that Polk had charges pending against her at the time of her testimony was explored by both the State and the defense in questions before the jury. Haire has failed to exhibit reversible error on this point.

IV. Rule 4-3(h)

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

Affirmed.

SMITH, J., not participating.

Trent HARMON *v.* STATE of Arkansas

CR 98-1354 8 S.W.3d 472

Supreme Court of Arkansas
Opinion delivered January 6, 2000
[Petition for rehearing denied February 10, 2000. *]

* CORBIN, J., not participating.

[redacted]

Bowden & Kendel, by: *David O. Bowden*; *William H. Craig*; and *David R. Cannon*, for appellant.

Mark Pryor, Att'y Gen., by: *Michael C. Angel*, Ass't Att'y Gen., for appellee.

ANNABELLE CLINTON IMBER, Justice. Appellant Trent Harmon, Jr., appeals the judgment of the Pulaski County Circuit Court convicting him of battery in the first degree and sentencing him to ten years' imprisonment. This case was certified to us from the Arkansas Court of Appeals because it presents issues involving constitutional interpretation. Our jurisdiction is thus pursuant to Ark. Sup. Ct. R. 1-2(a)(1) and (b)(3). Mr. Harmon raises five points for reversal. We find no error and affirm.

I. Sufficiency of the Evidence

For his first point for reversal, Mr. Harmon argues that there was insufficient evidence to support a conviction of battery in the first degree. Particularly, he asserts that the evidence was insufficient to demonstrate (1) that he had any involvement in the crime; (2) that he caused a serious physical injury; or (3) that he acted with the requisite mental state. Mr. Harmon was charged with violating Ark. Code Ann. § 5-13-201(3)(Repl. 1997), which provides that a person commits battery in the first degree if: "He causes serious physical injury to another person under circumstances manifesting extreme indifference to the value of human life[.]"

The test for determining sufficient proof is whether there is substantial evidence, direct or circumstantial, to support the verdict. *Johnson v. State,* 337 Ark. 196, 987 S.W.2d 694 (1999). On appeal, we review the evidence in the light most favorable to the State and sustain the conviction if there is any substantial evidence to support it. *Tigue v. State,* 319 Ark. 147, 889 S.W.2d 760 (1994). Evidence is substantial if it is forceful enough to compel reasonable minds to reach a conclusion and pass beyond suspicion and conjecture. *Id.* In determining whether there is substantial evidence, we consider only that evidence tending to support the verdict. *Johnson, supra.* We do not weigh the evidence presented at trial, as that is a matter for the factfinder. *Freeman v. State*, 331 Ark. 130, 959 S.W.2d 400 (1998); *Dabney v. State*, 326 Ark. 382, 930 S.W.2d 360 (1997). Where, as here, the trial is before the bench, the trial judge sits as factfinder. *See Gray v. State*, 311 Ark. 209, 843 S.W.2d 315 (1992); *State v. Watson*, 307 Ark. 333, 820 S.W.2d 59 (1991).

The evidence showed that on October 27, 1996, Kevin Anglin was beaten by several individuals in the parking lot of the Discovery Club in Little Rock. Mr. Anglin testified that he had no actual memory of the beating, but that the last thing he remembered seeing were the faces of Mr. Harmon and Mr. Benjamin Brown. At trial, Mr. Anglin identified Mr. Harmon for the record. Mr. Anglin testified that as a result of the beating he suffered "very, very acute" injuries and was placed in the intensive care unit for three days. Mr. Anglin testified that he suffered injuries to the left side of his face, for which he underwent plastic surgery to repair. Mr. Anglin stated further that since the beating, he suffered a loss of his senses of taste and smell and a loss of memory. Finally, Mr. Anglin indicated that

as of the time of trial some sixteen months after the incident, he had no sense of taste or smell and that he continued to suffer a loss of memory.

Mr. Ali Kaan Aydulun testified that he witnessed Mr. Anglin being beaten that night at the Discovery Club. He stated that he and his friend were walking in the parking lot when they encountered Mr. Brown, standing in the lot cussing. Mr. Aydulun and his friend were about to say something to Mr. Brown, when Mr. Anglin advised them to leave Mr. Brown alone because he was drunk. Mr. Aydulun stated that he and his friend began to walk away, and that when he turned around, he saw Mr. Brown and several other persons attack Mr. Anglin. Mr. Aydulun stated that Mr. Anglin had done nothing to provoke the fight. According to Mr. Aydulun, six or seven assailants punched and pushed on Mr. Anglin and eventually pulled him to the ground and started kicking him in the ribs, legs, face and the back of the head. Mr. Aydulun made an in-court identification of Mr. Harmon as one of the assailants. He had previously identified Mr. Harmon in a photo-lineup. Mr. Aydulun testified that Mr. Harmon kicked Mr. Anglin in the face. He explained that Mr. Harmon's foot missed Mr. Anglin the first time, but that on the second attempt Mr. Harmon backed up one step and ran at Mr. Anglin's head like a field-goal kicker runs toward a football.

Mr. James Patrick Cady also witnessed the attack. He testified that five or six people began hitting and kicking Mr. Anglin and then stomping on his head as he lay on the ground. Mr. Cady selected Mr. Harmon's photograph out of a photo-lineup as looking like one of the assailants. He stated that when the fight ended and the assailants dispersed, one assailant gave several last kicks to the victim's head before getting into a car and leaving. He identified Mr. Harmon as looking like the person who inflicted those last blows to the victim's head. Mr. Cady told police that the assailant had driven away in a White Honda, license plate number YTS 020. Within approximately fifteen minutes of the incident being reported to the police, a Little Rock police officer stopped a White Honda, license plate number YGS 020, on Cantrell Road, not far from the Discovery Club. Mr. Harmon was driving the car, and Mr. Brown was the only passenger.

The State also offered the testimony of Dr. Ali Krisht, which was taken during the previous trial against Mr. Brown. Dr. Krisht, an expert in neurosurgery, testified that he treated Mr. Anglin in the hospital in October 1996. He stated that a CAT scan of Mr. Anglin's head revealed contusions on the brain surface in more than one area, mostly on the left side. He explained that contusions are small hemorrhages that are usually caused by trauma. He stated that Mr. Anglin was diagnosed with "traumatic brain injury." Dr. Krisht also stated that a loss of short-term memory, taste and smell can be associated with such an injury, and that those losses can be permanent. Dr. Krisht further noted that during a subsequent visit to the clinic, Mr. Anglin complained that he was having problems with short-term memory and his sense of smell. Viewing this evidence in the light most favorable to the State, we find substantial evidence to support Mr. Harmon's conviction of battery in the first degree.

Mr. Harmon's first argument in opposition to this conclusion is an attack on the credibility of two of the State's witnesses: Mr. Aydulun, who identified Mr. Harmon as one of the assailants who kicked the victim in the head; and Mr. Cady, who reported that a person who looked like Mr. Harmon inflicted the last blows to the victim's head and drove away in a car that was eventually stopped by the police. The attack on the credibility of these witnesses is premised on certain inconsistencies in their testimony. The defense specifically points out that Mr. Aydulun indicated that some of the assailants, including Mr. Harmon, were wearing baseball caps and cowboy boots, and that a group of them left the scene in a blue Mazda. Whereas, Mr. Cady indicated that Mr. Harmon left the scene in a white Honda and the police officer testified that when he stopped the white Honda, he did not notice Mr. Harmon wearing a baseball cap or cowboy boots and he did not notice any blood on him. Finally, the defense also challenges the credibility of the witnesses by noting that some of the people identified during the investigation as possible "look-alikes" were merely fillers in the photo-lineup and were not actually involved in the assault.

The matters emphasized by Mr. Harmon bear exclusively upon the credibility of the State's witnesses. This court, however, does not attempt to weigh the evidence or assess the credibility of witnesses. That lies within the province of the trier of fact. *Williams v. State*, 338 Ark. 178, 992 S.W.2d 89 (1999). We are bound by the fact-finder's determination on the credibility of wit-

nesses. *Kitchen v. State*, 271 Ark. 1, 607 S.W.2d 345 (1980); *Thomas v. State*; 266 Ark. 162, 583 S.W.2d 32 (1979). Likewise, we have long held that the trier of fact is free to believe all or part of a witness's testimony. *Freeman v. State*, 331 Ark. 130, 959 S.W.2d 400 (1998); *Patterson v. State*, 326 Ark. 1004, 935 S.W.2d 266 (1996). Moreover, inconsistent testimony does not render proof insufficient as a matter of law, and one eyewitness's testimony is sufficient to sustain a conviction. *See Williams v. State, supra; Rawls v. State*, 327 Ark. 34, 937 S.W.2d 637 (1997).

Mr. Harmon contends that the purported inconsistencies in the testimony of the State's witnesses make their identification of him as the perpetrator of the crime "inherently improbable, physically impossible, and so clearly unbelievable that reasonable minds could not differ thereon." *Kitchen v. State, supra.* We disagree. We cannot say with assurance that it would have been physically impossible for Mr. Harmon to discard incriminating evidence, such as clothing, between the time he fled the scene and the time the officer stopped the vehicle he was driving. Furthermore, the officer admitted that he was not specifically looking for blood, cowboy boots, or baseball caps when he made the DWI arrest.

The defense fully explored all inconsistencies and weaknesses in its cross-examination of the State's witnesses. Nevertheless, the trial judge found their identification credible. The accuracy of the eyewitness identifications and any alleged weaknesses were matters of credibility for the trial court to resolve. *Davis v. State*, 284 Ark. 557, 683 S.W.2d 926 (1985). Mr. Harmon has presented us with no valid reason to disregard the trial judge's assessment of the witnesses's credibility. We therefore hold that substantial evidence linking Mr. Harmon to the crime does exist.

Mr. Harmon next asserts that the State's evidence was insufficient to establish that he caused a serious physical injury. Ark. Code Ann. § 5-1-102(19) (Repl. 1997) defines "serious physical injury" as: "Physical injury that creates a substantial risk of death or that causes protracted disfigurement, protracted impairment of health, or loss or protracted impairment of the function of any bodily member or organ."

Mr. Anglin testified that as a result of the injuries sustained in the fight, he spent three days in the hospital's intensive care unit. He

also stated that he suffered a loss of his senses of taste and smell, and a loss of memory as a result of the beating. At trial, some sixteen months after the incident, Mr. Anglin indicated that these symptoms continued to persist. During Mr. Anglin's hospitalization in October 1996, Dr. Krisht diagnosed Mr. Anglin with "traumatic brain injury." Dr. Krisht also confirmed that the protracted loss of memory, taste, and smell experienced by Mr. Anglin can be associated with the type of injury he sustained. A photograph showing the severity of the injuries to the left side of Mr. Anglin's face was also introduced into evidence, and Mr. Anglin testified that he underwent plastic surgery to repair those injuries.

Whether a victim has sustained a serious physical injury is an issue for the jury, or, as in this case, the trial judge sitting as factfinder. *Bangs v. State*, 338 Ark. 515, 998 S.W.2d 738 (1999); *Weaver v. State*, 324 Ark. 290, 920 S.W.2d 491 (1996). Likewise, the question whether injuries constitute a temporary or protracted impairment of a function of a bodily member or organ is for the factfinder to decide. *Purifoy v. State*, 307 Ark. 482, 822 S.W.2d 374 (1991).

In this case, the victim's testimony about the injuries he sustained on October 27, 1996, was corroborated by his doctor's testimony as well as a photograph of his face after the beating. We cannot say that the factfinder could not reasonably infer from this evidence that Mr. Anglin sustained a serious physical injury as a result of the beating, and particularly that he suffered a protracted impairment of the function of bodily organs or members. We therefore conclude that substantial evidence to support the finding of serious physical injury does exist. This conclusion is consistent with our holding in *Lum v. State*, 281 Ark. 495, 665 S.W.2d 265 (1984), where we held that three blows to the head with a fist resulting in fractures to the face and the victim's hospitalization for five days was sufficient to support a finding of serious physical injury.

Mr. Harmon finally asserts that the evidence was insufficient to establish that he acted with the requisite mental state for battery in the first degree. A person acts purposely with respect to his conduct or a result thereof when it is his conscious object to engage in conduct of that nature or cause such a result. *Tarentino v. State*, 302 Ark. 55, 786 S.W.2d 584 (1991)(citing Ark. Code Ann. §

5-2-202(1)(1987)). Because of the obvious difficulty in ascertaining the actor's intent or state of mind, a presumption exists that a person intends the natural and probable consequences of his acts. *Id.* The factfinder may draw upon common knowledge and experience to infer the defendant's intent from the circumstances. *Id.* The trial court's conclusion in this case that Mr. Harmon acted with the purpose of causing serious physical injury is supported by Mr. Aydulun's testimony that Mr. Harmon came at Mr. Anglin's head like a field-goal kicker approaches a football, and by Mr. Cady's testimony that Mr. Harmon was the last one to leave the scene, and did so only after delivering several more kicks at Mr. Anglin's head. This conclusion is consistent with our holding in *Anderson v. State*, 312 Ark. 606, 852 S.W.2d 309 (1993): "Repeated blows to the head by kicking or 'stomping' when [a] man [is] down [exhibit] purposeful action to inflict serious physical injury whether it be risk of death or protracted disfigurement or impairment." *Id.; see also Lum v. State, supra; Bangs v. State, supra; Tarentino v. State, supra; Golden v. State*, 265 Ark. 99, 576 S.W.2d 955 (1979).

Furthermore, there is substantial evidence to support a finding that Mr. Harmon acted "under circumstances manifesting extreme indifference to the value of human life," pursuant to section 5-13-201(3). The plain meaning of that phrase demonstrates that the circumstances must by necessity be dire and formidable in terms of affecting human life. *Tigue v. State*, 319 Ark. 147, 889 S.W.2d 760 (1994). In short, first-degree battery "involves actions which create at least some risk of death which, therefore, evidence a mental state on the part of the accused to engage in some life-threatening activity against the victim." *Id.* (citing *Jones v. State*, 282 Ark. 56, 665 S.W.2d 876 (1984)). The foregoing evidence demonstrates that Mr. Harmon, along with five or six other assailants, kicked Mr. Anglin in the face and head multiple times while Mr. Anglin was on the ground. This evidence certainly supports the conclusion that Mr. Harmon engaged in life-threatening conduct against the victim.

Moreover, the evidence of life-threatening conduct in this case is distinguishable from the circumstances addressed in *Tigue v. State, supra*, where we held that immersion of the victim's hands in hot water causing third-degree burns was not life-threatening conduct. Likewise, *Bolden v. State*, 267 Ark. 504, 593 S.W.2d 156 (1980), is inapposite because the police officer in that case did not know what

caused his injury (a broken jaw and ribs) and "[t]he physician who examined the officer shortly after the incident testified that he had not observed any contusion on the officer's head, and there was no physical evidence of a severe blow to the back of the head." Id.

We therefore conclude that there is substantial evidence from which the trial judge, sitting as factfinder, could have reasonably determined that Mr. Harmon acted with the purpose to cause serious physical injury to Mr. Anglin under circumstances manifesting extreme indifference to the value of human life.

II. Facts Not In Evidence

For his second point for reversal, Mr. Harmon argues that the trial court improperly relied on facts and evidence presented at the co-defendant's trial, over which the same judge presided. In support of this argument, he relies on the following colloquy, which occurred during the State's direct examination of the victim:

> Q: Are there any — as a result of — as a result of the injuries you received on
>
> MR. CRAIG: There's been no testimony of injury. Counsel's assuming the fact that's not in evidence.
>
> Q: Well, did you have any injuries on—
>
> A: I was in ICU for three days so, yes, I had very, very acute injuries.
>
> Q: Okay. Let's talk about your face. What happened? What was wrong with your face as a result of the beating you took on October—
>
> MR. CRAIG: Your Honor, Counsel is leading. Counsel is assuming facts not in evidence.
>
> THE COURT: Don't lead your witness and don't assume facts not in evidence. Now Mr. Craig, you're going to have to realize, also, that I've heard this gentleman testify about this same incident once before so there are some things that I do recall.
>
> MR. CRAIG: I understand, Your Honor, but that should have no bearing on this trial.
>
> THE COURT: I understand. All right, proceed.

We are not persuaded that the trial court did anything improper. As Mr. Harmon acknowledges, there is a presumption that a trial judge will consider only competent evidence, and this presumption is overcome *only* when there is an indication that the trial judge gave some consideration to the inadmissible evidence. *See Clinkscale v. State*, 269 Ark. 324, 602 S.W.2d 618 (1980); *Fields v. State*, 36 Ark. App. 179, 820 S.W.2d 467 (1991). In *Clinkscale, supra*, the trial judge repeatedly made remarks about the defendant's prior, inadmissible convictions, calling him a "perpetual crime wave," and stating that "it's one thing to have one offense for stealing ... but the idea since 1970 you have all these...." Thus, there was no question that the trial judge considered the prior convictions during sentencing. Here, there is no indication from the record that the trial was truncated or shortened in any fashion, or that the trial judge considered any evidence other than what was presented to him during Mr. Harmon's trial. Nor does Mr. Harmon point to any specific evidence that the trial judge considered which prejudiced him. Thus, Mr. Harmon has failed to overcome the presumption that a trial judge will consider only competent evidence. Moreover, the trial judge appeared to acknowledge that he could not consider the testimony he heard at the previous trial.

III. Confrontation of Witnesses

For his third point for reversal, Mr. Harmon argues that the trial court erred in allowing the State to elicit hearsay testimony during cross-examination of a defense witness. He urges that the trial court's ruling denied him the right to confront the witnesses against him, in violation of the Sixth Amendment to the United States Constitution. The State asserts that no such constitutional objection was made below.

The record reflects that Mr. Harmon called Sergeant Joe Oberle of the Little Rock Police Department to testify about information contained in the officer's affidavit of probable cause to arrest Mr. Harmon. At one point during the testimony, the prosecutor objected to questions regarding what a particular witness had told the officer on the ground that it was hearsay. Defense counsel responded that the evidence was not offered for the truth of the matter asserted, but, instead, only to show what information the

officer relied on in preparing the affidavit. The trial court allowed the evidence for that limited purpose.

On cross-examination, the prosecutor asked the officer about the witnesses described in the affidavit who had identified Mr. Harmon as one of the assailants. Defense counsel objected on the ground that the testimony was hearsay. The prosecutor argued that the testimony was admissible because (1) defense counsel had opened the door to this line of inquiry, and (2) the evidence was not being offered for the truth of the matter asserted. Defense counsel then argued that the evidence was irrelevant. The trial court allowed the evidence. Upon the prosecutor's conclusion of cross-examination, the following discussion occurred:

> MR. FINKELSTEIN: Pass the witness.
>
> MR. CRAIG: It's difficult to cross-examine hearsay, Your Honor, and I'd ask the Court in the interest of justice—
>
> THE COURT: This is your — this is your witness. This is your witness, Mr. Craig. And they're allowed a wide latitude on cross-examination.
>
> MR. CRAIG: But Your Honor, that is rank hearsay. Statements of people who are not present, who we cannot cross examine, and it is obviously prejudicial and it is improper.

Mr. Harmon argues that, although defense counsel never specifically referred to the constitutional right to confront the witnesses, it is apparent from the context of the objection that he was making such an argument. Be that as it may, Mr. Harmon has failed to show that he was prejudiced by the evidence because he opened the door to such testimony in the first place. See *Willis v. State*, 334 Ark. 412, 977 S.W.2d 890 (1998); *Puckett v. State*, 328 Ark. 355, 944 S.W.2d 111 (1997); *Smallwood v. State*, 326 Ark. 813, 935 S.W.2d 530 (1996). Indeed, the trial court based its ruling in part on the fact that Mr. Harmon "started talking about the report with this witness." Furthermore, the challenged evidence was admissible for the same reason that the trial court allowed similar evidence during defense counsel's questioning of the officer. It was not being offered for the truth of the matter asserted, but rather to show other information the officer relied on in preparing the affidavit. This court has repeatedly recognized that matters pertaining to the admissibility of evidence are left to the sound discretion of the trial

court, and we will not reverse such a ruling absent an abuse of that discretion. *See, e.g.*, *Bell v. State*, 334 Ark. 285, 973 S.W.2d 806 (1998); *Bailey v. State*, 334 Ark. 43, 972 S.W.2d 239 (1998). Nor will we reverse absent a showing of prejudice, as prejudice is not presumed. *Hill v. State*, 337 Ark. 219, 988 S.W.2d 487 (1999); *Bell, supra.* Accordingly, we cannot say that the trial court abused its discretion in admitting the evidence.

IV. Constitutionality of the Sentencing Guidelines

For his fourth point for reversal, Mr. Harmon argues that the trial court erred in refusing to declare Act 532 of 1993, the Sentencing Guidelines Act, unconstitutional for violating the doctrine of separation of powers. Specifically, Mr. Harmon contends that in passing Act 532, codified as Ark. Code Ann. §§ 16-90-801 to -804 (Supp. 1999), the General Assembly improperly delegated both legislative and judicial power to the Arkansas Sentencing Commission in violation of Article 4 of the Arkansas Constitution. We do not reach the merits of this argument, as Mr. Harmon has failed to show that he was prejudiced by the Act.

It is well settled that before a person can challenge the constitutionality of a statute, he or she must demonstrate that the challenged statute had a prejudicial impact upon him. *Nahlen v. State*, 330 Ark. 1, 953 S.W.2d 877 (1997); *Brooks v. State*, 328 Ark. 32, 941 S.W.2d 409 (1997). Here, Mr. Harmon cannot show that the Act was applied to him at all. Indeed, he admits that the trial court stated that it would not consider the pre-sentence report, and that it would impose sentence without regard for or reference to the sentencing guidelines. Mr. Harmon also does not dispute that the sentence imposed is within the range permitted by law for a Class B felony. *See* Ark. Code Ann. § 5-4-401(a)(3)(Repl. 1997). He contends, however, that the application of the guidelines to his case is obvious in that the sentence imposed by the trial court was the same as that established by the guidelines. The record reflects the trial court's ruling:

> THE COURT: I'm going to deny your motion and I'm not going to declare that act unconstitutional. It may well be, but let's let the other court out there make that decision rather than me. *But in addition to that I'm not necessarily going along with the sentencing guidelines in my proposed sentence. I've considered the full range and as I*

> *understand it the penalty provisions under the sentencing guidelines are recommendations only anyway.*
>
> * * *
>
> So it will be the judgment and sentence of the Court that he be taken by the Sheriff, delivered for the purpose of serving his term of ten years in the Arkansas Department of Corrections, *which is the same term as the co-defendant in this case got. And I did not follow the sentencing guidelines in that particular case. I departed from the sentencing guidelines, but I think this young man's sentence should be the same as the co-defendant's.*

(Emphasis added.) It is clear from this ruling that the trial court did not base his decision on the recommended sentence established in the sentencing guidelines; rather Mr. Harmon's sentence was based upon the trial court's determination that both co-defendants should receive the same punishment, ten years' imprisonment. Thus, because Mr. Harmon has failed to demonstrate that Act 532 had a prejudicial impact on him, we do not reach the merits of his constitutional challenge.

V. Cumulative Error

Mr. Harmon lastly argues that the trial court erred in denying his cumulative error objection. He bases this argument on each of the four individual points of error raised on appeal, as well as two additional points: (1) the trial court's comments that Mr. Harmon's objections could be addressed on appeal; and (2) the trial judge's alleged bias against Mr. Harmon evidencing a predisposition to convict. Neither of these additional points were raised below. As such, we will not consider them on appeal. This court has repeatedly held that for a cumulative-error argument to be upheld on appeal, the appellant must show that there were objections to the alleged errors individually and that a cumulative-error objection was made to the trial court and a ruling obtained. *See, e.g.*, *Gates v. State*, 338 Ark. 530, 2 S.W.3d 40 (1999); *Willis*, 334 Ark. 412, 977 S.W.2d 890. Moreover, we have considered the remaining assertions of error and concluded that no reversible error occurred in Mr. Harmon's trial. This court does not recognize the doctrine of cumulative error where there is no error to accumulate. *Nooner v.*

State, 322 Ark. 87, 907 S.W.2d 677 (1995); *Dillon v. State*, 317 Ark. 384, 877 S.W.2d 915 (1994).

Affirmed.

ARNOLD, C.J., THORNTON, J., and SPECIAL JUSTICE BUD CUMMINS, dissent.

CORBIN, J., not participating.

RAY THORNTON, Justice, dissenting. To be convicted of the crime of battery in the first degree, one must cause serious physical injury to another by means of a deadly weapon; cause injury which destroys, amputates, or permanently disables another person; or cause serious physical injury to another under circumstances manifesting extreme indifference to the value of human life. Ark. Code Ann. § 5-13-201(a) (Repl. 1997). Based on our previous decisions interpreting this statute, I cannot agree with the majority that these elements were present in appellant's conduct in this case, and, therefore, I respectfully dissent.

In *Bolden v. State*, 267 Ark. 504, 593 S.W.2d 156 (1980), we held that, in order to sustain a conviction of first-degree battery, life-endangering conduct must generally be involved. There must be a severe injury in conjunction with a wanton or purposeful culpable mental state, and each subsection of the statute described conduct that would produce murder liability if death resulted. *Id.* Indeed, in *Bolden*, we reversed a conviction for first-degree battery where the defendant had kicked and beaten a police officer about the head and chest, resulting in a broken jaw, because there was insufficient evidence to show that the injuries were caused by a weapon, rather than by the beating and kicking that the officer sustained. *Id.*

Here, as in *Bolden*, there was no evidence of any weapon having been used against the victim by any of the several people who kicked and beat him. There was no showing that the victim suffered any injury resulting from the use of a weapon. The only evidence of intent to cause serious and permanent injury was one witness's account that he saw an attacker, whom he later identified as appellant, kick the victim's head, and, upon missing his head, back up and run, in cowboy boots, at the victim, kicking him in the

head. The only evidence of a "weapon" employed was the attacker's cowboy boots.

The evidence was scant that Harmon was the attacker wearing cowboy boots. Upon apprehension only fifteen minutes after the attack, Harmon was not wearing cowboy boots, nor did his clothing fit the description of the blood-stained garb given by witnesses. Unlike the majority, I cannot agree that the evidence presented was sufficient to sustain a conviction of first-degree battery. I respectfully dissent and would send the matter back to the trial court on the question whether the evidence would support a conviction for a lesser-included offense.

Dissent.

ARNOLD, C.J., and CUMMINS, S.J., join in this dissent.

Tommy McINTOSH *v.* STATE of Arkansas

CR 99-64 8 S.W.3d 506

Opinion delivered January 13, 2000

Richard E. Holiman, for appellant.

Mark Pryor, Att'y Gen., by: *James R. Gowen, Jr.*, Ass't Att'y Gen., for appellee.

TOM GLAZE, Justice. Appellant Tommy McIntosh appealed his conviction of aggravated assault and sentence of nine years to the court of appeals, and raised three points for reversal. The State responded first by filing a motion to dismiss wherein it claimed McIntosh had prematurely filed his motion for new trial on August 28, 1998, or five days before his conviction judgment was entered on September 2, 1998. The State asserted that, because McIntosh's motion was untimely and ineffective, his time for appeal had not been extended, and therefore his thirty-day period for appeal commenced from September 2, 1998, and ended on October 2, 1998. Because McIntosh waited until October 22, 1998, to file his notice of appeal, the State argued McIntosh's appeal was late and should be dismissed.

In response to the State's dismissal motion, McIntosh argued to the court of appeals that he had filed two supplemental motions for new trial after his conviction judgment was entered on September 2. These two motions were filed on September 21, 1998, and September 23, 1998, wherein he essentially re-alleged the same grounds previously contained in his prejudgment motion of August 28, 1998. He stated that his subsequent post-trial motions stood on their own allegations as if his premature August 28 new-trial motion had never existed. As a consequence, McIntosh contended his motions for new trial were timely filed, and they thereby extended his appeal time thirty days from the time his new trial motions were denied by the trial court after a hearing on September 25, 1998. *See* Ark. R. App. P.—Crim. 2(a)(2) (1998); *see also* Ark. R. Crim. P. 33.3 (1998). In sum, McIntosh asserted that his appeal time ended on October 26, 1998, so his notice of appeal filed on October 22, 1998, was timely. After considering the State's motion to dismiss and McIntosh's response, the court of appeals denied the State's request without an opinion; however, instead of

going forward on the merits in the case, it certified this case to us, asking us to clarify the foregoing issues and confirm whether McIntosh's notice of appeal was timely, and whether an appellate court has jurisdiction to decide the case on its merits. We accepted certification of the case.

In addressing the procedural matters set out above, the State, citing *Davies v. State*, 64 Ark. App. 12, 16, 977 S.W.2d 900, 903 (1998), restates its earlier position that when a motion for new trial is filed prior to entry of judgment, it is untimely. It also contends that the fact that supplements or amendments relating back to the original untimely motion have been added after the entry of judgment does not serve to make the original motion timely. Relying on *Hicks v. State*, 324 Ark. 450, 921 S.W.2d 604 (1996), the State further submits that, when a motion for new trial is untimely, a notice of appeal must be filed within thirty days of the entry of judgment, or it, too, will be untimely.

The *Hicks* case is significantly distinguishable from the case now before us. There, the defendant Hicks was found guilty, and he filed a motion for new trial, setting out three grounds why his motion should be granted. However, this motion was filed three days prior to the entry of his conviction judgments. Six days after his judgment was filed, Hicks filed what he labeled as an amendment to his earlier motion for new trial, but the amended motion contained two new grounds without mentioning his earlier ones.[1]

In the instant case, McIntosh engaged new counsel who timely filed two new motions wherein he repeated the same grounds contained in his prejudgment motion; he merely added affidavits to support the same and only claims he ever asserted as grounds for a new trial. As McIntosh contends on appeal, while his earlier August 28 new-trial motion may have been void and ineffective, his post-conviction motions for new trial fully asserted the

[1] While it is not argued, another reason *Hicks*differs from the McIntosh case is that Rule 33.3 of the Rules of Criminal Procedure and Ark. R. App. P.—Crim. 2(a)(2) and (3)(b) were not in effect when the new-trial motions and notice of appeal were filed in *Hicks*. Then, Rule 36.22 contained the same language Rule 33.3 later adopted, but in 1995 when Hicks was tried, our criminal procedure and appellate rules did not encompass the "deemed denied" language our Criminal Appellate Rule 2(a) and (3) does now. However, even if it had, the trial court failed to rule on Hicks's amended new-trial motion of December 20, 1995, and the amended motion would have been denied on January 19, 1996, the same day Hicks filed his notice of appeal. In other words, Hicks's notice of appeal was a day early.

same and only grounds he wished to have the trial court consider and decide. When the trial court heard and denied McIntosh's motions on September 25, 1998, McIntosh had thirty additional days from the trial court's order of denial to file his notice of appeal; he did so on October 22, 1998. *See* Ark. R. Crim. P. 33.3 and Ark. R. App. P. — Crim. 2(a)(2). We hold McIntosh's statement of the law is correct, and therefore we rule McIntosh has timely filed his appeal. We now turn to the merits of the three points he offers for reversal.

McIntosh first argues the jury panel was tainted as a result of a biased remark made by a panel member, Hannah Dozier, during voir dire. When asked if the panel member knew defense witnesses Kesha Miller or Robert McIntosh, Dozier volunteered that if the Robert McIntosh was known as "Say," she was already biased against him. The trial court excused Dozier from further service. The trial court asked if anyone else knew of Robert McIntosh, and two other panel members said that they might know him. The judge asked if that would make a difference believing or disbelieving the witness's testimony. One of the two panel members, Janaytha Perry, said, "No, sir," at which point Tommy McIntosh's counsel added, "To make sure that they understand, this [witness] is Robert McIntosh, Jr. . . . and not 'Say' McIntosh, Sr." Both Perry and the other inquiring member, Marilyn Jones, indicated they understood. The trial court then allowed the two witnesses to be sworn, and the State and defense counsel selected twelve jurors. After the jurors were selected, defense counsel asked for a mistrial, stating Dozier's earlier remarks had biased the jury panel against the defendant. The trial court disagreed, and denied the request, stating, "The way the record appears now, it appears that it's been cleared up that they're [Robert McIntosh, Jr. and Robert 'Say' McIntosh, Sr.] not the same person." The trial court was correct in its ruling.

Trial judges are granted wide latitude of discretion in granting or denying a motion for mistrial, and we will not reverse the trial court's decision absent an abuse of that discretion or manifest prejudice to the complaining party. *Bragg v. State*, 328 Ark. 613, 946 S.W.2d 654 (1997). The rule is also settled that a jury is presumed to be unbiased and qualified to serve, and the burden is on the appellant to show otherwise. *Esmeyer v. State*, 325 Ark. 491, 930 S.W.2d 302 (1996). Here, appellant McIntosh failed to show

Dozier's comments had in anyway prejudiced the remaining jury panel, and, in fact, defense counsel clarified any existing misunderstanding that the witness who was to testify was not Robert "Say" McIntosh. Again, it was "Say" McIntosh against whom Dozier had expressed a bias. Thus, we cannot say that the trial court abused its discretion in denying the motion for mistrial.

In his second point, McIntosh contends the trial court erred in denying his mistrial motion when the prosecutor made remarks during opening argument that McIntosh claims violated his Fifth Amendment right not to be compelled to testify against himself. McIntosh's felony charges resulted from a shooting incident that took place from a second-story balcony of an apartment rented by McIntosh's girlfriend, Kesha Miller. In opening remarks, the deputy prosecutor stated the following:

> They [the victims] both look up, up to the balcony to the second floor, and they see this Defendant with a handgun pointing down onto the ground, but looking straight ahead talking to someone else. And then they're going to testify there are two to three more shots from this handgun. They watch, and they hear the sounds again. They hear the gunshots. They see the bullets hitting the dirt, and the dirt flying up. They see sparks from one of the bullets hitting a rock. They can feel the vibrations of the bullets in the ground, and they also, they feel a little afraid.
>
> * * *
>
> He [the witness] also looks up, and he sees this Defendant standing on the balcony, having a handgun, pointing it down, and he had, shoots two three times. He sees the dirt flying. He hears gunshots. *Perhaps the only person there that did not see the gunshots, did not feel any fear at all about what was going on is the Defendant himself, because he wasn't looking where he was shooting. He wasn't standing on the ground. He wasn't feeling the vibrations.* (Emphasis added.)

McIntosh's counsel objected to the prosecutor's remarks on Fifth Amendment grounds, contending that McIntosh was the only person who could refute the remarks. He also submitted that the prosecutor's comments were not within the proper scope of opening statement because the comments ventured into speaking of sights, feelings, and emotions of McIntosh. Such arguments have no merit. In making his opening argument, the prosecutor knew the State had three witnesses (the two victims and a third witness) who

would identify Tommy McIntosh as the person they saw on the second-story balcony, firing a gun while not looking in the direction that he was pointing the gun. Obviously, the State's witnesses could fairly testify that, because they saw him shooting his gun from the balcony, Tommy McIntosh did not feel the vibrations on the ground, nor did he feel any fear about what was going on. The prosecutor's opening remarks were fair inferences from the evidence he intended to, and did, present at trial. Accordingly, McIntosh's Fifth Amendment right was not violated in these circumstances.

In his final argument, McIntosh asserts that the trial court erred in denying his request for new trial because extraneous information was brought to the jury's attention during the deliberations, and undue influence was improperly brought to bear upon a juror. In support of Mcintosh's motion, his aunt, Leanna Godley, averred that two jurors told her that, "if they did not vote for McIntosh's conviction, they would be penalized." Godley also stated that two jurors said that, during deliberations, some other jurors related McIntosh had been previously convicted of drug charges and sentenced, but had been released early. In addition, McIntosh offered testimony of a juror, Tamara Townsend, who asserted she felt threatened by another juror (Dr. Joseph Kueter), and if she had not felt like she would have been "penalized," she would have voted not guilty.[2] The trial judge called Dr. Kueter as a witness and the doctor denied making such threats, nor did he recall hearing any threats. Townsend further claimed that McIntosh's earlier conviction was discussed and McIntosh should be given a stronger sentence because he "knows how to beat the system."

[redacted] McIntosh's arguments bearing on juror misconduct are meritless. Regarding juror Townsend's charge that alleged threats had been made during deliberations that caused her to fear voting in McIntosh's favor, our law is clear that such juror testimony is impermissible. Rule 606(b) controls and reads as follows:

> Upon an inquiry into the validity of a verdict or indictment, *a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations to the effect of anything upon his or any other juror's mind or emotions as influencing him to asset [assent] to or dissent from the*

[2] Jurors Dr. Kueter and Kessmidge Daniels denied hearing (or making) any threats, although Daniels recalled hearing McIntosh had "tricked the system to get [out], so he needed to serve a longer term."

> *verdict or indictment or concerning his mental processes in connection therewith*, nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received, but a juror may testify on the questions whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. (Emphasis added.)

See also Fulmer v. State, 337 Ark. 177, 987 S.W.2d 700 (1999); *Tosh v. State*, 278 Ark. 377, 646 S.W.2d 6 (1983).

Concerning McIntosh's final allegation that juror misconduct resulted from the jurors' discussion of McIntosh's earlier drug conviction and commutation of his sentence for same, we fail to see the error or any ensuing prejudice. McIntosh was tried as a habitual offender, thus, his prior conviction and sentence were before the jury. From the testimony taken at trial, it was obvious to the jury that McIntosh was not serving time when the present felony charges were filed, although he earlier had been awarded a fifty-year sentence. The decision whether to grant a new trial is left to the sound discretion of the trial court, and it is not reversed in the absence of an abuse of discretion or manifest prejudice to the complaining party. *Vasquez v. State*, 287 Ark. 468, 701 S.W.2d 357 (1985). No such abuse of discretion or manifest prejudice was demonstrated in the instant case.

For the reasons set out above, we affirm.

THORNTON, J., not participating.

Nakia BAKER *v.* ARKANSAS
DEPARTMENT OF HUMAN SERVICES

99-526 8 S.W.3d 499

Supreme Court of Arkansas
Opinion delivered January 13, 2000

Blackmon-Solis & Moak, L.L.P., by: *DeeNita Moak*, for appellant.

David K. Overton, for appellees.

Kathleen O'Connor, Attorney Ad Litem for appellee minors.

DONALD L. CORBIN, Justice. Appellant Nakia Baker appeals the judgment of the Pulaski County Chancery Court terminating her parental rights to her children D.R., age 8, and C.R., age 6. For reversal, Appellant argues that the chancellor erred: (1) in finding that there was sufficient evidence to terminate her parental rights, and (2) by not placing the children with their maternal grandmother. Counsel for Appellant also seeks attorney's fees on appeal. The payment of such fees presents a significant issue in need of clarification or development of the law; thus, our jurisdiction is pursuant to Ark. Sup. Ct. R. 1-2(b)(5). We affirm.

Facts and Procedural History

Appellant's minor children were taken into custody by Appellee Arkansas Department of Human Services ("DHS") on April 29, 1997. An emergency hearing was held on May 7, 1997, and the chancery court found that DHS had probable cause to bring the children into foster care. Evidence was introduced that Appellant had left the children with a friend, but then failed to return and pick them up. There was also evidence that C.R. had reported being sexually abused by Appellant's ex-boyfriend, who is also the custodial father of Appellant's two minor daughters. The chancellor ordered Appellant to submit to a psychological evaluation to determine what type of services, if any, she may need. Appellant was also ordered to attend parenting classes, submit to random drug screens, and obtain stable housing and employment.

An adjudication hearing was held on June 23, 1997, and the record reflects that there was testimony by the children involving allegations of sexual abuse. There was also testimony from the children's foster mother regarding the children's sexualized behavior, as well as the emotional problems they were experiencing. The

chancellor found that the minor children were dependent-neglected and ordered that they remain in the custody of DHS. The court continued her orders from the emergency hearing, and further ordered Appellant to attend outpatient counseling with her children. At the conclusion of the hearing, the court specifically warned Appellant to cooperate with DHS or face losing her children permanently.

In response to the chancellor's orders, DHS instituted a family preservation case plan for Appellant and her children with the goal established as reunification. A review hearing was held on October 13, 1997, to determine if Appellant was complying with the chancellor's orders. It was revealed that Appellant had failed to attend outpatient counseling with either child after repeated request by the therapist. Testimony by the DHS caseworker also indicated that Appellant had missed two separate appointments for drug and alcohol assessments. C.R.'s therapist testified that the child was suffering from post-traumatic stress disorder and suffered from a history of sexual abuse, as well as a history of neglect. The therapist also testified that if the goal in the case was reunification, it would be necessary for the primary care giver to participate in therapy sessions.

A second review hearing was held over four months later on March 2, 1998. C.R.'s therapist testified that Appellant had started attending her son's therapy sessions in January. The therapist also testified that C.R. required incredible structuring and consistency, as well as constant supervision due to his tendencies to inappropriately touch other children.

Appellant testified that she was not currently employed due to health problems. She further testified that since September 1997, she had held four different jobs, the longest one was for a month and a half. Appellant admitted that she had not become involved in C.R.'s therapy until January, but blamed her lack of participation on the fact that she was depressed. She asked the chancellor to give her some more time to prove that she could be a productive parent. The chancellor agreed to Appellant's request and set the termination hearing for five months later. The chancellor, however, cautioned Appellant that termination of her rights would become the goal if Appellant failed to make any progress in the case.

The termination hearing was subsequently held on August 10 and September 14, 1998. The children's foster home case manager testified that of the eighteen visitations scheduled, Appellant missed ten of those visits. Furthermore, Appellant frequently failed to notify anyone that she was not showing up for visitation, leaving her children with the expectation that they were going to visit with their mother. Both the case manager and the children's foster mother testified that after Appellant failed to show up for visitation both children would become upset. D.R. tended to bottle his emotions up, while C.R. would become extremely aggressive, and it would sometimes take days to calm him down. During one of the visits that Appellant attended, she admitted to the case manager that during her previous visit, she had been in a bad mood and had taken some Valium and that people in the car with her had been smoking marijuana.

C.R.'s therapist testified that Appellant had become more involved in the child's therapy sessions until the middle of May 1998; after that date her attendance declined. The therapist admitted that he saw some improvement in Appellant's parenting skills, but further explained that such improvement was often short-lived, and he would then see recurrences of the same problems. He also testified regarding examples of situations where Appellant exhibited poor judgment in dealing with C.R., including bringing her fiancé and his daughter to a therapy session. Finally, the therapist testified that after a session attended by both Appellant and her fiancé, he discovered a substance he believed to be crack cocaine. Appellant, however, denied that it belonged to her or to her fiancé.

A representative from Suspected Child Abuse and Neglect ("SCAN") testified regarding her agency's repeated attempts to offer in-home parenting services to Appellant. As of February 1998, Appellant had only participated in two sessions, even though SCAN had made ten attempts to schedule appointments. The representative also testified that SCAN is only required to make two attempts at arranging parenting classes before a parent is put on an inactive list. Finally, the SCAN representative reported that the house Appellant was residing in had no stove, no refrigerator, and no beds and was in need of major repairs. Appellant testified that she had missed visitation and therapy sessions due to health problems, as well as transportation problems. She blamed her inability to arrange parenting classes on conflicts with her schedule. She also argued that

she was unable to avail herself of the parenting classes because SCAN discontinued the program. Appellant admitted, however, that after the SCAN program ended, her DHS caseworker provided her with a referral to Next Step Teen Parenting.

Appellant also alleged that the DHS caseworker failed to return her calls. The DHS caseworker testified, however, that he repeatedly attempted to contact Appellant, but that her phone was usually disconnected and the pager number she provided to him was incorrect. He also testified that he was aware of only two drug screens performed on Appellant, both of which were negative, even though he set up several other appointments for the drug screens and arranged transportation for Appellant. The caseworker concluded his testimony by recommending the termination of Appellant's parental rights. At the conclusion of the hearing, a report from Bridgeway Hospital was also admitted after C.R., who was five years of age at the time, had tried to hang himself with the belt from his robe. During the four weeks that C.R. was in Bridgeway, Appellant did not visit him at all, even after the staff encouraged her to visit the child.

After taking the matter under advisement, the chancellor issued a letter opinion on October 7, 1998, terminating Appellant's parental rights pursuant to Ark. Code Ann. § 9-27-341 (Supp. 1997). The court recognized that Appellant had made some efforts to comply with her previous orders, but that such attempts had been inconsistent and none of the orders sought to rehabilitate her were ever completed. The chancellor further stated that Appellant's failure to visit with the children on a consistent basis had hurt both children, as evidenced by C.R.'s suicide attempt. The chancellor specifically found as follows:

> The Court cannot say that Ms. Baker has made a good faith effort to try to rehabilitate herself or that she would suddenly begin following the Court's orders and actually rehabilitate herself within a reasonable amount of time consistent with both children's health, safety, and welfare. Both children have serious behavior problems, particularly C.R., which must be dealt with consistently and daily. Ms. Baker has shown a complete lack of understanding as to her children's needs and her level of participation.

An order terminating Appellant's parental rights was then entered on January 12, 1998. This appeal followed.

Standard of Review

Our law is well settled that when the burden of proving a disputed fact in chancery is by clear and convincing evidence, the question that must be answered on appeal is whether the chancery court's finding that the disputed fact was proven by clear and convincing evidence was clearly erroneous. *J.T. v. Arkansas Dep't of Human Servs.*, 329 Ark. 243, 947 S.W.2d 761 (1997); *Anderson v. Douglas*, 310 Ark. 633, 839 S.W.2d 196 (1992). Clear and convincing evidence is that degree of proof that will produce in the factfinder a firm conviction as to the allegation sought to be established. *J.T.*, 329 Ark. 243, 947 S.W.2d 761. In resolving the clearly erroneous question, we must give due regard to the opportunity of the chancery court to judge the credibility of witnesses. *Id.*

Termination of Appellant's Parental Rights

For her first point on appeal, Appellant argues that there was not sufficient evidence to terminate her parental rights. Appellant alleges that the chancery court's finding that she failed to complete any of the orders aimed at reunification was a blatant misstatement of the history of the case. Appellees DHS and the minor children, through their attorney *ad litem*, argue that there was clear and convincing evidence to prove that DHS put forth meaningful efforts to rehabilitate the conditions that led to the removal of the children, but that Appellant failed to avail herself of those services. We agree with Appellees.

Section 9-27-341 requires that an order terminating parental rights must be based on clear and convincing evidence. Subsection (b)(2) sets forth the grounds for terminating parental rights, which include in part:

> (A) That a juvenile has been adjudicated by the court to be dependent-neglected and has continued out of the home for twelve (12) months, and, despite a meaningful effort by the Department of Human Services to rehabilitate the home and correct the conditions which caused removal, those conditions have not been remedied by the parent.

This court has held that when the issue is one involving the termination of parental rights, there is a heavy burden placed

upon the party seeking to terminate the relationship. *J.T.*, 329 Ark. 243, 947 S.W.2d 761; *Anderson*, 310 Ark. 633, 839 S.W.2d 196; *Bush v. Dietz*, 284 Ark. 191, 680 S.W.2d 704 (1984). Termination of parental rights is an extreme remedy and is in derogation of the natural rights of the parents. *Wade v. Arkansas Dep't of Human Servs.*, 337 Ark. 353, 990 S.W.2d 509 (1999); *J.T.*, 329 Ark. 243, 947 S.W.2d 761; *Anderson*, 310 Ark. 633, 839 S.W.2d 196. This court recognized in *J.T.*, however, that parental rights should not be allowed to continue to the detriment of the child's welfare and best interest. To illustrate that the best interest of the child is the primary consideration in these cases, this court in *J.T.* stated:

> While we agree that the rights of natural parents are not to be passed over lightly, these rights must give way to the best interest of the child when the natural parents seriously fail to provide reasonable care for their minor children. Parental rights will not be enforced to the detriment or destruction of the health and well-being of the child.

Id. at 248, 947 S.W.2d at 763. Subsection (a) of section 9-27-341 sets forth in relevant part the intent behind the law governing termination of parental rights:

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

Here, Appellant's repeated failure to comply with the chancery court's orders designed to remedy the problems that warranted removal in the first place is the exact type of situation this statute was designed to remedy. In her attempt to argue that the chancery court misstated the history of this case, Appellant sets forth examples of efforts she made to comply with the court's orders. What Appellant fails to realize, however, is that her mere attempts constituted nothing more than sporadic compliance at best. Appellant has failed to show any consistent improvements in terms of visitation, employment, or housing. In fact, her pattern of inconsistent visitation continued to harm her children even while they were not in her custody. In *Crawford v. Arkansas Dep't of Human Servs.*, 330 Ark. 152, 951 S.W.2d 310 (1997), this court upheld the termination of parental rights in a case where the evidence indicated that the

parent failed to maintain reasonable contact with his sons for almost a year while they were in protective custody. Likewise, Appellant has failed to maintain significant contact with her sons over the past year or to remedy the other problems that led to the removal of her children from her home.

Appellant's attempts to place blame for lack of improvement with DHS is also unpersuasive. Appellant's testimony regarding her attempts to comply with the chancellor's orders conflicted with the testimony of therapists and caseworkers. This court has said that we will defer to the chancery court's evaluation of the credibility of witnesses. *Wade*, 337 Ark. 353, 990 S.W.2d 509. Here, the chancellor found that the testimony of the therapists and caseworkers was more credible than the testimony of Appellant. A review of the record combined with the deference granted to the chancellor establishes that such a finding was not clearly erroneous.

Appellant also argues that the chancery court did not find that she was an unfit parent, and thus, her rights should not be terminated. Her argument ignores this court's decision in *J.T.*, 329 Ark. 243, 947 S.W.2d 761, where we held that the court's finding that the appellant was unable to be the type of parent that her child needed and was unable to learn how to be that parent was a sufficient finding of her unfitness. Testimony throughout the hearings held in this case repeatedly indicated that Appellant's children needed consistency and supervision above all else. Appellant's actions, or lack thereof, evidenced the fact that she was unable to provide her children with either consistency or supervision. Again, a review of the record does not indicate that the chancellor erred in finding that Appellant was unable to provide the type of setting that her children required. Based on the foregoing, we affirm the chancellor's order terminating Appellant's parental rights.

Denial of Placement with the Maternal Grandmother

For her second point on appeal, Appellant argues that it is standard practice in dependency-neglect proceedings for family members to be considered as placements for children who would otherwise enter or remain in the foster care system or be adopted outside of their biological parent's families. As the children's attorney *ad litem* points out, however, Appellant failed to make any

formal motions requesting that the children be placed with her mother. Furthermore, the maternal grandmother never intervened in this action to seek placement of the children with her.

This court held in *Anderson*, 310 Ark. 633, 839 S.W.2d 196, that when the circumstances reveal a studied indifference to the child, termination must result. Based on that holding, it would be illogical for this court to now hold that the chancery court erred in refusing to place the children with the maternal grandmother when the evidence revealed an indifference to the children's welfare on her part. The chancellor heard testimony regarding the maternal grandmother's refusal to accept placement of the children when DHS initially took them into custody. The grandmother attributed her initial refusal to using "tough love" on her daughter so that she would work to get her children back. There was also evidence presented at the hearings, however, that revealed a lack of visitation on the grandmother's part while the children were in foster care. The DHS case manager testified that while the grandmother agreed to accept placement of the children, she did not appear to really want the responsibility of dealing with the children. Finally, even when the grandmother testified about her willingness to take the children, she focused the situation on her daughter's needs, not the needs of the children.

In matters involving the welfare of young children, the appellate court gives great weight to the trial judge's personal observations. *In re Adoption of K.F.H. and K.F.H.*, 311 Ark. 416, 844 S.W.2d 343 (1993); *M.T. v. Arkansas Dep't of Human Servs.*, 58 Ark. App. 302, 952 S.W.2d 177 (1997). The chancellor relied on the above-enumerated testimony in declining to place the children with their maternal grandmother. Obviously, the chancellor had the benefit of witnessing first hand the grandmother's behavior and participation during the pendency of this case; therefore, we cannot say she clearly erred in refusing to place the children with the maternal grandmother.

Payment of Reasonable Attorney's Fees

For her third point on appeal, Appellant argues that the chancellor erred in denying the motion for attorney's fees for work performed on this appeal. Appellant's counsel in the present matter

was appointed by the chancellor pursuant to Ark. Code Ann. § 9-27-316 (Repl. 1998), which requires appointment of counsel for indigent parents in termination cases. The order appointing counsel to represent Appellant specifically stated that the appointment was for all stages of the proceedings, through appeal. Counsel filed a motion for attorney's fees with the chancery court on June 28, 1999. The chancellor refused to pay Appellant for any work performed after the notice of appeal was filed, because she found that her court no longer had jurisdiction over the case.

Appellant argues that requiring counsel to represent an indigent parent *pro bono* in a termination case amounts to an unconstitutional taking. We agree. This court has held that the services of an attorney are a specie of property subject to Fifth and Fourteenth Amendment protection. *Arnold v. Kemp*, 306 Ark. 294, 813 S.W.2d 770 (1991). In *Arnold*, this court held that the appointment of counsel in criminal cases results in a taking of the appointed counsel's property for which he must be justly compensated. *Id.* We recognize that termination cases are civil in nature. The principles that require payment of attorney's fees for representing an indigent criminal defendant, however, are applicable to termination cases as well. *See Phillips v. Arkansas Dep't. of Human Servs.*, 64 Ark. App. 201, 980 S.W.2d 276 (1998). It would, therefore, be unconstitutional for the chancellor to appoint counsel to represent Appellant, and then deny that counsel reasonable payment for services rendered.

Counsel for Appellant previously filed a motion with this court to withdraw as counsel on appeal, or in the alternative for attorney's fees. We denied her motion to withdraw as counsel. We reserved ruling on the motion for attorney's fees. In accordance with the foregoing opinion, we now request counsel for Appellant to submit an affidavit to this court setting forth the following information: (1) the date of appointment; (2) the court which appointed counsel; (3) the number of hours expended by counsel in research, court appearances, and preparation of pleadings and briefs; (4) counsel's customary rate of compensation in similar cases; (5) the customary rate of compensation in similar cases of attorney's in the community; (6) expenses incurred by counsel which are directly attributable to the case; (7) the experience of counsel in the representation of indigent parents; and (8) the relative complexity of the

case. This affidavit shall be filed no later than thirty days after the issuance of the mandate.

Affirmed.

GLAZE, J., dissents.

Jimmy Lynn PYLE and John F. Tunnicliff *v.* STATE of Arkansas

CR 99-85 8 S.W.3d 491

Supreme Court of Arkansas
Opinion delivered January 13, 2000

Louis Etoch, for appellant Jimmy Lynn Pyle.

Chris Carter, for appellant John F. Tunnicliff.

Mark Pryor, Att'y Gen., by: *Brad Newman*, Ass't Att'y Gen., for appellee.

DONALD L. CORBIN, Justice. Appellants Jimmy Lynn Pyle and John F. Tunnicliff appeal the judgments of the Baxter County Circuit Court convicting each of them of two counts of possession of methamphetamine and one count of simultaneous possession of drugs and firearms. In addition, Pyle appeals his convictions of one count of possession of marijuana and one count of possession of drug paraphernalia. Tunnicliff appeals his conviction of being a felon in possession of a firearm. Pyle was sentenced to a term of life imprisonment. Tunnicliff was sentenced to a term of fifty years' imprisonment. Our jurisdiction is thus pursuant to Ark. Sup. Ct. R. 1-2(a)(2). Each Appellant raises several points for reversal. We find no error and affirm.

Facts

Tunnicliff and Pyle were arrested following a prearranged reverse-buy sting operation in Mountain Home when an undercover police agent sold them methamphetamine. The police had been working with a confidential informant who was an acquaintance of Tunnicliff's and knew that he wanted to purchase methamphetamine. The informant had agreed to work with law enforcement officials in exchange for the dismissal of charges pend-

ing against him, namely driving while intoxicated (DWI) and possession of marijuana.

The informant contacted Tunnicliff and offered to arrange a sale of three ounces of crystal methamphetamine at a price of $1,300 per ounce. Tunnicliff agreed to the purchase, and a meeting was arranged for the following day at a nearby storage facility. Tunnicliff, however, failed to appear at that meeting. The informant again contacted Tunnicliff, who explained that he was unable to find transportation to the meeting. Another meeting was scheduled, and Tunnicliff told the informant he would arrive at the meeting in a white car. The following day, Tunnicliff arrived at the storage facility in a white Lincoln driven by Pyle. An undercover officer was present along with the informant. The officer passed the drugs to Tunnicliff and Pyle. Both men inspected the quality of the drugs by sniffing them; Tunnicliff even went so far as to taste them. Tunnicliff and Pyle purchased all three ounces of the methamphetamine, and subsequently, both men were arrested.

Police conducted an inventory search of the car, which was registered to Pyle. A black bag was found in the front seat of the vehicle. It contained a checkbook belonging to Pyle, a marijuana cigarette, and a semi-automatic handgun. Police also found a small gray case in a pouch behind the driver's seat that contained drug paraphernalia and marijuana. Additional crystal methamphetamine was also found in the car. Officers testified that at the time of his arrest, Pyle had a white powdery substance on his moustache. A video tape was also introduced at trial that depicted Pyle having problems with his nose while he was being held after his arrest. Furthermore, a search of both suspects revealed that each man was carrying large amounts of cash on his person.

Following his arrest, Tunnicliff completed and signed a sworn affidavit stating the Pyle did not have any knowledge of the pending drug sale. Tunnicliff, who is disabled, stated that he told Pyle he needed a ride to the storage facility to look at some furniture he was thinking of buying. Tunnicliff also claimed that the handgun belonged to the informant and that Tunnicliff had concealed it on his person until the time of the drug transaction. At trial, Tunnicliff, who asserted the affirmative defense of entrapment, testified that the facts contained in his affidavit were true. Pyle, who relied on the defense of lack of evidence, did not testify at trial. Following

their convictions, each Appellant filed a motion for a new trial. Both motions were denied, and this appeal followed.

Appellants' Joint Issues on Appeal

Appellants assert that there are overlapping issues presented in this matter. In his brief, Pyle attempts to incorporate three of Tunnicliff's points for reversal: (1) the reverse-buy operation amounted to entrapment as a matter of law; (2) it was illegal for law enforcement officers to use real drugs during the sting operation; and (3) the confidential informant should not have been allowed to testify. During the trial of this matter, however, Pyle never attempted to argue any of these points. He never asserted the affirmative defense of entrapment or sought a jury instruction on that defense. Pyle also failed to object to the law enforcement officers' use of real drugs during the reverse buy. Our law is well settled that we will not consider an argument raised for the first time on appeal. *Ayers v. State*, 334 Ark. 258, 975 S.W.2d 88 (1998); *McGhee v. State*, 330 Ark. 38, 954 S.W.2d 206 (1997). A party cannot change the grounds for an objection or motion on appeal, but is bound by the scope and nature of the arguments made at trial. *Ayers*, 334 Ark. 258, 975 S.W.2d 88; *Henderson v. State*, 329 Ark. 526, 953 S.W.2d 26 (1997). Pyle's failure to raise the arguments relating to the reverse buy and the use of real drugs in that buy precludes our review of those points as applicable to his appeal.

As to the issue whether the confidential informant should have been allowed to testify, Tunnicliff and Pyle argue that it was illegal for the State to drop the DWI charge pending against the informant in exchange for his cooperation because Arkansas law provides that no such charges shall be reduced. *See* Ark. Code Ann. § 5-65-107 (Repl. 1977). It is their contention that such action is tantamount to bribery, and thus, the informant should not have been allowed to testify. Their argument fails because neither Tunnicliff nor Pyle ever objected to the informant testifying. In fact, they made no objections to any of the statements he made while on the witness stand. Only Tunnicliff raised the issue at all, but not until the close of the State's case.

The law is well settled that to preserve an issue for appeal a defendant must object at the first opportunity. *Vaughn v. State*, 338

Ark. 220, 992 S.W.2d 785 (1999); *Smallwood v. State*, 326 Ark. 813, 935 S.W.2d 530 (1996); *Hill v. State*, 285 Ark. 77, 685 S.W.2d 495 (1985). In *Marts v. State*, 332 Ark. 628, 968 S.W.2d 41 (1998), this court stated that a party who does not object to the introduction of evidence at the first opportunity waives such an argument on appeal. The policy reason behind 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.* Thus, their failure to object to the informant's testimony at the first opportunity bars them from arguing this point on appeal. We turn next to those issues raised solely by Tunnicliff.

Tunnicliff's Issues on Appeal

Tunnicliff contends that the trial court erred in finding that the use of a reverse buy is permissible under Arkansas law. He argues that nothing in Arkansas law permits law enforcement officials to participate in reverse buys. Tunnicliff argues further that reverse buys violate Ark. Code Ann. § 5-64-401(a) (Repl. 1997), which prohibits the sale of controlled substances by any persons, and that there is no statutory exception for police officers to sell controlled substances. Tunnicliff urges this court to adopt the holdings of a minority of jurisdictions that have held that reverse buys constitute entrapment as a matter of law.

While this is an issue of first impression in this jurisdiction, the Eighth Circuit Court of Appeals has recently held that participation by government agents or informants in the illegal manufacture or distribution of drugs is a recognized means for the government to obtain convictions in drug-related offenses. *United States v. Berg*, 178 F.3d 976 (8th Cir. 1999). The *Berg* decision does discuss the possibility of the government's conduct being so outrageous as to warrant reversal of a conviction. The facts of this case, however, do not give rise to a finding of outrageous government conduct. Indeed, Tunnicliff presents no convincing argument as to why this court should hold that reverse buys constitute entrapment as a matter of law. This court has consistently refused to consider an argument where it is not apparent without further research that the argument is well taken. *See, e.g., McGehee v. State*, 338 Ark. 152, 992 S.W.2d 110 (1999); *Miller v. State*, 328 Ark. 121, 942 S.W.2d

825 (1997). Accordingly, we will not consider Tunnicliff's argument regarding reverse buys on appeal.

Related to the legality of the use of a reverse buy is the issue whether the police are allowed to use real drugs during a reverse buy. Tunnicliff argues that the Uniform Controlled Substance Act, codified at Ark. Code Ann. §§ 5-64-101 to -608 (Repl. 1997), does not provide an exception for any person to engage in the sale of drugs, including law enforcement officials. This argument ignores, however, section 5-64-506, which specifically exempts state officers from liability under the Act when engaged in the performance of their duties. In adopting this exception, the legislature clearly recognized the possible need of law enforcement officials to utilize real drugs during the course of undercover sting operations. The very facts of this case indicate the necessity of using real drugs in undercover operations. According to the testimony of eyewitnesses, both Tunnicliff and Pyle sampled the substance to be sold before handing over the cash. If a counterfeit substance had been used, law enforcement officials may well have been placed in danger, a danger made even more real by the fact that a firearm was found in Pyle's car.

[redacted] Tunnicliff also argues that the only reason real drugs were used was to enhance any penalty received as a result of a conviction. Again, Tunnicliff fails to support this argument with any convincing legal authority. Absent any convincing argument or authority, we will not consider this issue on appeal. *McGehee*, 338 Ark. 152, 992 S.W.2d 110; *Miller*, 328 Ark. 121, 942 S.W.2d 825.

[redacted] Next, Tunnicliff argues that it was error for the trial court to refuse to dismiss the firearm charges against him. At the close of the prosecution's case, Tunnicliff moved to dismiss the firearm charges on the ground that there was not substantial evidence to link him to the gun. As the State correctly points out, however, Tunnicliff failed to renew this motion at the conclusion of the case. As we stated in *King v. State*, 338 Ark. 591, 999 S.W.2d 183 (1999), our procedural rules require that a motion for a directed verdict be brought at the conclusion of the prosecution's evidence and again at the close of the case. *See also* Ark. R. Crim. P. 33.1. Tunnicliff's failure to renew his motion at the close of his case precludes our review of this point.

Finally, Tunnicliff argues that the trial court erred in running the sentences for the firearm convictions consecutively instead of concurrently. It is well established that the question whether sentences should run consecutively or concurrently lies solely within the province of the trial court. *Brown v. State*, 326 Ark. 56, 931 S.W.2d 80 (1996); *Love v. State*, 324 Ark. 526, 922 S.W.2d 701 (1996). The appellant assumes a heavy burden of demonstrating that the trial judge failed to give due consideration to the exercise of his discretion in the matter of the consecutive sentences. *Teague v. State*, 328 Ark. 724, 946 S.W.2d 670 (1997); *Brown*, 326 Ark. 56, 931 S.W.2d 80. The only reason Tunnicliff sets forth in support of his contention that the trial court abused its discretion is that the court gave no reason for running the drug sentences concurrently while running the firearm sentences consecutively. The trial court, however, is not required to explain its reason for running sentences consecutively. *See Smallwood*, 326 Ark. 813, 935 S.W.2d 530. Tunnicliff has thus failed to bear his burden of proof with regard to this point on appeal. We, therefore, cannot say that the trial court abused its discretion in running the sentences consecutively. Having concluded that there is no merit to Tunnicliff's arguments, we address those points raised solely by Pyle.

Pyle's Issues on Appeal

Pyle's first argument is that the trial court erred in refusing to dismiss the charges against him for lack of evidence. The record reflects that Pyle moved for a directed verdict at the close of the State's case, arguing that there was not substantial evidence to link him to any of the charges. Specifically, defense counsel stated:

> Your Honor, I'd move for a directed verdict on all charges on grounds of insufficient evidence. The State has presented numerous theories, none of which are supported by direct evidence linked to my client. I feel that the evidence is insufficient as a matter of law and move for a directed verdict on all charges.

Pyle's motion was insufficient to preserve this issue for appellate review. Ark. R. Crim. P. 33.1 provides in relevant part:

> 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. [Emphasis added.]

This court has stated that a general motion for a directed verdict does not preserve for appeal issues regarding sufficiency of the evidence. *Fultz v. State*, 333 Ark. 586, 972 S.W.2d 222 (1998). Accordingly, we will not address Pyle's argument pertaining to the sufficiency of the evidence.

[redacted] Pyle's remaining argument on appeal is that the trial court erred in refusing to grant his motion for a new trial because of ineffective assistance of counsel. Ordinarily, such claims are raised under Ark. R. Crim. P. 37. This court, however, has addressed claims of ineffectiveness on direct appeal when the issues were previously considered by the trial court, as on a motion for a new trial, and the facts surrounding the claim were fully developed. *See Willis v. State*, 334 Ark. 412, 977 S.W.2d 890 (1998); *Smith v. State*, 328 Ark. 249, 943 S.W.2d 234 (1997). To prevail on any claim of ineffective assistance of counsel, a petitioner must show first that counsel's performance was deficient. *Weaver v. State*, 339 Ark. 97, 3 S.W.3d 323 (1999); *Thomas v. State*, 330 Ark. 442, 954 S.W.2d 255 (1997). In order to establish such deficient performance, it must be shown that counsel was not functioning as the " 'counsel' guaranteed the petitioner by the Sixth Amendment." *Id.* at 447, 954 S.W.2d at 257. Petitioner must also 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.* We will not reverse the trial court's decision granting or denying postconviction relief unless it is clearly erroneous. *State v. Dillard*, 338 Ark. 571, 998 S.W.2d 750 (1999); *State v. Herred*, 332 Ark. 241, 964 S.W.2d 391 (1998).

Pyle's first allegation involves a purported failure by counsel to enforce a plea bargain. The record reflects that several discussions took place between counsel for Pyle and the deputy prosecuting attorney regarding a possible plea agreement. The deputy prosecuting attorney testified that Pyle never accepted any of the offers he made. Pyle alleges that his attorney communicated to him, on the morning of the trial, a plea bargain of ten years' imprisonment, which he accepted. Pyle further alleges that the State then conditioned his plea agreement on Tunnicliff also accepting a plea agreement. The deputy prosecuting attorney denied ever placing such a

condition on any plea agreement. Tunnicliff's trial counsel testified that the prosecuting attorney had made such a conditional offer, but that his client refused to plead guilty.

This court has held that until a trial court accepts a plea bargain, it has no binding effect. *See Kilgore v. State*, 313 Ark. 198, 852 S.W.2d 810 (1993); *Caldwell v. State*, 295 Ark. 149, 747 S.W.2d 99 (1988). Nothing in the record indicates that Pyle ever attempted to alert the trial court to the fact that he had accepted a plea. He sat through the entire guilt and sentencing phases without any indication that a plea agreement had been accepted. The trial court found that a formal plea never existed, although there had been communications about a possible plea agreement. Based on the foregoing, we cannot say that the trial court erred in finding that no plea agreement existed. We recognize that the testimony regarding the purported plea agreement was in conflict, but conflicts in testimony are for the trial court to resolve, as it is in a superior position to determine the credibility of witnesses. *McCoy v. State*, 325 Ark. 155, 925 S.W.2d 391 (1996). We, therefore, cannot say that Pyle's counsel was ineffective for not enforcing a plea agreement that never existed.

Pyle's second argument on this point is based on his attorney's failure to have his trial severed from Tunnicliff's. Trial counsel testified that he did not seek to sever Pyle's charges because there was an implied joint-defense agreement with Tunnicliff's counsel that Tunnicliff would stand by his affidavit and testify accordingly. The trial court pointed out that it seemed advantageous to try these cases together, considering that Pyle was relying on the defense of innocence, while Tunnicliff accepted all the blame. We agree with the trial court's finding that Appellants' defenses were never antagonistic and, thus, did not warrant severance. This court has repeatedly held that a lawyer's choice of trial strategy, even if it proved ineffective, is not a basis for meeting the test set forth in *Strickland v. Washington,* 466 U.S. 668 (1984). *State v. Slocum*, 332 Ark. 207, 964 S.W.2d 388 (1998); *Vickers v. State*, 320 Ark. 437, 898 S.W.2d 26 (1995). The decision whether to seek severance is one of strategy. *Coston v. State*, 284 Ark. 144, 680 S.W.2d 107 (1984). Accordingly, Pyle's argument on this point is without merit.

Next, Pyle argues that his attorney was ineffective for failing to seek an entrapment instruction. There is no merit to this point. Our law is well established that, if a defendant denies committing an offense, he cannot assert that he was entrapped into committing the offense. *Weaver*, 339 Ark. 97, 3 S.W.3d 323; *Heritage v. State*, 326 Ark. 839, 936 S.W.2d 499 (1996); *Young v. State*, 308 Ark. 647, 826 S.W.2d 814 (1992). In *Vickers*, 320 Ark. 437, 898 S.W.2d 26, this court held that an attorney cannot be declared ineffective for failing to present a defense theory entirely inconsistent with the defendant's denial of committing the crime. Pyle's entire defense centered on the fact that he was innocent, with Tunnicliff accepting all blame. He cannot now claim that his attorney was ineffective for failing to seek an entrapment instruction, which was inconsistent with his defense.

Pyle's fourth claim is that his counsel was ineffective for failing to object or seek an admonition when Tunnicliff stated that he had testified on Pyle's behalf at a parole hearing. This argument, however, is not properly preserved for appellate review. Pyle never argued the impropriety of this statement at trial, in his motion for a new trial, or during the posttrial hearing. This court has refused to consider such a claim unless the surrounding facts and circumstances were fully developed either during the trial or during other hearings conducted by the trial court. *Walker v. State*, 330 Ark. 652, 955 S.W.2d 905 (1997). Because Pyle failed to raise this claim below, we will not consider it.

Finally, Pyle claims his counsel was ineffective for failing to call any witnesses during the sentencing phase. Pyle argues that his counsel should have at least called his wife to testify during the sentencing phase, and that he was prejudiced by the lack of any mitigating evidence presented during the sentencing phase. Again, decisions regarding witness testimony are matters of trial strategy. *See Catlett v. State*, 331 Ark. 270, 962 S.W.2d 313 (1998); *Helton v. State*, 325 Ark. 140, 924 S.W.2d 239 (1996). As previously pointed out, a lawyer's choice of trial strategy, even one that proved ineffective, is not a basis for meeting the *Strickland* test. *Slocum*, 332 Ark. 207, 964 S.W.2d 388. Additionally, Pyle fails to establish what his wife or any other witness would have testified to, and he fails to show how their testimony would have changed the outcome of his case. When a petitioner fails to show what the omitted testimony was and how it could have changed the outcome, we will not grant

postconviction relief for ineffective assistance of counsel. *Johnson v. State*, 321 Ark. 117, 900 S.W.2d 940 (1995). For this reason, Pyle's argument on this point fails.

Rule 4-3(h) Review

Because Pyle received a life sentence, his record has been reviewed for prejudicial error in compliance with Ark. Sup. Ct. R. 4-3(h), and no reversible errors were found.

Dick BARCLAY, Director, Arkansas Department of Finance and Administration *v.* FARM CREDIT SERVICES, *et al.*[1]

99-1432 8 S.W.3d 517

Supreme Court of Arkansas
Opinion delivered January 13, 2000

[1] The certiorari petition filed in this court refers to "Farm Credit Services," but the mandamus petition in chancery court and the case pending before the United States Supreme Court refer to "Farm Credit Services of Central Arkansas." We treat them as the same party.

Beth B. Carson, Chief Counsel, and *Martha Hunt*, for petitioner.

Nichols & Campbell, by: *Mark W. Nichols*, for respondents.

ROBERT L. BROWN, Justice. The matter before this court is a petition for writ of certiorari filed by Dick Barclay, Director, Arkansas Department of Finance and Administration

(DFA). The respondents are Farm Credit Services of Central Arkansas, PCA; Farm Credit Services of Western Arkansas, PCA; Eastern Arkansas Production Credit Association; and Delta Production Credit Associations (the PCAs). The issue raised involves the propriety of a writ of mandamus issued by the chancery court to restrain counsel for DFA from representing the State of Arkansas before the United States Supreme Court. We dissolve the writ of mandamus due to lack of jurisdiction in the chancery court to issue the same.

On July 1, 1999, this court affirmed the summary judgment entered by the Pulaski County Chancery Court in favor of the PCAs because the PCAs were entitled to immunity from the state sales tax and income tax due to their status as "federal instrumentalities." *See State v. Farm Credit Services of Central Arkansas*, 338 Ark. 322, 994 S.W.2d 453 (1999). Throughout that litigation, the State was represented by Martha Hunt, legal counsel for DFA. On July 16, 1999, the State, which continued to be represented by Martha Hunt, moved this court to stay its mandate pending the resolution of its petition for writ of certiorari in the United States Supreme Court. This court stayed its mandate on September 9, 1999, over the objection of the PCAs.

On November 23, 1999, the PCAs filed a petition for writ of mandamus. In that petition, they prayed that the Pulaski County Chancery Court order DFA to refrain from acting in violation of Ark. Code Ann. § 25-16-703(a) (Repl. 1996). Section 25-16-703(a) reads that the Attorney General shall represent the State of Arkansas before the United States Supreme Court. The PCAs prayed that the DFA's legal counsel be stopped from filing the petition for writ of certiorari in that court or, if it already had been filed, be directed to withdraw it. On November 24, 1999, the chancery court orally granted the PCAs' petition for mandamus. The matter was then transferred to another division of the chancery court due to the recusal of the first chancellor. A motion for reconsideration was filed by DFA on December 3, 1999. Attached to the motion was correspondence from the Attorney General in which he declined to act as counsel and a letter from Governor Huckabee appointing Martha Hunt as counsel. On December 8, 1999, the new chancellor denied DFA's motion for reconsideration and issued the writ of mandamus.

Also, on December 8, 1999, DFA filed its petition for certiorari in this court as well as a motion for expedited consideration and an application for temporary relief. In the application for temporary relief, DFA requested that this court stay the mandamus order so that DFA's legal counsel could proceed with the petition before the United States Supreme Court. The deadline for docketing that petition was December 13, 1999. By *per curiam* order handed down on December 10, 1999, we temporarily stayed the chancery court's writ of mandamus in order to permit the certiorari petition to be docketed in the United States Supreme Court, and we ordered the parties to brief (1) the merits of DFA's petition in this court, and (2) the basis for the chancery court's jurisdiction to issue a writ of mandamus. On December 13, 1999, DFA's petition for writ of certiorari was docketed in the United States Supreme Court.

We turn first to the matter of the chancery court's jurisdiction to issue a writ of mandamus in this case to prevent DFA's counsel from representing the State. This court is obligated to raise issues of subject-matter jurisdiction on its own, and we do so in this instance. *See, e.g., Hoyle v. Faucher*, 334 Ark. 529, 975 S.W.2d 843 (1998).

When this court asked for briefs on the question of the chancery court's jurisdiction, the parties briefed the issue of whether the chancery court had in fact issued a writ of mandamus, or whether it, in reality, had issued an injunction to prevent a public official from committing an *ultra vires* act. *See Villines v. Lee*, 321 Ark. 405, 902 S.W.2d 233 (1995). We do not address that issue, because we conclude that the chancery court had no jurisdiction to take the action it did pertaining to *State v. Farm Credit Services of Central Arkansas, supra*, on December 8, 1999.

It is axiomatic that this court takes jurisdiction of a matter once the record on appeal is filed with the Clerk of the Supreme Court. *See, e.g., Heigle v. Miller*, 332 Ark. 315, 965 S.W.2d 116 (1998); *In re Morgan*, 310 Ark. 220, 833 S.W.2d 776 (1992). This court loses jurisdiction to the trial court once the mandate is issued from this court to the trial court. *See First Pyramid Life Ins. Co. of Am. v. Stoltz*, 312 Ark. 516, 849 S.W.2d 525 (1993); *Brimson v. Brimson*, 228 Ark. 562, 309 S.W.2d 29 (1958). A mandate is the official notice of the action taken by the appellate court. 5 AM. JUR. 2D, Appellate Review § 777 (1995). The mandate is directed to the

trial court, and it instructs that court to recognize, obey, and execute the appellate court's decision. *Id.* In the instant case, the mandate had been stayed by this court, which had the effect of preventing reinvestment of jurisdiction in the chancery court. Accordingly, the chancery court had no jurisdiction to act in *State v. Farm Credit Services of Central Arkansas, supra.*

The remaining question then is whether the PCAs could file a new mandamus action subsequent to the mandate's stay to prevent counsel from representing the State in its petition for certiorari before the United States Supreme Court in *State v. Farm Credit Services of Central Arkansas, supra.* Stated differently, was the new mandamus action truly a separate case from the primary litigation, or was it a procedural maneuver to prevent the certiorari petition from being heard by the United States Supreme Court?

We conclude that the mandamus action and resulting writ were so intertwined with the primary litigation as to be part and parcel of it. The stated prayer for relief in the mandamus petition was to prevent DFA's counsel from representing the State in the case before the United States Supreme Court. Indeed, at the time DFA petitioned this court for a writ of certiorari on December 8, 1999, the Attorney General had already declined the invitation to represent the State and Governor Huckabee had appointed Martha Hunt as counsel to represent the State before the United States Supreme Court, under the authority of Ark. Code Ann. § 25-16-702(c) (Repl. 1996). Thus, the effect of the chancery court's writ of mandamus was to thwart the State's certiorari petition from being docketed in the Supreme Court in *State v. Farm Credit Services of Central Arkansas, supra.*

Moreover, the appropriate avenue for relief to resolve the legal counsel issue would have been a petition filed before this court at the time the mandate was stayed. The PCAs were aware that the mandate was stayed on September 9, 1999, and would continue to be stayed pending resolution of the certiorari petition before the United States Supreme Court. Yet, the PCAs failed to petition this court for relief under § 25-16-703(a), when it was clear that this court retained jurisdiction over the matter and that the chancery court had no authority to act. Instead, the PCAs waited to file the mandamus petition until almost three months after the mandate was stayed. We cannot countenance a mandamus action brought under

these circumstances to derail appellate review of a certiorari petition filed in the United States Supreme Court.

We hold that the chancery court lacked subject-matter jurisdiction to issue the writ of mandamus in this matter.

Writ dissolved.

Albert BESHEARS *v.* STATE of Arkansas

CR 98-97 8 S.W.3d 32

Supreme Court of Arkansas
Opinion delivered January 13, 2000

Randel Miller, P.A., for appellant.

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

ANNABELLE CLINTON IMBER, Justice. This is a second appeal from the denial of appellant Albert Beshears's petition for postconviction relief pursuant to Ark. R. Crim. P. 37. *Beshears v. State*, 329 Ark. 469, 947 S.W.2d 789 (1997) (*Beshears II*). Mr. Beshears had entered a conditional plea of guilty to possession of a controlled substance with intent to deliver. Ark. R. Crim. P. 24.3(b). He appealed the denial of his motion to suppress evidence seized from his premises pursuant to a search warrant. We affirmed the trial court's denial of the motion to suppress. *Beshears v. State*, 320 Ark. 573, 898 S.W.2d 49 (1995). Mr. Beshears subsequently filed a petition for postconviction relief pursuant to Ark. R. Crim. P. 37.

In the petition, Beshears alleged that his counsel was ineffective because he misled Mr. Beshears about the existence of an offer of a negotiated plea; because he failed to file a motion asking the trial judge to recuse; and because he represented a conflicting interest that adversely affected the defense. Mr. Beshears also alleged that his counsel was ineffective for participating, without his client's permission, in the division of monies seized by forfeiture. The court held a hearing and denied Mr. Beshears's request for postconviction relief.

We summarized Mr. Beshears's contentions in the first appeal:

> On appeal, Beshears contends that the Trial Court erred in denying relief on his claim that his counsel was ineffective because he represented a conflicting interest at the same time he represented Beshears. Specifically, he argues that his attorney also represented his brother, Eddie, on an unrelated charge; and that during that representation, Eddie made a statement that exculpated Beshears.

> Beshears contends that his attorney's choice not to use this statement on his client's behalf made his guilty plea involuntary and unintelligent. Beshears also makes a two-part argument concerning the recusal of the trial judge. He contends that the trial judge erred in denying his motion to recuse from the postconviction proceeding; and that it was error to deny relief on his claim that his counsel was ineffective for failing to file a motion to recuse prior to Beshears's conviction.

Beshears v. State, 329 Ark. at 471, 947 S.W.2d at 790. Although we concluded that the trial court did not abuse its discretion in denying the motion to recuse from the postconviction proceeding, we did not reach the merits of Mr. Beshears's other arguments concerning postconviction relief because the trial court did not enter any written findings of fact and conclusions of law as required by Ark. R. Crim. P. 37.3(c). *Id.* We reversed and remanded the case to the trial court for written findings of fact and conclusions of law on Mr. Beshears's claims for postconviction relief. *Id.*

On remand, the trial court entered an order that contained written findings of fact and conclusions of law. Mr. Beshears now appeals that order and argues, as he did in *Beshears II*, that he was denied the effective assistance of counsel because his attorney labored under a conflict of interest, and that the trial court clearly erred in ruling otherwise. In response, the State argues that the conflict-of-interest issue is not preserved for our review because the trial court did not address that particular issue in its order on remand.

It is the appellant's obligation to obtain a ruling at trial in order to properly preserve an issue for review. *Oliver v. State*, 323 Ark. 743, 918 S.W.2d 690 (1996). We stated in *Oliver* that when the trial court does not specifically rule on an issue when it denies Rule 37 relief, and when we cannot tell from the court's order whether the issue was considered or decided, the issue is not preserved for appellate review and we will not address the point. *Id.*; *see also Matthews v. State*, 333 Ark. 701, 970 S.W.2d 289 (1998).

Mr. Beshears candidly admits in his reply brief that the trial court's written findings do not specifically include a ruling on the conflict-of-interest issue. Therefore, that issue is not preserved for appellate review. Mr. Beshears, however, contends that the trial court's failure to address the conflict-of-interest issue on remand is

grounds for this court "to grant a new trial or dismiss the original criminal action." We disagree.

Rule 37.3(c) of the Arkansas Rules of Criminal Procedure provides that, following a hearing on the petitioner's request for postconviction relief, the trial court "shall determine the issues and make written findings of fact and conclusions of law with respect thereto." The trial court's original order denying postconviction relief did not contain written findings of fact or conclusions of law. In that circumstance, we will reverse and remand the case for written findings of fact and conclusions of law on the petitioner's claim for postconviction relief. *Beshears II, supra.* In contrast, the trial court's order on remand did contain written findings of fact and conclusions on several issues raised by Mr. Beshears in his petition for postconviction relief. In the later circumstance, we have held that it is the appellant's obligation to obtain a ruling on any omitted issues in order to preserve those issues for appeal. *Matthews v. State, supra*; *Oliver v. State, supra.*

In *Matthews, supra,* we specifically held that a request that the trial court modify its order to include an omitted issue is not a request for a rehearing that is prohibited by Rule 37.2(d). Thus, after the trial court entered its order on remand, Mr. Beshears could have asked the trial court to modify its order to include a ruling on the omitted conflict-of-interest issue. We note that he did in fact file a petition for reconsideration. That petition, however, did not request a ruling on the omitted issue, but instead requested that the trial court "reverse itself," which is prohibited by Rule 37.2(d). *Matthews v. State, supra.* Mr. Beshears failed to obtain a ruling on the conflict-of-interest issue. Consequently, we are precluded from addressing that issue on appeal.

Affirmed.

ROSS EXPLORATIONS, INC. *v.*
FREEDOM ENERGY, INC.

98-1415 8 S.W.3d 511

Supreme Court of Arkansas
Opinion delivered January 13, 2000
[Petition for rehearing denied February 17, 2000.]

Pryor, Barry, Smith, Karber & Alford, PLC, by: *Gregory G. Smith*, for appellant.

Daily & Woods, P.L.L.C., by: *Thomas A. Daily* and *Leigh M. Chiles*, for appellee.

LAVENSKI R. SMITH, Justice. Appellant, Ross Explorations, Inc. ("Ross"), seeks reversal of a declaratory judgment obtained by Appellee, Freedom Energy, Inc. ("Freedom"). Following a hearing, the Sebastian County Chancery Court declared that Freedom possessed the lease rights to natural gas produced from the Dill "A" #1 gas well. The trial court found that the Ross leases expired due to the well failing to produce gas in commercial paying quantities. The court further found that later leases which Freedom acquired from the lessors entitled Freedom to the gas subsequently produced after the termination. Ross alleges that the trial court committed three errors. First, Ross contends that the trial court erred in finding that the well's lifting costs exceeded its revenue. Second, Ross contends that the trial court erred in its choice of the time period for determining if production was adequate. Third, Ross, contends that the trial court erred in failing to make a finding with respect to the "reasonably prudent operator" rule. Our juris-

diction is pursuant to Ark. Sup. Ct. R. 1-2(b)(1). We find no reversible error and affirm.

Standard of Review

We review chancery cases *de novo* on the record, but we will not reverse a finding of fact by the chancellor unless it is clearly erroneous. *Slaton v. Slaton*, 336 Ark. 211, 983 S.W.2d 951 (1999). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed. *Saforo & Assocs., Inc. v. Porocel Corp.*, 337 Ark. 553, 991 S.W.2d 117 (1999);*RAD-Razorback Ltd. Partnership v. B.G. Coney Co.*, 289 Ark. 550, 713 S.W.2d 462 (1986). *Crawford & Lewis v. Boatman's Trust Company*, 338 Ark. 679, 1 S.W.3d 417 (1999).

Facts

In 1985, TXO Production Company ("TXO") drilled a gas well in Sebastian County known as the Dill "A" #1 Well. TXO did so pursuant to leases it had acquired from the land owners in previous years. TXO shared lessee rights with Tiros Exploration Company ("Tiros") and Ross Explorations, Inc. TXO controlled 98.5% of the lessee rights while Tiros and Ross controlled the remaining 1.5% of the rights. The habendum clauses of each of the leases granted lease rights for a fixed term of years as well as for some indefinite additional period if the lessee maintained production. The leases contained a number of specific variations in their habendum clauses. However, the parties tried the case, and the trial court ruled on the apparently stipulated premise that each lease required that the lessee produce gas in "commercial paying quantities" in order to preserve lease rights beyond the term of years stated in the lease. The parties did stipulate that the term of years in all the leases had expired. At some point, Sonat Exploration Company ("Sonat") became successor to TXO's lease rights and operated the well until the spring of 1996. In the spring of 1996, according to Sonat internal company memoranda introduced at trial by Freedom, Sonat intended to cease all production from the well and abandon it. Sonat engineer B.M. Hickman recommended the well be plugged and abandoned due to low production and the well

being "uneconomic in its current completion." Sonat records indicate that the well produced at a rate of less than 10 MCF/D at that time. Sonat ceased all production from the well on April 30, 1996, when it "shut-in" the well. Sonat estimated it would cost $12,500 to plug and abandon the well. Also on April 30, Appellant Ross offered to purchase Sonat's interest in the Dill "A" #1 well for $1,000.00 in lieu of plugging the well. Sonat did agree at some point to sell its interest to Ross; however, Sonat did not assign its rights to Ross until August 16, 1996. Hence, no production occurred at the subject well from April 30, 1996, until September 1996 when Ross reopened the well. In May 1996, Freedom obtained "Options to Purchase Oil and Gas Leases" from the lessors of the Dill "A" #1 Well. These contracts entitled Freedom to purchase lease rights previously held by Sonat should the Sonat leases terminate for any reason.

The central conflict of this case is who controls the lease rights to the Dill "A" #1 well. Freedom alleged and proved to the satisfaction of the trial court that Sonat's lease interests terminated at some point prior to Sonat's assignment to Ross. Ross, on the other hand, contends that Sonat's lease rights remained in full force and effect when it acquired them via the August 16, 1996, assignment. The parties agree that the principal issue that resolves the dispute is whether or not the subject well ever ceased to produce in "commercial paying quantities" before Ross acquired its assignment from Sonat.

In reaching its conclusion that the subject leases had indeed expired, the trial court made forty specific findings of fact. The court relied upon documentary evidence from Sonat's files, including various company records, internal memoranda, and accounting data. The court also based its findings upon expert testimony offered by the parties, and trial exhibits produced by the parties. In particular, the trial court placed substantial weight upon Sonat engineer B.M. Hickman's memoranda and also upon the memorandum of Sonat geophysicist Quentin Danser. Danser's handwritten note indicated his opinion in March 1996 that the leases had probably already lapsed due to low production. The trial court evaluated the extensive accounting testimony put forth principally by Freedom and cross-examined by Ross. The court found Freedom's evidence based upon Sonat's records that the well's production had steadily declined over a course of years to be credible. More specifi-

cally, the trial court found that for a period of twenty-four months prior to the April 30, 1996 shut-in that the well operated at a net loss. The parties provided the court with four charts comparing revenue of the well to expenses of operating the well. In its decision, the trial court used Appellant Ross's chart, which the court deemed most favorable to Ross. During the relevant period, the trial court found that there were eight months of profit totaling $1,283.00, and sixteen months of loss totaling $1,890.00. Combining these two figures left a loss of $607.00 over the twenty-four-month period. The trial court concluded that Sonat's rights under its lease terminated prior to transfer to Ross and that Freedom's new leases gave Freedom rights to the gas.

On appeal, Ross asserts that the chancellor erred (1) by finding that costs exceeded revenue, (2) by using a twenty-four-month period, and (3) by failing to make a ruling on the application of the "reasonably prudent operator rule."

Production in Paying Quantities

At the trial of this matter, Freedom bore the burden of showing that the earlier leases terminated due to lack of production. *Perry v. Nicor Exploration*, 293 Ark. 417, 738 S.W. 2d 414 (1987). In other words, Freedom had to show the well ceased to produce in commercial paying quantities. Ross asserts Freedom failed to do this because the figures introduced into evidence by Freedom impermissibly included overhead as a cost, and therefore when subtracted from revenues produced by the well failed to show the actual production of the well under the habendum clause. Ross asserts the trial court erred in adding in costs that were not lifting costs, although they might be direct costs of operation.

In *Turner v. Reynolds Metal, Co.*, 290 Ark. 481, 721 S.W.2d 626 (1986), we considered whether a gas lease should be canceled due to "failure to produce in paying quantities." *Turner, supra*, at 482. We stated, "A provision in a habendum clause of an oil and gas lease requiring production, as in this lease, means production in paying quantities." *Turner, supra*, at 483. In *McLeon v. Wells*, 207 Ark. 303, 180 S.W.2d 325 (1944), we held the phrase, "and as long thereafter as oil or gas, or either of them, is produced from said lands by lessee," meant "production in commercial quantities...."

McLeon, supra, at 305. Commercial or paying quantities, we have said, is determined by what is profitable to the lessee. *Turner, supra*, at 483.[1]

Ross, based upon dicta contained in *Perry*, asserts this court has adopted a "lifting costs" test. The sentence Ross relies on states, "Cross-examination, however, revealed that he did not know if some of the expenses used in his calculations were directly related to lifting." *Perry, supra*, at 421. Ross also cites *Mason v. Ladd Petroleum Corp.*, 630 P.2d 1283 (Okla. 1981), as support, wherein the Oklahoma Supreme Court stated, "Only those expenses which are directly related to lifting or producing operations can be offset against production proceeds to determine whether a well is a producer."

We have not expressly adopted this test nor have we explicitly decided what is meant by costs directly related to lifting. Other jurisdictions have dealt with this question. The Oklahoma Supreme Court in *Stewart v. Amerada Hess Corp*, 604 P.2d 854 (1979), defined "lifting expenses" as "Expenses necessary to lift the oil from the ground." The Oklahoma Supreme Court also stated, "The term 'lifting costs' relates to a portion of the cost of producing oil and gas exclusive of drilling and equipping costs — the term defies a more precise definition." *Hinniger v. Kaiser*, 738 P.2d 137 (1987). The Supreme Court of Kansas seems to be in agreement that costs of drilling and equipping the well are excluded. *Texaco, Inc. v. Fox*, 228 Kan. 589, 618 P.2d 844 (1980). This is also true in Texas. *See Evans v. Gulf Oil Corp.*, 840 S.W.2d 500 (1992). In *Reese Enterprises, Inc. v. Lawson*, 220 Kan. 300, 553 P.2d 885 (1976), the Kansas Supreme Court stated, "Expenses which are taken into account in determining 'paying quantities,' include current costs of operation in producing and marketing the oil or gas."

The crucial issue, then, is whether the well, when appropriate expenses are deducted, turns a profit, however small. Costs of drilling and equipping the well are excluded, because they are not costs of operation of the well. In Kansas, marketing is a cost of operation, and apparently is often added in because without it there

[1] See also, 3 Williams & Meyers, *Oil and Gas Law* § 604.6(a) (1986) (stating that "the term 'paying quantities' has generally been defined as such production as will enable the lessee to realize a profit from the sale of oil, gas or other minerals after the marketing expenses and the current cost of operation are deducted").

is no production. *Reese Enterprises, Inc., supra.* Depreciation has been included as a cost of operation by some courts, but the "better view" is to exclude it as associated with the equipping of the well. Williams & Meyers, *Oil and Gas Law* § 604.6(b). Overhead is excluded by some courts as a cost. We agree with the view that what ought to be considered are "direct expenses attributable to the operation of the lease." *Reese Enterprises, Inc., supra.*

The trial court examined the accounting data put forth by the parties. He then relied upon the chart prepared by Ross using figures from Sonat's joint-interest billing statements. According to Ross's president, Tim Smith, the chart employed the cost figures furnished by Sonat less the following items that Ross contended should not be counted as direct operating costs: (1) administrative overhead; (2) "other"; (3) equipment rentals other than compressors; (4) environmental safety; (5) meals; (6) communication; (7) miscellaneous; (8) entertainment; and (9) allocated costs. The remaining costs included in Ross's chart are: Pumping labor; field labor; auto/truck; road/location; chemical treating; taxes; salt water disposal; product/equipment services; well services; services for leased eqipment; other and indirect services; and materials and supplies. These expenses are in accord with those set out by the Kansas Supreme Court in *Reese, supra.* Based upon Ross's figures, the trial court found that for the twenty-four-month period preceding April 30, 1996, the well was operated at a net loss. Consequently, it did not produce in commercial paying quantities and the leases terminated under their own terms.

Appellant has not shown that the trial court considered improper costs in deciding the well's lack of profitability. Ross asserts the Joint Interest in Billing Statements and the Profit and Loss Statements do not provide information from which one can determine the "lifting" or "direct" costs of production. Ross asserts the categories listed on the statements did not provide information about what exactly was included. Ross also asserts that their Exhibit N-10 was misunderstood by the trial court as representing what Ross believed the lifting/direct costs to be, when it was actually only a statement created with the categories removed that were clearly inapplicable as overhead, but the remaining categories are still unreliable because without actual invoices, it is impossible to determine the accuracy of what was charged to the operation of the well.

The trial court found that "Sonat maintains a computerized accounting system. Each Sonat operated well is assigned a property number. Revenues and expenses are then coded with the property number of well to which they pertain as they are entered into the accounting system's computer." The trial court also noted that the accounting information is used to bill non-operating lease holders and to generate the profit and loss statements.

The evidence of costs came in by expert and lay testimony. The judge has broad discretion in admitting expert testimony. *Scott v. State*, 318 Ark. 747, 888 S.W.2d 628 (1994). And, as to credibility, "We have held many times that this Court will defer to the trial court's evaluation of the credibility of the witnesses." *Saforo & Assoc. Inc. v. Porocel Corp.*, 337 Ark. 553, 991 S.W.2d 117 (1999)(quoting *Crawford v. Dep't of Human Services*, 330 Ark. 152, 951 S.W.2d 310 (1997). The costs considered appear to be those reasonably associated with producing gas from the well. We hold, therefore, that the chancellor did not clearly err.

Period of Time in Calculation of Operating Costs

Ross asserts that the trial court used too short a period of time for determining profitability. Ross also argues that periods after assignment of the lease to Ross should have been considered. Other courts which have faced this issue clearly disfavor an inflexible period in all cases. Instead, the determinations depend upon the facts of the particular case and the specific reasons production waned or ended. The trial court used Ross's Exhibit N-10, which covered the twenty-four months prior to Sonat's shut-in of the well on April 30, 1996. Under the facts of the instant case, we hold that period of time to have been reasonable.

In *Fisher v. Grace Petroleum, Inc.*, 830 P.2d 1380 (Okla. Ct. App. 1992),[2] the Oklahoma Court of Appeals dealt with a habendum clause that provided "as long as gas is or can be produced." In discussing the proper period for determining profitability, the Court stated, "The appropriate period for determining profitability is a time appropriate under all the facts and circumstances of each

[2] *See also Texaco, Inc. v. Fox*, 618 P.2d 844 (Kan. 1980).

case." The court then cited Kuntz, *The Law of Oil and Gas*, § 26.7 (1990), which states:

> The better rule precludes the use of a rigid fixed term for determination of profitability and uses a reasonable time depending upon the circumstances of each case, taking into consideration sufficient time to reflect the current production status of the lease and thus to provide the information with which a prudent operator would take into account in whether to continue or abandon operation.

The *Fisher* court found a thirteen-month time period to be adequate.[3]

It also cannot be ignored that Ross's predecessor in interest voluntarily ceased all production on April 30, 1996, due to the well's low production and it being "uneconomic." Voluntary cessation is a factor that some courts consider in determining whether a lease has been terminated. *Hunter v. Clarkson*, 428 P.2d 210 (Okla. 1967). At the time Ross acquired the rights, if any, that Sonat had, the well was "shut-in" for lack of production. It had a tag on it that indicated temporary abandonment. A handwritten memo dated March 14, 1996, noted "looks like the leases are probably gone anyway, with only 10MCF/D production." Under the facts presented here, we find no error in the trial court's use of the twenty-four-month period immediately preceding the well's shut-in by Sonat. Nor are we persuaded by appellant that the court should have considered production data for the well after Ross resumed production in September 1996. If the leases terminated at any time prior to that time, under their own terms subsequent production would be irrelevant.

Reasonably Prudent Operator Rule

Ross asserts that the trial court erred when it failed to rule on "whether a 'reasonably prudent operator' would have continued to operate the well, even assuming a loss in the two years prior to shut-in." Failure to obtain a ruling from the trial court is a procedural bar to our consideration of the issue. We have held on many

[3] In the *Reese* case from Kansas, eighteen months was considered an appropriate time period given its facts but the court clearly believed the period could be more or less given other facts.

occasions that we will not address the merits of an argument where the appellant has failed to obtain a ruling from the trial court. *Howard v. Northwest Arkansas Surgical Clinic P.A.*, 324 Ark. 375, 921 S.W.2d 596, (1996); *Haase v. Starnes*, 323 Ark. 263, 915 S.W.2d 675, 680 (1996); *Vanderpool v. Fidelity & Cas. Ins. Co.*, 327 Ark. 407, 939 S.W.2d 280 (1997). It is well settled that this Court will not address an argument where the abstract does not show that it was made in the trial court, *Webber v. Webber*, 331 Ark. 395, 962 S.W.2d 345 (1998), *and* ruled upon there. *Sanders v. Bradley County Human Servs. Public Facility Bd.*, 330 Ark. 675, 956 S.W.2d 187 (1997); *see also Skokos v. Skokos*, 332 Ark. 520, 968 S.W.2d 26 (1998); *Myrick v. Myrick*, 339 Ark.1, 2 S.W.3d 60 (1999). Viewing the current landscape of oil and gas law, it may well be advisable and appropriate for this court to adopt the prudent-operator rule. However, we will only do so when the matter is properly before us. It is incumbent upon the appealing party to obtain a ruling on an issue in order to preserve it for our review. *Fisher v. Valco Farms*, 328 Ark. 741, 945 S.W.2d 369 (1997); *Farm Bureau P.H. v. Fm. Bureau Mut. Ins. Co.*, 335 Ark. 285, 984 S.W.2d 6 (1998). Since there was no ruling below, we will not decide the matter here.

Affirmed.

.Kenneth Joel RUSHING *v.* STATE of Arkansas

CR 98-1312 8 S.W.3d 489

Supreme Court of Arkansas
Opinion delivered January 13, 2000

[redacted]

Jim Pedigo, Public Defender, for appellant.

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

LAVENSKI R. SMITH, Justice. We recently affirmed Kenneth Joel Rushing's conviction and life sentence for the first-degree murder of William Jack Allen. *Rushing v. State*, 338 Ark. 277, 992 S.W. 2d 789 (1999). Public defender Jim Pedigo of Miller County represented Rushing as trial counsel and subsequently as appellate counsel. Pedigo now motions this court for attorney's fees under Ark. Sup. Ct. R. 6-6 for his work on Rushing's criminal appeal. Pedigo contends that he is entitled to attorney's fees under Ark. Sup. Ct. R. 6-6(c) despite his employment as a full-time public defender. Pedigo argues that his public-defender salary only compensated him for his trial work, not his appellate work. He takes the position that no prohibition exists to prevent his petitioning this court for attorney's fees for appellate work done for indigent clients during non-office hours. In response, the State argues that Rule 6-6(c) applies only to appointed counsel not otherwise paid, and that Ark. R. App. P.—Crim. 16 requires all counsel to represent defendants through their direct appeal unless relieved. We agree with the State and deny Pedigo's motion for attorney's fees.

Facts

Pedigo has been a salaried, full-time public defender since January 1, 1998. Pedigo states in his brief that he prepared Rushing's appeal in forty-four hours during weekends and evenings. He indicates that he did so because regular office hours were inadequate due to the heavy caseload in the 8th Judicial District public defender's office. He also asserts the Director of the Public Defenders Commission told him that he was to obtain compensation for appellate work from the appellate court. He provides no evidence of this comment. He does attach to his motion a letter from Didi Sallings, Executive Director of the Public Defender Commission, in which Sallings tells Pedigo that he is responsible for representing his client at all stages of proceedings. Sallings also told Pedigo that it was Commission policy that public defenders not seek compensa-

tion from the appellate courts. He asserts that the public-defender statutes provide only for compensation for work done at the trial level.[1] Therefore, he contends he is entitled to payment under Rule 6-6(c) for work on Rushing's appeal.

Statutory Provisions

The Constitution of the United States and the Arkansas Constitution require appointment of counsel for indigent defendants in criminal cases. *Gideon v. Wainwright*, 372 U.S. 335 (1963); *State v. Post*, 311 Ark. 510, 845 S.W.2d 487 (1993). Arkansas has accomplished this by appointment of private counsel compensated with public funds and through full- or part-time public defenders. *Mears, County Judge v. Hall*, 263 Ark. 827, 569 S.W. 91 (1978). The legislature created the State's current public-defender system with Act 1193 of 1993. This Act, which is codified in Ark. Code Ann. §§ 16-87-201—16-87-216 (Supp. 1999), governs Pedigo's employment. Public-defender salaries, including Pedigo's, are set by the Arkansas Public Defender Commission. Ark. Code Ann. § 16-87-107 (Repl. 1987). Public defenders are prohibited from receiving "any funds, services or other thing of monetary value, directly, or indirectly, for the representation of an indigent person pursuant to court appointment, except the compensation provided by law." Ark. Code Ann. § 16-87-214. The legislature in its enactment of the appropriation of funds for the Public Defender Commission expressly subjected the Commission to the Regular Salary Procedures and Restrictions Act. *See* Act 1379 of 1999, § 1; Ark. Code Ann. §§ 19-4-1601—1615. As applied to a state-salaried public defender, this Act, in essence, prohibits the public defender from receiving compensation from the State in an amount greater than that established by the General Assembly as the maximum annual salary for the employee.

[1] See Ark. Code. Ann § 16-87-306 listing duties of public defenders. This statute however, does not exempt public defenders from the requirements of Ark. R. App. P. -Crim. 16.

Ark. Sup. Ct. R. 6-6(c) states in pertinent part: "All motions for attorney's fees from attorneys appointed to represent indigent appellants in criminal cases shall contain...." Rule 6-6(c), by its terms, applies to attorneys "appointed to represent indigent appellants in criminal cases...." While it might appear that this could include salaried public defenders appointed to represent indigent appellants, we hold it does not. When considered with the relevant public-defender statutes, it is evident that the reference to appointed counsel in Rule 6-6(c) is to attorneys not otherwise compensated for their representation. In the instant case, the Miller County Circuit Court appointed Pedigo to represent defendant Rushing. At the time of his appointment and at all times since, Pedigo received compensation from the State of Arkansas as a full-time public defender. Once Pedigo undertook representation of Rushing as trial counsel, he was obligated to continue that representation "throughout any appeal to Arkansas Supreme Court, unless permitted by the trial court or the Arkansas Supreme Court to withdraw...." Ark. R. App. P.—Crim. 16. In that he remained a salaried, full-time public defender during the appeal, he is not entitled to receive any additional compensation from the State for his services.

Motion denied.

Mishon Laron WRIGHT *v.* STATE of Arkansas

CR 99-1457 8 S.W.3d 32

Supreme Court of Arkansas
Opinion delivered January 13, 2000

Morley Law Firm, by: *Stephen E. Morley*, for appellant.

No response.

PER CURIAM. Appellant, Mishon Laron Wright, by his attorney, Stephen E. Morley, has filed a motion for a belated appeal. Appellant was convicted on October 8, 1998, on two counts each of aggravated robbery, terroristic act, and theft of property, and judgment was entered on October 27, 1998. However, Wright filed a motion for a new trial on October 22, 1998, prior to the entry of judgment. Although the trial court entered an order denying that motion on December 17, 1998, the order is void in light of the date of judgment.

In any event, the notice of appeal filed on January 15, 1999, made Wright's appeal untimely. Mr. Morley admits in the instant motion that he failed to timely file the notice of appeal 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 for belated appeal is granted. A copy of this opinion will be forwarded to the Committee on Professional Conduct. *Id.*

Karen SHELTON, As Next Friend of
Nathan Piccirilli *v.* William P. FISER, M.D.; Robert L. Watson,
As Executor of the Estate of John Roger Clark;
Arkansas Sports Medicine & Orthopedic Center, P.A.;
Edward R. Weber, M.D.; and
Arkansas Specialty Care Centers, P.A.

99-331 8 S.W.3d 557

Supreme Court of Arkansas
Opinion delivered January 20, 2000

Jack Pasqual and *Patton, Tidwell & Sandefur, LLP*, by: *Nicholas H. Patton* and *Christie Gunter Adams*, for appellant.

Laser, Wilson, Bufford & Watts, P.A., by: *Ken Cook* and *Donna L. Gay*, for appellee William P. Fiser, M.D.

Womack, Landis, Phelps, McNeill & McDaniel, by: *Paul D. McNeill* and *Jeffrey L. Singleton*, for appellee Robert L. Watson.

Anderson, Murphy & Hopkins, L.L.P., by: *Overton S. Anderson* and *David A. Littleton*, for appellees *Edward R. Weber, M.D.* and *Arkansas Specialty Care Centers, P.A.*

ROBERT L. BROWN, Justice. This appeal involves the application of the statute of limitations to a medical malpractice action brought by a parent on behalf of a minor child. Three issues are raised in this appeal by appellant Karen Shelton as the mother of the minor child, Nathan Piccirilli: (1) the general savings statute should apply to toll the two-year statute of limitations for medical malpractice actions; (2) Shelton's own claims for medical expenses are not barred by the two-year statute of limitations but should exist as long as the minor child's cause of action does; and (3) a genuine issue of material fact exists concerning fraudulent concealment by the appellees. We find no merit in any of these claims, and we affirm the order of dismissal and the summary judgment.

The facts leading up to the trial court's two orders are these. On November 5, 1994, Nathan Piccirilli, who was age eleven at the time, fractured his right arm in a go cart accident. He was taken to Saline Memorial Hospital in Benton where he was treated by Dr. Shelby Duncan, an orthopedic specialist. Dr. Duncan recommended that Piccirilli be transferred to Baptist Medical Center in Little Rock, and he was transferred on November 7, 1994. At Baptist, Piccirilli was accepted as a patient by Dr. William P. Fiser, a vascular surgeon, who is an appellee. Dr. Fiser determined that Piccirilli needed surgery and consulted with Dr. John Roger Clark, an orthopedic surgeon, whose probate estate is also an appellee.

On November 7, 1994, Drs. Fiser and Clark operated on Piccirilli. Dr. Fiser operated on the brachial artery in the arm which had been crushed or contused by a bone fragment, and Dr. Clark performed a fasciotomy on the arm and resplintered it. The following day Dr. Clark performed a skin release of the volar/flexor compartment, and on November 10, 1994, he did a dressing change under general anesthesia and attempted to evaluate the viability of the forearm muscles.

On November 12, 1994, Dr. Edward R. Weber, another appellee, was brought in as a hand specialist, and he performed a debridement of dead muscle tissue in the forearm. Two days later he did a second debridement and concluded that there were not enough viable muscles left for tendon transfers to reconstruct the hand. Drs. Fiser and Weber recommended amputation to Piccirilli's family but encouraged them to seek a second opinion. The family had Piccirilli transferred to Arkansas Children's Hospital on November 15, 1994.[1]

On May 23, 1996, Shelton, as next friend of Piccirilli, filed a medical malpractice action against Dr. Duncan, five Jane Does, and St. Paul Fire and Marine Insurance Co., the malpractice carrier for Saline Memorial Hospital. On April 24, 1998, Shelton filed a first amended complaint, adding Drs. Weber, Fiser, and Clark and Arkansas Sports Medicine and Orthopedic Center and Arkansas Specialty Care Centers as parties defendant.[2] The amended complaint asserted claims of medical malpractice, civil conspiracy, and fraudulent concealment against Drs. Fiser and Clark and Arkansas Sports Medicine, and claims of civil conspiracy and fraudulent concealment against Dr. Weber and Arkansas Specialty Care. Following the amended complaint, the added parties defendants, who are the appellees in this appeal, moved to dismiss the complaint based on the two-year statute of limitations for medical malpractice claims.

On May 28, 1998, Shelton added Robert L. Watson, the executor of the Clark Estate, as a party defendant. On September 24, 1998, she added a cause of action against Dr. Fiser for deceit. The appellees then separately moved for summary judgment on the claim of fraudulent concealment.

In its first order, the trial court granted the appellees' separate motions to dismiss the malpractice causes of action because they were barred by the two-year statute of limitations. In that same order, the trial court found that Shelton had sufficiently pled fraudulent concealment and that this claim would not be dismissed. In a subsequent order, the trial court granted summary judgment in

[1] The arm apparently was not amputated, as the first amended complaint states that Piccirilli has regained significant motor function but has little strength in his right hand.

[2] Dr. Clark apparently worked for Arkansas Sports Medicine and Orthopedic Center and Dr. Weber worked for Arkansas Specialty Care Centers.

favor of the appellees on the fraudulent concealment claim. Shelton then took a voluntary non-suit against Dr. Duncan and St. Paul, and the trial court entered a final judgment based on its previous orders pursuant to Ark. R. Civ. P. 54(b).

Shelton's first point on appeal concerns which savings statute should apply to a minor child's cause of action for medical malpractice. According to Shelton, the general savings statute for minors (Ark. Code Ann. § 16-56-116(a) (1987)), applies. That section read as follows in 1994:

> (a) If any person entitled to bring any action under any law of this state is, at the time of the accrual of the cause of action, under twenty-one (21) years of age, or insane, or imprisoned beyond the limits of the state, that person may bring the action within three (3) years next after attaining full age, or within three (3) years next after the disability is removed.

Shelton also cites our decision in *Graham v. Sisco*, 248 Ark. 6, 449 S.W.2d 949 (1970), for the proposition that § 16-56-116(a) applies to *any* action under *any* law and, thus, tolls the two-year statute of limitations for minor children under our Medical Malpractice Act. Finally, Shelton emphasizes that the General Assembly in 1999 added a repealer clause to § 16-56-116, which stated that all laws and parts of laws in conflict with this act are repealed. 1999 Ark. Acts 18.[3]

We disagree with Shelton's analysis of the history of the savings statute as it applies to minor children in medical malpractice actions. By Act 709 of 1979, Act 997 of 1991, and Act 735 of 1995, the General Assembly added a savings statute for minors to the Medical Malpractice Act. The savings statute for minors now reads:

> (c)(1) If an individual is nine (9) years of age or younger at the time of the act, omission, or failure complained of, the minor or person claiming on behalf of the minor shall have until the later of the minor's eleventh birthday or two (2) years from the act, omission, or failure in which to commence an action.
>
> (2) However, if no medical injury is known and could not reasonably have been discovered prior to the minor's eleventh

[3] Act 18 of 1999 also deleted the phrase "or imprisoned beyond the limits of the state" in § 16-56-116(a).

> birthday, then the minor or his representative shall have until two (2) years after the medical injury is known or reasonably could have been discovered, or until the minor's nineteenth birthday, whichever is earlier, in which to commence an action.

Ark. Code Ann. § 16-114-203(c) (Supp. 1999).[4] Otherwise, all causes of action for medical malpractice must be commenced within two years of the medical injury. Ark. Code Ann. § 16-114-203(a) (Supp. 1995).

Act 709 of 1979 was enacted seven years after our decision in *Graham v. Sisco, supra.* Act 997 of 1991 and Act 735 of 1995 were enacted much later. In *Graham*, we specifically noted that the statute of limitations for medical malpractice did not contain a savings statute for minors. That was rectified by Act 709 and then by Act 997 and Act 735, all of which enacted the controlling statute for minor children who have malpractice actions brought on their behalf. It has long been the law in Arkansas that a general statute must yield when there is a specific statute involving the particular subject matter. *See, e.g., Board of Trustees v. Stodola*, 328 Ark. 194, 942 S.W.2d 255 (1997); *Donoho v. Donoho*, 318 Ark. 637, 887 S.W.2d 290 (1994); *Conway Corp. v. Construction Eng'rs, Inc.*, 300 Ark. 225, 782 S.W.2d 36 (1989). That principle governs this issue, and we hold that § 16-114-203(c) provides the applicable statute of limitations for a minor child's medical malpractice action. *See also Adams v. Arthur*, 333 Ark. 53, 969 S.W.2d 598 (1998) (two-year limitations period in Medical Malpractice Act supersedes limitations period in Product Liability Act). In this regard, we adopt the reasoning of the court of appeals in *Smith v. Diversicare Leasing Corp.*, 65 Ark. App. 138, 985 S.W.2d 749 (1999) (specific savings statute under Medical Malpractice Act for incompetents supersedes the general savings statute).

Furthermore, we do not consider a repealer clause added to the general savings statute to have the effect of repealing the specific savings statute enacted for minor children in the Medical Malpractice Act. To be sure, a general repealer may repeal conflict-

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[4] Act 997 of 1991 limited the savings statute for minors to medical injuries occurring from obstetrical care. Act 735 of 1995 expanded the applicability of the savings statute to all medical injuries. The application of Act 735 to a 1994 alleged medical injury was not raised by the parties. The issue raised by Shelton was that a statute dealing with children who are nine or younger cannot govern the cause of action of Piccirilli, who was eleven.

ing laws. *See Winston v. Robinson*, 270 Ark. 996, 606 S.W.2d 757 (1980). However, repeals by implication are not favored in interpreting our statutes. *See Robinson v. Langdon*, 333 Ark. 662, 970 S.W.2d 292 (1998). And, again, repeal does not occur in a situation, such as we have in the instant case, where the specific act establishing a cause of action for medical malpractice contains its own savings statute for minors.

We conclude that Piccirilli does not fall within either of the two exceptions for a minor's cause of action under § 16-114-203(c). Accordingly, the complaint brought on his behalf is barred by the two-year statute of limitations.

Shelton's second point is dependant upon our resolution of her first point. She contends that a parent's cause of action to recover medical expenses incurred on a child's behalf should be subject to the same limitations period as the child's cause of action for negligence. As already discussed, her theory is that Piccirilli's cause of action survived under the general savings statute until age twenty-one. Hence, she reasons that her cause of action should only be restricted by the same limitations period.

Because we have already held that Piccirilli's complaint had to have been brought within two years of the alleged medical injury, this second issue is effectively resolved. The parent under these facts is subject to the same two-year period for recovery of the medical expenses. *See National Bank of Commerce v. Quirk*, 323 Ark. 769, 918 S.W.2d 138 (1996). The trial court did not err in this regard.

For her final point, Shelton claims that genuine issues of material fact exist surrounding her fraudulent concealment claim against the appellees, and summary judgment as a result was not appropriate.

This court recently stated its standard of review for orders of summary judgment:

> The law is well settled that summary judgment is to be granted by a trial court only when it is clear that there are no genuine issues of material fact to be litigated, and the party is entitled to judgment as a matter of law. *Wallace v. Broyles*, 331 Ark. 58, 961 S.W.2d 712 (1998), *supp. opinion on denial of reh'g*, 332 Ark. 189 (1998). Once the moving party has established a prima facie

> entitlement to summary judgment, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact. *Id.* On appellate review, this court determines if summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of the motion leave a material fact unanswered. *Id.* 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.* Our review focuses not only on the pleadings, but also on the affidavits and other documents filed by the parties. *Id.*

Adams v. Arthur, 333 Ark. at 62, 969 S.W.2d at 605.

Fraudulent concealment suspends the running of the statute of limitations, and the suspension remains in effect until the party having the cause of action discovers the fraud or should have discovered it by the exercise of due diligence. *See Martin v. Arthur*, 339 Ark. 149, 3 S.W.3d 684 (1999); *First Pyramid Life Ins. Co. v. Stoltz*, 311 Ark. 313, 843 S.W.2d 842 (1992), *cert. denied* 510 U.S. 908 (1993). This court also noted that "[a]lthough the question of fraudulent concealment is normally a question of fact that is not suited for summary judgment, when the evidence leaves no room for a reasonable difference of opinion, a trial court may resolve fact issues as a matter of law." *Martin*, 339 Ark. at 154, 3 S.W.2d at 687.

This court has recently addressed what constitutes fraudulent concealment:

> In order to toll the statute of limitations, we said that plaintiffs were required to show something more than a continuation of a prior nondisclosure. We said that there must be evidence creating a fact question related to "some positive act of fraud, something so furtively planned and secretly executed as to keep the plaintiff's cause of action concealed, or perpetrated in a way that it conceals itself."

Martin, 339 Ark. at 154, 155, 3 S.W.2d at 687 (*quoting Adams v. Arthur*, 333 Ark. at 68, 969 S.W.2d at 605 and *Norris v. Bakker*, 320 Ark. 629, 633, 899 S.W.2d 70, 72 (1995)). Accordingly, it is clear from our caselaw that not only must there be fraud, but the fraud must be furtively planned and secretly executed so as to keep the fraud concealed.

In the instant case, Shelton contends that the factual issue for her allegation of fraudulent concealment is created by the deposi-

tion testimony of Dr. Duncan's expert witness, Dr. Thomas P. Rooney. Piccirilli's medical records state that Dr. Clark performed a fasciotomy of the volar compartment of Piccirilli's right forearm on November 7, 1994. Dr. Rooney testified in his deposition that Dr. Clark's care and treatment fell below the standard of care because Dr. Clark performed only a partial fasciotomy. A second expert for Dr. Duncan, Dr. Reese Louis Crow, confirmed that opinion in his deposition. Dr. Rooney concluded that the incomplete nature of the fasciotomy caused or contributed to the damage to the forearm. Dr. Rooney also stated that he read a letter written by Dr. Fiser to Shelton's attorney and that some of the statements made by Dr. Fiser in quoting Dr. Weber have turned out not to be factually true. In particular, Dr. Rooney questioned Dr. Fiser's statement that there were no viable muscles in the flexor compartment. He pointed out that Piccirilli was later found to have some viable muscles. Additionally, Dr. Rooney referred to Dr. Fiser's statement that the extensor compartment muscles were not viable. Dr. Rooney emphasized, however, that later some of those muscles were used for tendon transfers.

Shelton further alleges that Drs. Fiser, Clark and Weber discussed among themselves the potential causes of Piccirilli's injuries, and that following these discussions, Dr. Fiser dictated discharge summaries indicating that the cause of the muscle death in the forearm was an unrecognized injury to the brachial artery. Six months later, Dr. Fiser stated in a letter to Piccirilli's attorney that the care and treatment provided by Drs. Fiser, Clark and Weber were not causes of the muscle death in Piccirilli's forearm. This inconsistency between the discharge summaries and Dr. Fiser's subsequent statements establishes fraud, under Shelton's theory of the case.

We do not agree that Shelton has raised a genuine issue of material fact regarding fraudulent concealment. First, Dr. Rooney's and Dr. Crow's conclusions go to the proper standard of care and, therefore, to negligence rather than to fraud. In addition, the asserted inconsistency between the discharge summaries and Dr. Fiser's later statement to counsel were not proved to have been concealed in any form or fashion. We need not reach the issue of whether the inconsistency amounted to fraud because our law is clear that in order to toll the statute of limitations, the fraud perpetrated must be concealed. Concealed fraud means fraud which is

furtively planned and secretly executed. *See Martin v. Arthur, supra.* Here, the medical records pertaining to Piccirilli's treatment and care at Baptist were not concealed but turned over to his first medical expert, Dr. Leland Hall, in 1995. And Drs. Weber and Fiser filed affidavits in support of their motions for summary judgment averring that their findings and opinions were not hidden but disclosed. Shelton failed to offer countervailing proof of concealment and, thus, failed to establish an essential element of the tort.

Affirmed.

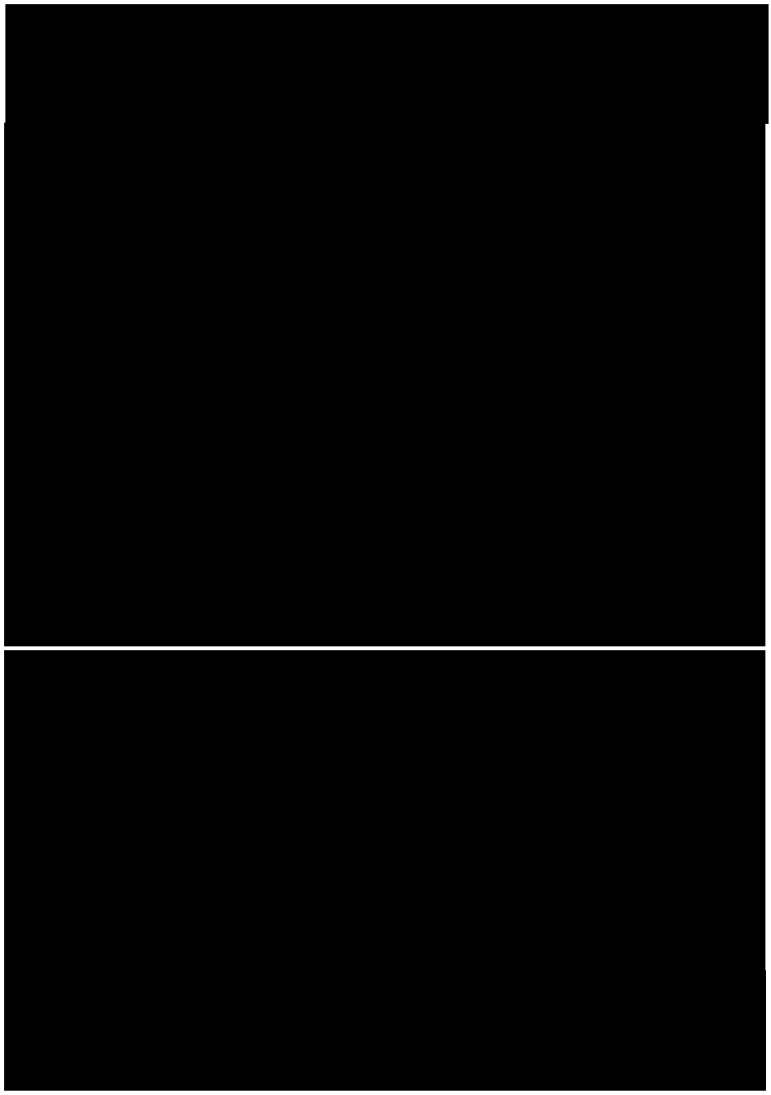
GLAZE, IMBER, and SMITH, JJ., not participating.

SPECIAL JUSTICE DAVID KEITH RUTLEDGE and SPECIAL JUSTICE JAMES PENDER join in this opinion.

Andra GAINES *v.* STATE of Arkansas

CR 99-88 8 S.W.3d 547

Supreme Court of Arkansas
Opinion delivered January 20, 2000



Donald A. Forrest, for appellant.

Mark Pryor, Att'y Gen., by: *Brad Newman*, Ass't Att'y Gen., for appellee.

ANNABELLE CLINTON IMBER, Justice. Andra Gaines was convicted of three counts of capital murder and one count of first-degree battery. He was sentenced to three terms of life imprisonment on the capital murder charges, to run concurrently with a twenty-year term on the battery charge. On appeal, he raises seven points for reversal. We affirm.

In 1996, Mr. Gaines lived at the West Memphis Housing Authority project. He and Brenda Davis, who lived nearby at the Imperial Homes complex, had been involved in a romantic relationship for about three years. Although the Imperial Homes complex and the Housing Authority project were separated by a chain-link fence, an opening in the fence allowed access by foot from one complex to another. Each unit at the Imperial Homes complex had four apartments, two upstairs and two downstairs, with an inside stairway providing access to the upstairs apartments.

Testimony at trial established that Mr. Gaines and Ms. Davis had a particularly volatile relationship. He was extremely jealous of her relationships with other men and frequently made threats to

harm Ms. Davis. An order of protection that was issued by the chancery court on May 15, 1996, excluded Mr. Gaines from Ms. Davis's residence based upon her allegations that Mr. Gaines had beaten her. Shortly thereafter, Mr. Gaines was shot in the legs by Ms. Davis's brother, Eric Davis. On June 9, 1996, a fire suddenly broke out in an apartment that was close to the apartment where Ms. Davis lived. According to Ms. Davis, Mr. Gaines made the following remark to her soon after that fire: "the fire should have came [*sic*] down a little further." As a result of the fire, Ms. Davis moved to another upstairs apartment in the complex. Mr. Gaines was a possible suspect in the investigation of the June 9 fire, but no charges were ever filed against him. Mr. Gaines threatened Ms. Davis again on June 14, 1996, when he told her that he was "going to get [her] and [her] brother for everything [they] had did [*sic*] to him." About that same time, Delisha Stennett heard Mr. Gaines threaten to line Ms. Davis and her family up against a fence and "have his boys from Little Rock come in and kill them all."

On June 22, 1996, at approximately 4:30 a.m., a second fire broke out at the Imperial Homes complex. This fire destroyed the two upstairs apartments in the unit where Ms. Davis lived. She attempted to escape through her front door, but the heat from the door knob burned her hand. She then found her way through the smoke to a bedroom window, jumped out of the window, and landed on the ground without injury. The occupants of the other upstairs apartment were not so fortunate. Patrice Hardin discovered the fire in the stairwell after she smelled smoke and opened the door to her apartment. Three young children who were asleep in that apartment died in the fire. Patrice and fourteen-year-old Alicia Warren managed to escape, although Alicia was badly burned. According to a West Memphis Fire Department paramedic, Alicia's condition was life-threatening because she sustained second- and third-degree burns to thirty-five percent of her body.

Several people had seen Mr. Gaines in the vicinity of Ms. Davis's apartment during the late evening and early morning hours before the second fire broke out on June 22, 1996. Ms. Davis herself saw him there around 10:30 p.m. the night before the fire as she was preparing to go out for the evening. At around 4:00 a.m. on the morning of the fire, Robert Miller dropped Ms. Davis off at her apartment and saw Mr. Gaines standing near the manager's building at the Imperial Homes complex.

Darren Foster also saw Mr. Gaines at the Imperial Homes complex that evening. Mr. Foster was returning home from work at 11:00 p.m. when he first saw Mr. Gaines at the complex. About one hour later, Mr. Foster was on his way to his cousin's apartment in the Housing Authority project when he encountered Mr. Gaines again. At Mr. Gaines's request, Mr. Foster walked back to the complex with him, where Mr. Gaines knocked on the door of a downstairs apartment that was directly underneath Ms. Davis's apartment. Despite Mr. Gaines's statement that a girl named Sharon lived there, Mr. Foster knew the downstairs apartment was vacant. As they walked away, Mr. Gaines looked up at the upstairs apartments in the unit where Ms. Davis lived. The two men then returned to the project and smoked some marijuana. Mr. Gaines asked Mr. Foster once more to return with him to the complex where Mr. Gaines knocked a second time on the same downstairs apartment door and looked up again at the same upstairs apartments. Mr. Foster eventually parted company with Mr. Gaines at 2:00 a.m. on June 22.

Cornelius Franklin saw Mr. Gaines during the early morning hours of June 22 when he made several trips to see Mr. Gaines about purchasing some crack cocaine. During one of those trips, Mr. Franklin heard Mr. Gaines say that he was going "to get that bitch, Brenda Davis, and fuck her up." When Mr. Franklin went back to see Mr. Gaines for the third time that evening, he asked to purchase the drugs "on credit." According to Mr. Franklin, Mr. Gaines responded with an offer to give him some dope if Mr. Franklin would go to the store, purchase a dollar's worth of gas, and bring it back to Mr. Gaines. Mr. Franklin accepted the offer and delivered a dollar's worth of gas to Mr. Gaines. In return, Mr. Gaines gave Mr. Franklin a $20 rock of crack cocaine. Mr. Franklin's testimony was corroborated by Linda Green, the mother of one of the victims, who testified that she saw Cornelius Franklin carrying a container of gasoline at approximately 3:00 a.m. on the morning of the fire. Likewise, James Clark testified that between 3:00 a.m. and 4:00 a.m. on the morning of the fire, he saw Mr. Franklin hand Mr. Gaines a container of gasoline, and that ten minutes later the Imperial Homes complex was on fire.

On the morning after the fire, Mr. Gaines checked into a room at a motel and asked to talk with a former girlfriend, Evelyn Simms. He asked her for a telephone book so that he could find the

number for the bus station. He also told her that "he had did [*sic*] something that he knew he was going to have to pay for." When she asked him if it had anything to do with the children who died in the fire, he merely repeated the following statement seven or eight times: "I've made a mistake and I know I've got to pay for it." According to Ms. Simms, her romantic relationship with Mr. Gaines ended in 1995 because he was "too possessive." Another witness, Vanessa Ann Richmond, testified that she overheard Mr. Gaines say he had "thrown the fire" in the wrong apartment.

A certified fire investigator confirmed that the fire was started in the stairwell outside the apartments with a liquid accelerant that had been ignited by an open flame, such as a match or cigarette lighter. After Patrice Hardin opened the door to her apartment, the fire matriculated upward toward that apartment and the new source of oxygen. The medical examiner concluded that all three children died from smoke and soot inhalation.

Andra Gaines was found guilty by a jury of three counts of capital murder and one count of first-degree battery. He was sentenced by the trial court to serve three terms of life imprisonment without parole in the Department of Correction, to run concurrently with a twenty-year term on the battery charge. Mr. Gaines now appeals those convictions.

[redacted] The seven points for reversal raised by Mr. Gaines involve evidentiary rulings by the trial court. On appeal, we will not reverse a trial court's ruling on the admission of evidence absent an abuse of discretion; nor will we reverse absent a showing of prejudice. *Huddleston v. State*, 339 Ark. 266, 5 S.W.3d 46 (1999); *Misskelley v. State*, 323 Ark. 449, 915 S.W.2d 702 (1996).

I. Evidence of an Earlier Fire

For his first point on appeal, Mr. Gaines argues that the trial court abused its discretion in allowing evidence of the June 9, 1996 fire and Ms. Davis's testimony that Mr. Gaines told her "the fire should have came [*sic*] down a little further," presumably to her apartment. The State contends that Mr. Gaines's motion in limine only sought to exclude evidence of the fire itself, and that any objection to testimony about his subsequent statement is not preserved for appellate review.

We will not consider an argument raised for the first time on appeal. *McDole v. State*, 339 Ark. 391, 6 S.W.3d 74 (1999); *McGhee v. State*, 330 Ark. 38, 954 S.W.2d 206 (1997). To preserve an argument for appeal, there must be an objection in the trial court that is sufficient to apprise the court of the particular error alleged. *Love v. State*, 324 Ark. 526, 922 S.W.2d 701 (1996). A party cannot change the grounds for an objection or motion on appeal, but is bound by the scope and nature of the arguments made at trial. *Henderson v. State*, 329 Ark. 526, 953 S.W.2d 26 (1997).

Prior to trial, Mr. Gaines moved in limine to exclude all evidence concerning the earlier fire that occurred on June 9, 1996. Such evidence would necessarily encompass Mr. Gaines's remarks to Ms. Davis about the fire. The admissibility of that evidence, including Mr. Gaines's subsequent statement, is therefore preserved for appellate review.

Mr. Gaines's first challenge to the admissibility of evidence about the earlier fire is on grounds of relevancy. Arkansas Rule of Evidence 401 defines relevant evidence as:

> . . . evidence having any tendency to make the existence of fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Pursuant to Ark. R. Evid. 402, all relevant evidence is admissible, except as otherwise provided by statute or rule, and evidence which is not relevant is not admissible.

The charges of capital murder in this case included not only felony murder, but also an allegation that Mr. Gaines caused the deaths of the unintended victims while acting with the premeditated and deliberate purpose of causing the death of Ms. Davis. *See* Ark. Code Ann. § 5-10-101(4) (Repl. 1997). Thus, evidence having any tendency to establish Mr. Gaines's intent toward Ms. Davis would be pertinent to the premeditation element of the State's alternative capital murder charge. There was evidence of domestic violence in Mr. Gaines's relationship with Ms. Davis before the June 9 fire. An order of protection had been issued in May 1996 based upon Ms. Davis's allegations that she had been beaten by Mr. Gaines. Moreover, he had been shot in the legs by Ms. Davis's brother. Under these circumstances, Mr. Gaines's remark to Ms. Davis that the first fire should have reached her apartment was

relevant in establishing his intent toward her. With regard to the fire itself, the State did not attempt to establish that Mr. Gaines committed any crime in connection with the first fire. However, evidence of that earlier fire was also relevant in that it provided the necessary context for Ms. Davis's testimony regarding the statement Mr. Gaines made to her about the fire on June 9, 1996.

Mr. Gaines also challenges the admissibility of this evidence under Ark. R. Evid. 404(b), which states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of the person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Evidence offered under Rule 404(b) must be independently relevant, thus having a tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. *McGehee v. State*, 338 Ark. 152, 992 S.W.2d 110 (1999). The admission or rejection of evidence under Rule 404(b) is committed to the sound discretion of the trial court, and this court will not reverse absent a showing of manifest abuse. *Echols v. State*, 326 Ark. 917, 936 S.W.2d 509 (1996).

As previously stated, the State did not attempt to establish that Mr. Gaines committed any crime in connection with the June 9, 1996 fire. In any event, evidence that the first fire occurred was independently relevant under Rule 404(b). The first fire was a catalyst for Mr. Gaines's statement that the fire should have "came [*sic*] down a little further" to reach Ms. Davis's apartment, suggesting his desire that she be harmed. Where the purpose of evidence is to disclose a motive for a killing or attempted killing, anything that might have influenced the commission of the act may be shown. *McGhee v. State, supra*. Evidence of circumstances that explain the act, show a motive, or illustrate the accused's state of mind, may be independently relevant and admissible. *Lee v. State*, 327 Ark. 692, 942 S.W.2d 231 (1997). In this case, the first fire might have given Mr. Gaines the idea to harm Ms. Davis by means of fire. Thus, evidence about the earlier fire was not prohibited by Rule 404(b).

Finally, Mr. Gaines asserts that the evidence should have been excluded as unduly prejudicial. Rule 403 of the Arkansas Rules of Evidence states:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading of the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

The trial court has the discretion to determine whether the prejudicial value of the evidence substantially outweighs its probative value, and its judgment will be upheld absent a manifest abuse of discretion. *Parker v. State*, 333 Ark. 137, 968 S.W.2d 592 (1998). Ms. Davis's testimony regarding the statement Mr. Gaines made to her as well as evidence about the earlier fire, which provided a context for that statement, were probative of his intent and of a possible plan or scheme. We cannot say that the trial court abused its discretion in ruling that the probative value of that evidence was not substantially outweighed by the danger of unfair prejudice. We affirm on this point.

II. Evidence of Drug Use and Drug Dealing

Mr. Gaines next argues that the trial court abused its discretion when it denied his motion in limine to exclude testimony that he smoked marijuana and sold crack cocaine on the evening of the fire. Specifically, Mr. Gaines asserts that this evidence was not relevant and, alternatively, that any relevance was outweighed by the danger of unfair prejudice. He also contends that Rule 404(b) prohibits proof of other crimes such as drug use and drug dealing.

The State again argues that Mr. Gaines has not preserved an argument based on Rule 404(b) because his objections below were premised solely on the admissibility of the evidence under Rules 402 and 403. We disagree. The specific ground of an objection must be stated if the specific ground was not apparent from the context. Ark. R. Evid. 103. While Mr. Gaines's objection was predicated on the assertion that evidence of the drug use and drug dealing would be more prejudicial than probative, he also argued that the admission of such evidence would require him to defend himself against uncharged crimes. Accordingly, we cannot

say that an argument based on Rule 404(b) was not apparent from the context.

With regard to the merits of Mr. Gaines's rule 404(b) argument, the general rule is that evidence of other crimes by the accused, not charged in the indictment or information and not a part of the same transaction, is not admissible at the trial of the accused; however, evidence of other crimes is admissible under the *res gestae* exception to the general rule to establish the facts and circumstances surrounding the alleged commission of the offense. *Haynes v. State*, 309 Ark. 583, 832 S.W.2d 479 (1992); *Young v. State*, 269 Ark. 12, 598 S.W.2d 74 (1980). Under the *res gestae* exception, the State is entitled to introduce evidence showing all circumstances which explain the charged act, show a motive for acting, or illustrate the accused's state of mind if other criminal offenses are brought to light. *Haynes v. State, supra.* Specifically, all of the circumstances connected with a particular crime may be shown to put the jury in possession of the entire transaction. *Haynes v. State, supra.* Where separate incidents comprise one continuing criminal episode or an overall criminal transaction, or are intermingled with the crime actually charged, the evidence is admissible. *See Ruiz & Van Denton v. State*, 265 Ark. 875, 582 S.W.2d 915 (1989); *Thomas v. State*, 273 Ark. 50, 615 S.W.2d 361 (1981); *Henderson v. State*, 284 Ark. 493, 684 S.W.2d 231 (1985). *Res gestae* testimony and evidence is presumptively admissible. *Henderson, supra; Lair v. State*, 283 Ark. 237, 675 S.W.2d 361 (1984); *Love v. State*, 281 Ark. 379, 664 S.W.2d 457 (1984); *Hobbs v. State*, 277 Ark. 271, 641 S.W.2d 9 (1982).

Darren Foster testified that he and Mr. Gaines smoked marijuana after midnight on the morning of the fire as they went back and forth between the Imperial Homes complex and the West Memphis Housing Authority project. It was during this time that Mr. Gaines repeatedly returned to the area where the intended victim's apartment was located. Cornelius Franklin testified that he contacted Mr. Gaines that same night to "buy some dope from him." His drug purchases from Mr. Gaines that evening eventually led to Mr. Gaines making an offer to give Mr. Franklin some dope in exchange for one dollar's worth of gas. Within a short time after that transaction, the fire broke out. The evidence of drug use and drug dealing was clearly intermingled and contemporaneous with the arson, culminating in the commission of the crimes charged. As

such, it was part of the *res gestae* and admissible as an exception to Rule 404(b). Furthermore, we cannot say that the probative value of this evidence was outweighed by the danger of unfair prejudice. Accordingly, we affirm on this point.

III. Evidence of An Order Of Protection

Mr. Gaines also challenges the trial court's admission of an *ex parte* order of protection entered against Mr. Gaines on May 15, 1996. Specifically, he contends that the protection order should have been excluded under Rule 404(b).

As previously stated, Mr. Gaines's intent toward Ms. Davis was relevant to the premeditation element of the State's alternative capital murder charge. Intent or state of mind is seldom capable of proof by direct evidence and must usually be inferred from the circumstances surrounding the killing. *Starling v. State*, 301 Ark. 603, 786 S.W.2d 114 (1990); *Parker v. State*, 290 Ark. 158, 717 S.W.2d 800 (1986). Threats made by a defendant prior to the time a homicide occurred are admissible to establish motive and ill will, even where they are never communicated to the victim. *Starling, supra; Pitts v. State*, 273 Ark. 220, 527 S.W.2d 849 (1981); *Lang v. State*, 258 Ark. 504, 527 S.W.2d 900 (1975).

The State argued below that Mr. Gaines was attempting to kill Brenda Davis when he accidentally killed the children. She testified that she sought a protection order because Mr. Gaines had threatened to kill her and had beaten her. In *Starling v. State, supra*, we upheld the admission of testimony that the defendant had previously used physical force against the victim, and had recently threatened to kill her. We held that such evidence "clearly tended to show appellant's motive, intent or plan to kill his wife." *Id.* Likewise, Ms. Davis's testimony in this case about earlier threats and beatings by Mr. Gaines was certainly probative of his motive, intent, or plan to harm her. This evidence was admissible regardless of whether she had sought or obtained a protection order. Evidence of the order itself was merely cumulative because the protection order was based upon admissible evidence of prior threats and beatings. With regard to Mr. Gaines's complaint that the protection order was issued in an *ex parte* proceeding, we note that he failed to request a curative instruction that would have explained the difference

between *ex parte* and adversarial proceedings. Under these circumstances, we conclude that the admission of an *ex parte* order of protection was not an abuse of the trial court's discretion.

IV. Prior Consistent Statement By Cornelius Franklin

Mr. Gaines next argues that the trial court abused its discretion in allowing Essie Franklin to testify about statements made to her by her son, Cornelius Franklin. Specifically, he contends that such testimony was inadmissible hearsay.

Arkansas Rule of Evidence 801(d) provides in relevant part that:

> (d) A statement is not hearsay if:
>
> (1) *Prior Statement By Witness.* The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . .
>
> (ii) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive.

When there is an express or implied charge that a witness has fabricated a statement that he is now making under oath, it is then proper, and not hearsay, to show that he made the same statement before the motive for fabrication came into existence. *Henderson v. State*, 311 Ark. 398, 844 S.W.2d 360 (1993).

The defense cross-examined Cornelius Franklin extensively about a possible deal with the prosecution in return for his testimony concerning Mr. Gaines's actions on June 22, 1996. In its effort to establish that Mr. Franklin's testimony was motivated by a deal, or his desire for a deal, with the prosecution, the defense also called Mr. Franklin's attorney, Tom Montgomery, to testify as a witness. Both Mr. Franklin and his attorney denied that he had been promised anything in return for his testimony. Mr. Gaines was clearly challenging Mr. Franklin's testimony as being recently fabricated or improperly influenced or motivated by desires for a deal with the prosecution. On direct examination by the State, Ms. Franklin testified that her son made the following statement to her before he ever spoke to the police officers: "He told me that Andra

had sent him to get some gas. He went, got the gas, brought it back to him; and he left." Mr. Franklin's statement to his mother was consistent with his testimony at trial and was made before he had contact with the police or the prosecutors. It was admissible under Rule 801(d)(1)(ii) to rebut the implied charges of recent fabrication or improper influence or motive. We cannot say that the trial court abused its discretion in allowing this testimony by Ms. Franklin.

V. Denial of Mistrial

Mr. Gaines also challenges the trial court's failure to grant a mistrial on grounds that Ms. Franklin blurted out that her son, Cornelius, told her shortly after the fire that Mr. Gaines started it. Mr. Gaines contends that this was inadmissible hearsay.

A mistrial is a drastic remedy and should be declared only when there has been an error so prejudicial that justice cannot be served by continuing the trial, or when the fundamental fairness of the trial itself has been manifestly affected. *Ward v. State*, 338 Ark. 619, 1 S.W.3d 1 (1999); *McFarland v. State*, 337 Ark. 386, 989 S.W.2d 899 (1999); *Barr v. State*, 336 Ark. 220, 984 S.W.2d 792 *cert. denied*, 120 S.Ct. 334 (1999). The trial court has wide discretion in granting or denying a motion for a mistrial, and absent an abuse of that discretion, the trial court's decision will not be disturbed on appeal. *Ward, supra.*

The damaging testimony that prompted a motion for mistrial was Ms. Franklin's statement that her son Cornelius told her "Andra had killed Linda Green's kids." Cornelius Franklin had previously testified, without objection, that he told his mother that "Andra had killed some kids." We have repeatedly held that prejudice is not presumed and we will not reverse the trial court's ruling absent a showing of prejudice. *Windsor v. State*, 338 Ark. 649, 1 S.W.3d 20 (1999); *Clark v. State*, 323 Ark. 211, 913 S.W.2d 297 (1996). No prejudice results where the evidence erroneously admitted was merely cumulative, and we do not reverse for harmless error in the admission of evidence. *See Thompson v. Perkins*, 322 Ark. 720, 911 S.W.2d 582 (1995). Even if this testimony by Ms. Franklin was erroneously admitted, no prejudice resulted as it was merely cumulative evidence. Accordingly, we affirm the trial court on this point.

VI. Testimony by Evelyn Simms

In his sixth point on appeal, Mr. Gaines asserts that the trial court erred in allowing Evelyn Simms to testify about statements made by Mr. Gaines the day after the fire. He contends that her testimony was not relevant, did not amount to an admission against interest, and was unfairly prejudicial.

[redacted] The State suggests that Mr. Gaines abandoned any objection to Ms. Simms's testimony, with the exception of her testimony about Mr. Gaines being possessive, when his attorney made the following remark at trial:

> DEFENSE COUNSEL: I don't mean that her whole testimony should be precluded. I think either reference to the statements that he was possessive which caused their breakup is the specific portions of her testimony that we object to.

The State nonetheless acknowledges that Mr. Gaines never specifically disavowed any portion of his motion to exclude Ms. Simms's testimony. Based on this record, we cannot say that Mr. Gaines abandoned any portion of his arguments on the admissibility of Ms. Simms's testimony.

[redacted] As previously stated, Ms. Simms testified that Mr. Gaines checked into the motel where she worked and asked her for a telephone book to locate the number for the bus station. During this conversation, he also told her that "he had did [*sic*] something that he knew he was going to have to pay for." When she asked him if it had anything to do with the children who died in the fire, he repeated the following statement several times: "I've made a mistake and I know I've got to pay for it." Mr. Gaines now claims that he never specifically told Ms. Simms that his "mistake" had something to do with the fire, and that he could have been referring to some other mistake. Such a claim concerning how a defendant's statement should be interpreted does not go to the admissibility of the statement, but only to its weight, which lies within the province of the jury. *See Webb v. State*, 327 Ark. 51, 938 S.W.2d 806 (1997); *Slocum v. State*, 325 Ark. 38, 924 S.W.2d 237 (1996). A party's own statement that is offered against him is clearly admissible under Ark. R. Evid. 801(d)(2). In considering the evidence as a whole, the jury could have reasonably inferred that Mr. Gaines was referring to the fire and the deaths of the unintended victims when he made the

statements to Ms. Simms only hours after the fire. We conclude that the trial court did not abuse its discretion in allowing Ms. Simms's testimony.

VII. Cumulative Error

Mr. Gaines's final point on appeal is an assertion that his conviction should be reversed on the basis of cumulative error. We have considered all assertions of error and concluded that no reversible error occurred in Mr. Gaines's trial. This court does not recognize the cumulative error doctrine when there is no error to accumulate. *Nooner v. State*, 322 Ark. 87, 907 S.W.2d 677 (1995).

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

The transcript of the record in this case has been reviewed in accordance with our Rule 4-3(h) which requires, in cases in which there is a sentence to life imprisonment or death, that we review all prejudicial errors in accordance with Ark. Code Ann. § 16-91-113(a). None have been found.

Affirmed.

Henry Jackson SMITH *v.* STATE of Arkansas

CR 99-913 8 S.W.3d 534

Supreme Court of Arkansas
Opinion delivered January 20, 2000

William R. Simpson, Jr., Public Defender, by: *Kent C. Krause*, Deputy Public Defender, for appellant.

Mark Pryor, Att'y Gen., by: *David R. Raupp*, Ass't Att'y Gen., for appellee.

ANNABELLE CLINTON IMBER, Justice. The appellant, Henry Jackson Smith, was charged with two counts of rape for engaging in sexual intercourse or deviate sexual activity with his son, J.F., and his daughter, T.F., in violation of Ark. Code Ann. § 5-14-103 (Repl. 1997). Both of the victims were under the age of fourteen at the time they were alleged to have been raped by Mr. Smith. After a bench trial, the Pulaski County Circuit Court convicted Mr. Smith on both counts and sentenced him to two concurrent life terms in the Arkansas Department of Correction.

Both victims testified at the bench trial. J.F., age eleven at the time of the trial, testified that Mr. Smith held a gun to his head and then "sticked [*sic*] his private part into [J.F.'s] behind." According to J.F., Mr. Smith threatened to kill him, his sister, and his mother if J.F. told anyone about the incident. J.F. also testified that Mr. Smith forced him to "suck his private" about two times a day since he was five or six years old. Furthermore, J.F. testified to an incident in which he saw Mr. Smith, with his pants pulled down, laying on top of his sister, T.F., whose pants were also pulled down. T.F., age ten at the time of the trial, testified that Mr. Smith engaged in sexual intercourse with her "every Saturday or Sunday when mama worked." She further testified that Mr. Smith put a gun to her head and threatened to kill her, her brother, and her mother if she told her mother about the sexual activity. At the conclusion of her direct examination, T.F. identified Mr. Smith as the person who had raped and sexually abused her.

The State also introduced a taped statement that had been given by Mr. Smith prior to trial. In that statement, he confessed to rubbing T.F.'s clitoris with his index finger and laying on top of her and "hunching her on the stomach," while they were both naked and he wore a rubber on his penis. He maintained, however, that his penis never touched or penetrated her vagina. Mr. Smith also denied having anal sex with J.F., but acknowledged that he showed J.F. how to masturbate by touching J.F.'s penis and having J.F. touch his penis.

Mr. Smith took the stand in his own defense at the trial and denied sexually penetrating either of his children. He admitted, however, that he had oral sex with T.F., that he had rubbed her vagina with his fingers, and that he had laid on top of her with his penis on her stomach while both were naked and "hunched" on her stomach. Moreover, he admitted showing J.F. how to masturbate. On cross-examination by the State, he denied holding a gun to the children's heads, but acknowledged that he told T.F. not to tell her mother about the sexual activity. Finally, he admitted using a rubber when he was on top of T.F. "so it wouldn't make a mess."

Denise Maples, a psychotherapist and counselor, testified that both children suffered from post-traumatic stress disorder and that both had regressed in developmental achievement as a result of being abused. She also testified that T.F. had become enuretic and was forced to take medication for the condition. With regard to J.F., Ms. Maples testified that he was extremely traumatized by the abuse, had repeated nightmares, and had developed an extreme fear of other men who entered his home. J.F. also had to take medication for his condition. According to Ms. Maples, J.F. tended to disassociate at times when he would become traumatized and think about his past abuse. Kay Lynn Franklin, the children's mother, testified that T.F. tried to climb out of a two-story window as a result of the abuse, and J.F. hid in a closet because he was afraid someone was going to hurt him.

At the beginning of the bench trial, the following colloquy took place between the prosecutor, the defense counsel, and the trial court:

> PROSECUTOR: Your Honor, I have one question that I would like — or I guess motion that I would like to ask. The children in this particular case have been traumatized somewhat, and we believe

> that the presence of the defendant is going to have some problem with them being able to testify. I would ask to simply be able to have them testify with the chair facing outside his line of sight.
>
> THE COURT: Sure.
>
> PROSECUTOR: In other words, have the chair facing over there.
>
> THE COURT: I don't mind that, as long as he's here and the attorneys and everybody can observe the child. Sure, I don't have any problem with that.
>
> DEFENSE COUNSEL: Your Honor, I just would like to object just for Mr. Smith's benefit, that he should be able to confront them face-to-face.
>
> THE COURT: I don't think confronting means sitting face-to-face with them. Confronting them, being they're in the courtroom, hearing the testimony and seeing them and so forth. That's what confronting means; not being able to stare them in the face. They'll be here in the courtroom where he can see them and see them testify. They don't have to look at him, and there's nothing wrong in turning the chair over there so they don't have to look at him.

Mr. Smith now appeals his rape convictions and alleges that the trial court erred in denying him his right to confront J.F. and T.F. face-to-face during the trial without first making specific findings that such an abridgment of the Confrontation Clause in the Sixth Amendment to the United States Constitution and the Arkansas Constitution was necessary to further an important public policy, and that the procedures to determine the reliability of the children's testimony were still preserved and available.

The Confrontation Clause in the Sixth Amendment to the United States Constitution states: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ." Article 2, section 10, of the Arkansas Constitution repeats that same right of confrontation. We have consistently interpreted both clauses to provide identical rights:

> The [S]ixth [A]mendment to the United States Constitution and Art. 2, 10 of the Arkansas Constitution guarantee the right of an accused in a criminal prosecution to be confronted with the witnesses against him. The right of confrontation provides two types of protection for a criminal defendant: the right physically to face

> those who testify against him and the opportunity to conduct effective cross-examination.

Bowden v. State, 301 Ark. 303, 783 S.W.2d 842 (1990). *See also, Winfrey v. State*, 293 Ark. 342, 738 S.W.2d 391 (1987); *Miller v. State*, 269 Ark. 409, 601 S.W.2d 845 (1980). The United States Supreme Court held in *Coy v. Iowa*, 487 U.S. 1012 (1988), that "the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact." Two years later, the Court held that the Confrontation Clause does not guarantee criminal defendants an *absolute* right to a face-to-face meeting with witnesses against them at trial. *Maryland v. Craig*, 497 U.S. 836 (1990). The Court further held that the right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where the trial court makes a case-specific finding that the denial of such confrontation is necessary to further an important public policy, such as protecting a child witness from trauma, and only where the reliability of the testimony is otherwise assured. *Id.* Mr. Smith, in his only point on appeal, argues that the trial court erred when if failed to make the findings required by *Maryland v. Craig.*

The two-part test established in *Maryland v. Craig* applies only when a criminal defendant has been deprived of his constitutional right to a face-to-face confrontation with the witnesses against him. *Id.* Consequently, as a threshold matter, we must first decide whether Mr. Smith has been deprived of his constitutional right to a face-to-face confrontation with his accusers.

In *Coy v. Iowa*, the Court held that the defendant's constitutional right to confront the witnesses against him face-to-face was violated when a screen that was authorized by a state statute was placed between the defendant and the witnesses during their testimony. When the screen was in place, the defendant could "dimly perceive" the witnesses, but the witnesses could not see the defendant at all:

> The screen at issue was specifically designed to enable the complaining witnesses to avoid viewing [the defendant] as they gave their testimony, and the record indicates that it was successful in this objective. It is difficult to imagine a more obvious or damaging violation of the defendant's right to a face-to-face encounter.

Coy v. Iowa, supra.

The undisputed facts in this case are that the trial court allowed the child witnesses to testify while sitting in a witness chair that faced "outside of [Mr. Smith's] line of sight." The trial court noted that the witnesses did not have to look at Mr. Smith, but that they would be in the courtroom where Mr. Smith, the attorneys, and the trier of fact could see and hear them testify. Although the witness chair was positioned so that the witnesses did not have to look at Mr. Smith while they testified, the record reflects that they were not precluded from doing so. This is evidenced by the undisputed fact that T.F. identified Mr. Smith during her testimony as the person who raped her. During her direct examination, the prosecutor asked T.F. if she could "point at him and tell us if you see the person in here that did this to you? Could you point at him for us?" The record then indicates that T.F. "[p]ointed at defendant." The witnesses in this case were therefore not physically prevented from looking at Mr. Smith. In contrast, the witnesses were physically blocked from seeing the defendant by a one-way screen in *Coy v. Iowa*, and by a one-way closed-circuit television in *Maryland v. Craig*. Here, the witnesses were able to look at Mr. Smith if they chose to do so, as shown by T.F.'s in-court identification of Mr. Smith. Nor were they required by the Confrontation Clause to look at Mr. Smith: "The Confrontation Clause does not, of course, *compel* the witness to fix his eyes upon the defendant; he may studiously look elsewhere, but the trier of fact will draw its own conclusions." *Coy v. Iowa, supra.* (Emphasis added.)

Based on the undisputed facts in this case, we conclude that nothing prevented the witnesses from hearing or seeing Mr. Smith and nothing prevented Mr. Smith, the attorneys, and the trier of fact from hearing or seeing the witnesses as they testified against him. We therefore hold that Mr. Smith has failed to establish as an initial matter that there has been a deprivation of his constitutional right to a face-to-face confrontation with the witnesses against him.

Our holding is supported by cases from other jurisdictions. For example, in *People v. Sharp*, 36 Cal. Rptr. 2d 117 (Cal. Ct. App. 1994), the California Court of Appeals held that the defendant was not deprived of his constitutional right to confront witnesses when the prosecutor positioned herself in the courtroom so that the child

victim, Tammy G., did not have to look at the defendant while testifying about his acts of sexual molestation.

Similarly, in *State v. Utah*, 806 P.2d 204 (Utah Ct. App. 1991), the defendant claimed that his constitutional right of confrontation was denied when his daughter, the victim, was seated out of his direct line of sight during her testimony. The defendant and his counsel were seated at the table customarily assigned to the prosecution, in order to remove the witness from the defendant's direct line of sight. *Id.* The Utah Court of Appeals rejected the defendant's claim that his confrontation rights were denied based upon the following conclusion: "We find no constitutional requirement that an accused be able to establish eye contact with a witness who is looking straight ahead." *Id.* Finally, the Indiana Court of Appeals held that there was no Confrontation Clause violation in placing the witness chair at a slight angle toward the jury and away from the accused. *Stanger v. State*, 545 N.E.2d 1105, 1112-14 (Ind. App. 1989), *overruled on other grounds*, *Smith v. State*, 689 N.E.2d 1238 (Ind. 1997). The court stated:

> Where, as here, the method of eliciting testimony permits jury, witness, and defendant all to see and hear each other and possesses the added virtue of actually facilitating the truthfinding function at the trial, positioning the witness away from the defendant is but a reasonable limitation on the defendant's interest in physical confrontation. As the Court noted with respect to cross-examination, confrontation does not mean in whatever way and to whatever extent a defendant might wish.

Id. (citations omitted). *See also, Brandon v. State*, 839 P.2d 400 (Alaska Ct. App. 1992) (defendant's right to confrontation not infringed by child testifying from small chair and table in courtroom rather than witness stand).

For his only point on appeal, Mr. Smith argues that the trial court erred when it failed to make the specific findings required by *Maryland v. Craig*. That argument, however, makes an assumption that Mr. Smith has been deprived of his constitutional right to a face-to-face confrontation at trial. In light of our holding that Mr. Smith has failed to establish as an initial matter the presence of such a constitutional deprivation, we need not reach the merits of his sole argument on appeal.

Affirmed.

BROWN, J., concurs.

ROBERT L. BROWN, Justice, concurring. I do not disagree with the legal reasoning of the majority opinion in any respect. My problem is I do not believe Smith has presented this court with sufficient information to make a merits determination on the Confrontation Clause. What does "outside his [Smith's] line of sight" mean? How was the courtroom configured with respect to Smith and the child witnesses? Did the child witnesses have their backs to Smith or were they at an angle? None of this is clear from the record presented to this court, and it was Smith's obligation to make it clear for our review.

I would affirm based on Smith's failure to present this court with a record of what occurred so that we can make an intelligent decision. *See Tarry v. State*, 289 Ark. 193, 710 S.W.2d 202 (1986). Without that record, we can only speculate about how Smith and the child witnesses were positioned and whether the Confrontation Clause was implicated in any respect.

Tim A. WOMACK *v.* Phillip FOSTER

99-953 8 S.W.3d 854

Supreme Court of Arkansas
Opinion delivered January 20, 2000

Kinard, Crane & Butler, P.A., by: *Mike Kinard*; and *Michael W. Frey*, for appellant.

Eugene D. Baramblett; *Searcy W. Harrell, Jr.*; and *Allen P. Roberts*, for appellee.

ANNABELLE CLINTON IMBER, Justice. This is an election-contest case. A special election was held on March 9, 1999, to fill a vacancy in the office of Ouachita County Municipal Judge. No candidate received a majority of the votes cast, so a runoff election was held on March 30, 1999, between the appellant, Tim A. Womack, and the appellee, Phillip J. Foster. On the night of the election, Mr. Foster challenged over 600 absentee ballots as they were being counted. Based on Mr. Foster's challenge to the absentee ballots, the Ouachita County Election Commission threw out sixteen ballots for failure of the voters to comply with absentee voting laws. Mr. Womack made no challenges to any absentee votes as the votes were counted. Mr. Womack was declared the winner by a vote of 3,011 to 3,004, a margin of only seven votes. Not including absentee votes, the vote tally was 2,717 for Mr. Foster and 2,337 for Mr. Womack. The absentee votes added 674 to Mr. Womack's total and 287 to Mr. Foster's total. Thus, the absentee votes provided Mr. Womack with his seven-vote margin of victory. These results were certified by the Election Commission of Ouachita County on April 12, 1999.

Shortly before the runoff election, Mr. Foster had filed a petition for a writ of mandamus and declaratory judgment against

Eve Holeman in her capacity as Ouachita County Clerk, asking that the trial court order her to comply with Arkansas's absentee voting laws in the conduct of the runoff election. Specifically, Mr. Foster alleged that the county clerk had accepted absentee-ballot applications in which the applicants did not indicate a reason for voting absentee, as required by statute; and that she had also accepted applications and issued ballots to applicants who designated agents to deliver their applications to the county clerk because they were medically unable to do so themselves, but whose medical status was not verified by affidavit, as required by statute. Mr. Foster further alleged that the voter statement provided to absentee voters did not comply with the form mandated by Ark. Code Ann. § 7-5-409 (b)(4) (Supp. 1997); that the county clerk had failed to require that any person identified by the absentee voter as a designated bearer, authorized agent, or relative, sign documentation upon delivery of absentee ballots to her office; and that she had also failed to maintain any record of how many such ballots had been delivered to her office by each person so identified, as required by Ark. Code Ann. § 7-5-411(a)(2) (Supp. 1997).

At a hearing on March 29, 1999, Ms. Holeman testified that she advised applicants for absentee ballots that they did not have to indicate a reason for voting absentee. She also told her deputy clerks and employees to dispense this same advice to voters. According to her testimony, the clerk's office readily issued absentee ballots to voters knowing that they had not indicated a reason on their absentee-ballot applications. She also admitted that she failed to make sure that medical affidavits were attached to absentee-ballot applications delivered by authorized agents for persons who were medically unable to deliver their own applications to her office. Furthermore, Ms. Holeman confirmed that the voter statements provided to absentee voters by her office were not in compliance with the law. Specifically, the forms did not contain a place for the voter to appoint a designated bearer to return the ballot. Nor did it contain a place for the bearer of the ballot, either as a designated bearer, relative of the voter, or authorized agent, to sign his or her name. Finally, Ms. Holeman testified that the county clerk's office did not maintain a document signed by persons delivering absentee ballots to her office or any kind of record as to how many absentee ballots were brought to her office by a person other than the absentee voter.

The trial court granted Mr. Foster's petition for writ of mandamus on March 29, 1999, and directed the county clerk to follow the applicable statutes regarding absentee voting. However, the trial court reserved ruling on Mr. Foster's request that absentee ballots not applied for, issued by, or delivered to the county clerk in compliance with absentee voting laws, be declared null and void. Mr. Womack did not appeal the issuance of the writ of mandamus, and Mr. Foster's mandamus and declaratory-judgment action was eventually consolidated with the election contest now at issue.

Mr. Foster's election-contest complaint, which was timely filed on April 14, 1999, sought to cancel more than 600 absentee votes for Mr. Womack based on numerous instances of noncompliance with the absentee voting laws. Specifically, Mr. Foster asked the trial court to disqualify the votes of those absentee voters who did not state a reason for voting absentee on their applications and those who delivered their applications by means of an agent but failed to submit a medical affidavit. He also asked the trial court to disqualify all absentee ballots where the application or the ballot was delivered by a bearer, agent, or relative, unless the bearer signed the voter statement and a clerk-maintained record that identified the voters for whom the ballots were borne; and to disqualify all absentee ballots supported by undated applications, or applications showing only the March 9 election date, or applications altered to add the March 30 election date or the words "all elections."

Furthermore, he alleged that one voter died prior to the runoff election; four voters were not mentally competent to vote in the election; the absentee ballots of three voters were fraudulently marked by someone else; seven voters fraudulently stated on their applications for absentee ballots that they would be unavoidably absent from their polling sites on election day; and that certain conduct on the part of Mr. Womack's campaign workers was illegal and fraudulent. Exhibits attached to the complaint identified the voters whose votes were being challenged by Mr. Foster and the reasons for those challenges. Finally, Mr. Foster alleged that he would be the winner of the election if the election returns were purged of the challenged absentee ballots cast for Mr. Womack. On April 21, 1999, Mr. Womack filed a timely answer to the election-contest complaint denying each of Mr. Foster's substantive allegations of illegality or fraud. Mr. Womack also asserted in his answer that Mr. Foster's complaint represented an improper effort to disen-

franchise qualified voters, in violation of the constitution and laws of Arkansas, and in violation of the U.S. Constitution and federal civil rights and voting rights laws.

Mr. Foster filed a timely amendment to his earlier complaint on April 30, 1999. In addition to restating many of the allegations found in his original complaint, he alleged that four voters were convicted felons and not legally entitled to vote; five voters were not residents of Ouachita County and not entitled to vote; signature irregularities and forgeries were on applications and voter statements; voter-registration cards did not exist for 10 voters; 408 voters failed to state a valid reason for voting absentee on their voter statements; 116 voters, whose applications indicated the appointment of an authorized agent for medical reasons, failed to attach medical affidavits to their applications or voter statements; some voters voted absentee despite being available to vote at their polling sites on election day; and Mr. Womack's campaign workers inserted the names of bearers on absentee-ballot applications after the applicant had already signed the application.

On May 3, 1999, Mr. Womack filed a counterclaim, also alleging noncompliance with absentee voting laws. Specifically, he alleged that Mr. Foster's campaign workers made changes to the ballot materials of unidentified absentee voters after those materials had been filled out by the voters but before delivery to the court clerk; that one identified voter was paid to vote for Mr. Foster; that the ballots of three identified voters were cast by persons other than the voters, acting pursuant to powers-of-attorney; that thirty-one identified voters were nonresidents of Ouachita County and not entitled to vote; that eight ballots were delivered to the clerk by persons claiming to be relatives of identified voters, when, in fact, they were not relatives; that certain signatures of unidentified voters appeared to be forgeries; that more than five envelopes containing ballot materials were illegally delivered to a certain address; that all votes should be canceled where bearers returned more than five ballots to the county clerk; and that unidentified felons voted in the election. Mr. Womack also alleged that the county clerk disenfranchised certain unidentified voters when she refused to issue ballot materials to them because their applications for absentee ballots tendered the day before the election did not comply with absentee voting laws; and that she disenfranchised twenty-five unidentified absentee voters whose ballots were not counted

because they had not been delivered to the clerk's office until the day after the election.

Mr. Womack further challenged the Election Commission's rejection of certain absentee ballots for various reasons, including the voter's failure to attach a medical affidavit to his or her application or voter statement; the voter's married name not matching the name on the voter-registration card; the voter's failure to properly complete, sign, and tender the voter statement; and ballot stubs being lost or misplaced. Most significantly, Mr. Womack alleged in his May 3 counterclaim that the Ouachita County Election Commission violated Section 3 of Amendment 50 to the Arkansas Constitution by failing to number the ballots correctly, thus rendering all ballots used in the election untraceable. Mr. Womack restated this allegation in a motion for summary judgment filed on June 3, 1999, and further asserted that the failure to comply with the constitutional numbering requirement rendered the entire election void, thereby requiring that the results of the election be set aside. Mr. Womack filed an amended counterclaim on June 7, 1999, restating many of his earlier allegations. Additionally, he alleged various instances of illegality and fraud by Mr. Foster's campaign workers and asked that all absentee ballots handled by them be set aside and canceled. Mr. Womack also rebutted many of the earlier allegations made by Mr. Foster in his complaint and amended complaint.

A trial was held on Mr. Foster's complaint and amended complaint and Mr. Womack's counterclaim and amended counterclaim over the course of eleven days, beginning on June 8, 1999, and ending on July 21, 1999. Mr. Foster first introduced several exhibits that contained separate groups of absentee-ballot applications and voter statements in the following categories: applications and voter statements in which no reason was given for voting absentee; voter statements where "early voting" was marked as the reason for voting absentee; applications and voter statements in which medical reasons were given for voting absentee, but with no medical affidavits attached; applications that were undated; and applications with no election date or an incorrect or crossed out election date. Mr. Foster also introduced certified copies of a death certificate, a guardianship order, and circuit court records reflecting the felony convictions of four individuals.

Mr. Foster then called Sylvester Smith, Jr., to testify about his work for Mr. Womack's campaign. As part of that work, Mr. Smith delivered between 100 and 200 absentee-ballot applications to voters and urged them to vote for Mr. Womack. Mr. Smith gave the following description of how he solicited absentee votes:

> [F]or the last several years I have gotten out and tried to get people that wasn't involved in voting that was always complaining on the street, but never doing anything about it at the polls. I convinced a lot of them to register to vote and get involved in the process. After they got involved in the process, every election a lot of them flagged me down on the street wanting to continue to vote absentee, being involved in the process. Okay.
>
> I would get them a application. A lot of these people work at different places. They leave at 6:00 in the morning. A lot of them don't get home until 7:00 at night, trying to struggle to make a living for their families.
>
> Okay. I would get then a application. They would sign the application. I would explain to them up front that I could only — according to the Clerk — pick up five ballots from the Clerk's office. They would ask me, "then who would be bringing my ballot?" I'd say, "Well, I would have to find a bearer, a designated bearer to go and obtain your ballot. Do you mind?" "No. I don't mind, but I want you to bring my ballot back to me. I don't want any stranger person coming to my house or in day the [*sic*] that I don't know." A lot of these people are elderly people that I assist in voting, because they cannot get to the polls.
>
> Okay. They know up front that on these applications that I'm not going to be the bearer, that I can only get five. Okay. I asked Ms. Bevers did she know some credible people, honest people that would work to be a bearer, would they mind to go and pick up a ballot. She said she thought she could find some bearers. Okay. No one has been, you know, fooled or tricked. Up front, these people have signed these applications. They know that Sylvester Smith is going to help them obtain their ballot. They know Sylvester Smith is going to bring their ballot back to them. They know that after they vote, these ballots are going to be sealed up in front of them and either taken back to the polls by the bearer or mailed back to the Clerk's office.

During his testimony, Mr. Smith produced twenty-nine envelopes containing original ballots and original voter statements that he had

in his possession on election day, but that had not been delivered to voters.

Randall C. Ferguson, another Womack campaign worker, testified that he had helped people vote absentee for at least eight years, and that he also solicited in excess of 100 absentee votes for Mr. Womack. Mr. Ferguson's method of soliciting absentee votes was similar to that of Mr. Smith, except that Mr. Ferguson was shown on each application as the voter's authorized agent to deliver the application because the voter was medically unable to deliver the application. However, medical affidavits were not attached to any of the applications or voter statements that identified Mr. Ferguson as the voter's authorized agent. Mr. Ferguson acknowledged that on some voter statements, he was incorrectly identified as a voter's relative for purposes of delivering the ballot to the clerk's office. He also testified that he saw voters mark their ballots and sign their voter statements and that he would help voters place their ballots and voter statements in the appropriate envelopes and then seal the envelopes. Finally, Mr. Ferguson acknowledged that after he had personally delivered at least five ballots to the clerk's office, he began to mail the envelopes containing each absentee voter's ballot and voter statement back to the clerk's office.

Many absentee voters and their relatives were called to testify about numerous instances of impropriety in the absentee voting process. Several of those absentee voters testified that they could have voted at their regular polling places on election day. Some witnesses testified about the mental and physical condition of their spouses or parents who were absentee voters in the runoff election. Other witnesses testified about the status of their residency or a relative's residency in Ouachita County on the date of the election. Many witnesses testified that Mr. Smith or Mr. Ferguson assisted them or their relatives in voting absentee. For example, Mildred Ann Hill testified that she and her husband, Robert Hill, allowed Mr. Smith to mark their ballots because they did not have glasses on at the time. Grady Moore testified that he relied upon Mr. Ferguson's advice when he signed his wife's name to an application for an absentee ballot and to the voter statement, as well as when he marked her ballot. At that time, his wife was living at a nursing home and could not communicate with anyone. Gwen Ford testified that Mr. Ferguson witnessed her sign the applications for herself and her parents, Sherman Sanders and Beadie Sanders, and that

Mr. Ferguson's fellow campaign worker, Milton Cook, was present when she signed all three voter statements and marked all three ballots. At that time, her mother was a stroke patient at a nursing home.

Similarly, Sudie Jackson testified that Mr. Ferguson saw her sign voting materials for not only herself, but also for Ben Davis and her mother, Callie Murphy. Several witnesses who had designated Mr. Ferguson as their authorized agent to deliver their applications because they were medically unable to do so, testified that they picked up ballots for other absentee voters at the clerk's office and delivered them to Mr. Ferguson. Another Womack campaign worker, Nancy Kendall, solicited absentee ballots from nursing home residents. She was a designated agent for five of those residents, but did not attach medical affidavits to their applications or voter statements. She also solicited several other applications where another bearer's name was inserted.

Linda R. Taylor testified as an expert witness in the field of handwriting examination. She testified that she examined the voter applications, voter statements, and, in some instances, the voter-registration cards of many of the absentee voters who voted in the runoff election. As part of her testimony, she offered her expert opinion that it was highly probable that sixty-six absentee voters did not sign either the application, the voter statement, or both, and that the signatures on the voter statements of five absentee voters did not match the signatures on their respective applications. Ms. Taylor specifically identified those seventy-one absentee voters in a report.

After Mr. Foster concluded his presentation of testimony and evidence concerning the ballots he was challenging, the parties stipulated to the following facts: As the absentee ballots were being processed by election officials on the day of the election, Mr. Foster challenged approximately 630 of about 1000 absentee ballots. The envelopes containing each absentee ballot, along with the voter statement and ballot stub, were then segregated. The election officials rejected twenty-six ballots for various irregularities, including the absence of a voter statement, the failure of the voter to sign the voter statement, illegible signatures, or incorrect signatures or names. Approximately 332 unchallenged ballots were then set aside to be counted, and the ballot stubs were separated from those

ballots. This made it impossible to identify the persons who cast those ballots because the ballot numbers and the voter numbers appeared only on the ballot stubs. After a hearing on Mr. Foster's challenges, the Ouachita County Election Commission rejected seventeen more ballots, with one being thrown out because the stub was missing and the remaining sixteen being thrown out because the voter statements identified the reason for voting as a medical disability, but no medical affidavits were attached. The Election Commission then began to count the challenged but unrejected ballots. It was at that point that the back of each challenged ballot was marked with the ballot number printed on that ballot's stub so that each ballot could be traced to a voter.

When the recitation of the above stipulated facts was completed, the trial court ruled that Mr. Foster had made a *prima facie* showing that the ballots of 546 identified absentee voters should be set aside as not in compliance with the laws of Arkansas. The parties then stipulated that 518 of those absentee ballots were cast for Mr. Womack.

Mr. Womack then proceeded with the presentation of his case and called Ms. Holeman, the Ouachita County Clerk, as his first witness. She testified about attending regular continuing education programs for county clerks where she would receive training and information on the current status of election laws and procedures. Ms. Holeman confirmed that prior to the issuance of the writ of mandamus on March 29, 1999, her office did not verify that one of two statutory reasons for voting absentee had been declared on each application. When the application permitted delivery by an authorized agent, Ms. Holeman would only require a medical affidavit if the applicant was going to be in the hospital or a nursing home on election day. Nor would she verify whether information about the particular election was properly filled out or whether an application that indicated it could be delivered by a relative or designated bearer was in fact delivered by a relative or someone who knew the voter. However, she did keep a separate list of the names of those persons who picked up ballot materials for other voters in order to enforce the five-ballot rule.[1] She would also keep a list of the voters who

[1] Ballot materials included a ballot (with a ballot number printed on the back of the detachable ballot stub and the words "List of Voter's Number" printed on the front of the detachable ballot stub), ballot envelope, voter statement, and outer envelope.

were issued absentee ballots in order to avoid sending duplicate ballots to the same voters.

These policies and procedures in her office were conveyed to her clerks and to voters and campaign workers who sought guidance regarding absentee voting procedures. Ms. Holeman further testified that twenty-five ballot packages were not counted because they were received by the clerk's office the day after the election. On cross-examination, Ms. Holeman reaffirmed her earlier testimony at the mandamus hearing that the voter statement used by her office before March 29 did not comply with the law. She also confirmed that her office's previous policies on absentee voting procedures changed after the writ of mandamus. Finally, Ms. Holeman testified that voters in Ouachita County vote by paper ballot and the ballots are then tabulated by machine.

Ray Bush, a Foster campaign worker, testified by deposition about his method of soliciting absentee votes. He would take the application to the voter, get it filled out, and then take it to Mr. Foster's office where someone would make sure it had been filled out correctly. If corrections were necessary, one of the secretaries would fill in the missing items or check a box that needed to be checked. Mr. Bush would then take the application to the clerk's office, pick up a ballot, and take it to the voter. He would tell the voters how to fill out the ballot and the voter statement, place both items in the envelope, and take the envelope back to the office where the ballot and voter statement were pulled out of the envelope and checked to make sure they had been filled out properly. After making a record of how the absentee voter voted, the envelope would then be sealed and delivered to the clerk's office.

When Mr. Bush could no longer be a ballot bearer due to the five-ballot rule, he began to ask each voter not to fill in the spaces on the application or the voter statement for the bearer's name so that a bearer's name could be inserted at the office. When the bearer's name was left blank, he would drop the application off at the office, at which point someone else would take the application to the clerk's office, pick up the voter's ballot materials, and return them to the office. Mr. Bush would then go to the office and pick up those ballot materials, deliver them to the voter, and return the completed ballot materials to the office for delivery to the clerk's office by another bearer. According to a certified copy of a federal

court record introduced by Mr. Womack, a criminal judgment had been entered against Mr. Bush in 1993.

Andrea Easter testified by deposition that Herbert Thompson paid her $5 to vote for Mr. Foster. Her sister, Carla Purifoy, also testified by deposition that Mr. Thompson gave her $5, possibly to encourage her to vote for Mr. Foster; but she didn't know if she voted, much less who she voted for. Mr. Thompson testified by deposition that he was hired by Mr. Foster to take people to the polls to vote. He denied paying anyone to vote for Mr. Foster in the runoff election. He also testified that someone else signed his name on two absentee-ballot applications.

On July 26, 1999, the trial court issued its written findings of fact, conclusions of law, and judgment that invalidated 518 absentee votes for Mr. Womack and one absentee vote for Mr. Foster. Thus, Mr. Foster gained 517 votes due to the trial court's findings and was declared the winner by 510 votes. The 518 absentee votes for Mr. Womack were invalidated by the trial court for the following reasons: 495 were invalidated because the absentee-ballot applications did not indicate a reason for voting absentee; twelve were invalidated because the voters testified that they were available to vote at their polling sites on election day, despite the fact that they voted absentee; fifteen votes were invalidated because the name of the bearer was filled in by someone other than the voter after the voter had signed the application; sixty-four votes were invalidated because, according to the testimony of Mr. Foster's expert witness, Linda Taylor, those ballots were cast as a result of a forgery on either the application or the voter statement; 119 votes were invalidated for failure to attach a medical affidavit and additionally because Mr. Randall Ferguson mailed the ballots in for the voters; ten votes were invalidated because the applications either gave no reason for not voting on election day, a person was listed as a bearer after the voter signed the application, or Sylvester Smith mailed the ballot in for the voter; one was invalidated because the voter died before election day; four votes were invalidated because the voters were not residents of Ouachita County; four votes were invalidated because the voters were mentally incompetent; and four votes were invalidated because the voters were convicted felons. Many votes were thrown out for multiple reasons. The trial court reached the total number of 518 by invalidating 495 votes for not stating a reason on the absentee-ballot application for voting absentee, and by invalidat-

ing an additional twenty-three votes for some of the other reasons listed above.

With regard to Mr. Womack's argument that the entire election should be voided for failure to comply with the numbering requirement of Ark. Const. amend. 50, § 3, the trial court found that the runoff election in Ouachita County was conducted by "machine" rather than by "ballot." Thus, the trial court ruled that the numbering requirement did not apply, and there was no constitutional violation. The trial court further stated that Mr. Womack waived any argument based on the constitutional numbering requirement because Mr. Womack knew or should have known about the numbering of the ballots before the runoff election was conducted. The trial court noted also that the numbering requirement, while mandatory before the election, would only be directory after the election.

The trial court dismissed Mr. Womack's counterclaim and amended counterclaim under Ark. R. Civ. P. 12(b)(6) for failure to state sufficient facts upon which relief could be granted. According to the trial court, Mr. Womack's counterclaim and amended counterclaim did not sufficiently allege that the outcome of the election would be different if the trial court were to rule in his favor on his claims for affirmative relief. Specifically, the trial court found that in a majority of instances where voting irregularities were alleged to have occurred, the pleadings did not allege for whom the questioned votes were cast. Despite dismissing the counterclaim and amended counterclaim for failure to state a claim, the trial court proceeded to rule on the merits of each point raised by Mr. Womack and concluded that Mr. Foster's margin of victory would be reduced by 37 votes, that is to 473 votes. Thus, even when the trial court reached the merits of Mr. Womack's claims for affirmative relief, Mr. Foster remained the winner of the election.[2]

Mr. Womack now brings this appeal from the trial court's judgment and raises several assignments of error. On September 9, 1999, we granted Mr. Womack's motion to advance the appeal on the docket and establish an expedited briefing schedule. *Womack v. Foster*, 338 Ark. 514, 998 S.W.2d 737 (1999) (*per curiam*).

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[2] The trial court did not rule on Mr. Womack's allegations of violations of the U.S. Constitution and federal civil rights and voting rights laws.

Section 3 of Amendment 50 to the Arkansas Constitution.

For his first point on appeal, Mr. Womack argues that the Ouachita County Election Commission failed to record the voter number on any of the absentee ballots or the ballots cast on election day as required by Amendment 50, section 3, to the Arkansas Constitution, which states:

> In elections by ballot every ballot shall be numbered in the order in which it is received, the number shall be recorded by the election officers on the list of voters opposite the name of the elector who presents the ballot, and the election officers shall be sworn or affirmed not to disclose how any elector voted unless required to do so as witnesses in a judicial proceeding or a proceeding to contest an election.

Ark. Const. amend. 50, § 3 (emphasis added). The number referred to in section 3 is the "voter number," that is, the number assigned to each voter in the order of his or her appearance at the polling place, or in the case of absentee voting, in the order that each outer absentee-ballot envelope is opened and the voter's name is read aloud from his or her voter statement. Ark. Code Ann. §7-5-416 (Supp. 1997).

The trial court ruled that the runoff election in Ouachita County was by machine and not by ballot. Thus, Ark. Const. amend. 50, § 3, did not apply to that election, and voter numbers were not required to be recorded on the ballots. Mr. Womack argues that the election at issue was conducted by ballot and that the trial court erred in holding that it was by machine. The voters in this election marked ballots printed on paper with a pencil. The ballots were then fed into a machine known as the American Information Systems Machine ("AIS machine") for the purpose of tabulating the votes.

Two methods of voting are established by the Arkansas Constitution. Section 2 of Amendment 50 to the Arkansas Constitution states that "all elections by the people shall be by ballot or by voting machines which insure the secrecy of individual votes." As previously stated, section 3 of Amendment 50 prescribes how ballots shall be numbered in elections by ballot. Whereas, section 4 of Amendment 50 delegates to the General Assembly the power to prescribe rules in elections by voting machines: "voting machines

may be used to such extent and under such rules as may be prescribed by the General Assembly."

The General Assembly has enacted statutes governing election by voting machines. *See* Ark. Code Ann. §§ 7-5-501—531 (Repl. 1993 and Supp. 1999). Pursuant to Ark. Code Ann. § 7-5-501, voting machines "may be acquired and used in any election conducted in a municipality or county upon the adoption of an ordinance therefore by the governing body of the municipality or the quorum court of the county." The statutory specifications for voting machines provide that the machine must be constructed not only to perform the tabulation of votes, but the voter must also be able to perform the physical act of voting "on the machine." Ark. Code Ann. § 7-5-504 (Repl. 1993).

Elections by paper ballot are also the subject of certain statutory provisions. For example, Ark. Code Ann. § 7-5-208(b) (Supp. 1999) provides that "[e]ach ballot shall be printed on paper with a perforated portion capable of being detached for use as the ballot stub." At elections where paper ballots are used, the voters mark the ballot, and the votes are then calculated without the aid of a machine. Ark. Code Ann. §§ 7-5-309, 315 (Supp. 1999).

Sections 7-5-601—615 provide for yet another method of voting in a subchapter entitled "Electronic Voting." Section 7-5-601 states:

> The purpose of this subchapter is to authorize the use of electronic voting systems in which the voter records his votes by means of marking or punching one (1) or more vote cards, which are so designed that votes may be counted by data processing machines at one (1) or more counting places. In the enactment of this subchapter, the General Assembly recognizes that existing laws authorize the use of paper ballots or voting machines in elections of this state and that it is not the intention of this subchapter to repeal or modify any of those laws. *It is the purpose of this subchapter to establish a method of marking vote cards and tabulating election results which shall be in addition and supplemental to the existing systems of voting by paper ballot or by voting machines* as defined in Act 53 of 1963 [repealed].

See Ark. Code Ann. §§ 7-5-601—615 (Repl. 1993 and Supp. 1999). (emphasis added.)

We must first determine what method of voting was used in the March 30, 1999 runoff election. Ouachita County voters voted by making a mark on a printed vote card with a special pencil, much like voting was done on paper ballots in the days before any type of mechanical or electronic equipment was used. Once the voters marked their vote cards with the special pencil, the vote cards were fed into the AIS machine for tabulation. This was clearly an "electronic voting system" as described in section 7-5-601. Amendment 50, however, only recognizes elections by ballot and elections by voting machine and does not recognize elections by an "electronic voting system." Nonetheless, Mr. Womack argues that this "electronic voting system" should be considered voting by ballot because the vote cards are used for the actual voting and the AIS machine is only used for the tabulation of votes. We must therefore decide whether the Amendment 50 numbering requirement applies to electronic voting systems such as the one used in Ouachita County.

Electronic voting systems merely tabulate voting cards that have been filled out by the voter in the same way that a paper ballot would be filled out. In essence, the voter is voting by paper ballot. On the other hand, when a voter uses a voting machine, the voter is actually performing the physical act of voting on the machine, and no paper ballots or voting cards are involved. Additionally, Ark. Code Ann. § 7-5-604(b) (Repl. 1993) states:

> So far as applicable, the procedures provided by law for voting by [means other than electronic voting systems] and the conduct of the election in regard thereto by the election officials, not otherwise inconsistent with this subchapter, shall apply to the system of electronic voting and tabulation as authorized in this subchapter.

We therefore hold that the electronic voting system used in the March 30, 1999 runoff election constituted an election by ballot and was subject to Amendment 50's numbering requirement. The trial court erred in holding otherwise.

We now consider whether Ouachita County's election officials complied with Amendment 50's numbering requirement. In this runoff election, the election officials placed voter numbers on the ballot stubs as they were received. Mr. Womack asserts that the ballots were not properly numbered because the Arkansas Constitution requires that the voter numbers be placed on the ballots so that

that the vote cast by a voter may be traced in an election contest.[3] The question then is whether election officials complied with Amendment 50 when they placed the voter numbers on the ballot stubs, rather than on the upper portion of the ballots. Section 3 of Amendment 50 merely states that "every *ballot* shall be numbered in the order in which it is received..." and does not specify where the number must be placed on the ballot. Mr. Womack argues that the clear intent of that constitutional provision was for the voter number to be placed on the ballot in such a way that the voter's vote could be determined if that vote were ever challenged. We agree.

The constitutional requirement of recording voter numbers on ballots began with Article 3, section 3, of the Arkansas Constitution of 1874. Perforated ballot stubs, however, were not implemented by the General Assembly until 1949. *See* Ark. Stat. Ann. § 3-818 (Repl. 1956). Prior to that time, the voter number was placed directly onto the ballot, resulting in the voter number and the voter's vote being shown on one document. Ark Stat. Ann. § 3-911 (1947). After the election, one copy of the voter list was placed in the ballot box, which was given to the County Election Commissioners. Ark. Stat. Ann. §§ 3-919, 3-1008, and 3-1013. Under this system, there was no voter secrecy because the County Election Commissioners had access to the voter list, which contained the voter's name and voter number, and the ballots that contained the voter numbers. On the other hand, election officials were able to trace votes for election-contest purposes, as was constitutionally required.

Pursuant to Act 353 of 1949, the lower one inch of each ballot had to be perforated so that it could be detached, and the ballots were to be numbered consecutively as they were printed, with the same number being placed on the lower portion of the ballot and on the upper portion of the ballot. Ark. Stat. Ann. §§ 3-818—3-819 (Repl. 1956). This number is referred to as the "ballot number." Act 353 also required that the words "List of Voters Number" followed by a blank, be printed on the lower portion of the ballot.

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[3] Contrary to the trial court's alternative ruling, this argument was not waived by Mr. Womack prior to the election. Until the election officials placed the voter numbers on the ballots on election day, either at the polling places or when the absentee-ballot envelopes were being opened, Mr. Womack could not have known that the numbering of the ballots might not comply with Amendment 50. *See Pearson v. Henrickson*, 336 Ark. 12, 983 S.W.2d 419 (1999).

Ark. Stat. Ann. § 3-821. Under this system, election officials were able to determine how a voter voted by first looking at the voter list to find the voter's number. With that voter number, they could locate the ballot stub. The ballot number on the ballot stub would then lead them to the upper portion of a ballot which contained the same ballot number and the voter's vote. Therefore, the statutory scheme allowed for tracing, but secrecy remained questionable.

In *City of Little Rock v. Henry*, 233 Ark. 432, 345 S.W.2d 12 (1961), we held that the use of voting machines in popular elections would not satisfy the numbering requirement of Article 3, section 3, of the Arkansas Constitution, because the machines were not capable of making a record of individual votes. Amendment 50, eliminating the constitutional difficulty for voting machines, was initiated and adopted in 1962. *Walsh v. Campbell, County Judge*, 240 Ark. 1034, 405 S.W.2d 264 (1966). Although Article 3, section 3, of the 1874 Arkansas Constitution was repealed by section 1 of Amendment 50, the numbering requirement of Article 3, section 3, was readopted verbatim as section 3 of Amendment 50, along with sections 2 and 4 of Amendment 50, authorizing the use of voting machines in elections under rules prescribed by the General Assembly.

The General Assembly amended the election laws of this state in 1969 because "the present election laws are ancient and outdated in part and have caused and are causing much confusion and controversy...." Emergency Clause of Act 465 of 1969. Act 465 again provided that the lower one inch of each ballot be perforated so that it could be detached and that the words "List of Voters Number," followed by a blank, be printed on the lower portion of the ballot along with the printed ballot number. Ark. Stat. Ann. § 3-613 (b), (c), (f) (Supp. 1969). The ballot number was to be printed on the upper portion of the ballot, but it was to be covered with a black sticker that could only be removed on the order of a proper court. Ark. Stat. Ann. § 3-613 (c) and (d). This system provided for complete tracing in the case of an election contest, and also allowed for greater secrecy due to the use of a blackout sticker. Ballots were to be kept by the County Board of Election Commissioners after the election, and the stub boxes were to be kept by the County Treasurer. Ark. Stat. Ann. § 3-718. While each of these officials also had a voter list, the stubs and the ballots were separated so that secrecy was maintained.

The system established by the General Assembly in 1969 remained in effect until 1995. Act 461 of 1995 amended the subsequent codification of Ark. Stat. Ann. § 3-613, Ark. Code Ann. § 7-5-208, to provide that the ballot number be printed only on the ballot stub and not on the upper portion of the ballot. Ark. Code Ann. § 7-5-208 (Supp. 1999). Furthermore, Act 461 deleted the provision for printing the words "List of Voters number," followed by a blank. *Id.* Election officials were only required to place the voter number on the stub end of absentee ballots. *See* Ark. Code Ann. § 7-5-416 (Supp. 1997). Section 7-5-208, as amended by Act 461 of 1995, also provided that the ballots be held by the County Board of Election Officials, the stubs be held by the County Treasurer, and the voter list be filed with the County Clerk. Ark. Code Ann. § 7-5-317 (Supp. 1999). Under this system, total secrecy would be assured, but the ability to trace votes in the event of an election contest would no longer be available. This statutory scheme was in effect at the time of the runoff election in this case.

Although the General Assembly enacted Act 461 of 1995 to ensure total secrecy and foreclose the tracing of votes, Amendment 50 to the Arkansas Constitution still requires the numbering of ballots in elections by ballot. In *City of Little Rock v. Henry, supra,* we addressed that particular constitutional provision, albeit while it was still Article 3, section 3, to the 1874 Constitution and before it was readopted as section 3 of Amendment 50. This court's interpretation of the constitutional numbering requirement was succinctly expressed by Justice George Rose Smith in *City of Little Rock v. Henry, supra*:

> It is perfectly clear that the draftsmen of the constitution did not consider the numbering of the ballots to be a mere gesture having no practical significance. To the contrary, the matter was deemed so important that it was written into the constitution as a fundamental requirement in every election, not to be dispensed with by the legislature or by the courts.
>
> When Section 3 of Article 3 is studied as a whole the reason for the mandatory numbering of the ballots cannot be open to doubt. If the number of each ballot is recorded alongside the voter's name it becomes possible in an election contest to open the ballot box and determine how each person voted. Thus if an election should apparently be decided by a margin of ten votes and it is shown that twenty ineligible persons voted, the numbering of

> the ballots enables the courts to declare the winner with certainty. Obviously this clause in the constitution is an effective precaution against fraud and a valuable safeguard to the purity of elections.

233 Ark. at 436, 345 S.W.2d at 15. Thus, section 3 of Amendment 50 does not merely require that voter numbers be placed on the ballots or ballot stubs in a manner that would have no practical significance. Rather, the purpose of the constitution's numbering requirement in elections by ballot is to allow for the tracing of votes in the event of an election contest.

With the abolition in 1995 of the statutory framework established by Act 465 of 1969 that required the printing of a ballot number on the upper and lower portions of the ballot and the insertion of the voter number on the ballot stub, there is no longer a statutory scheme that allows for the tracing of votes. Moreover, the absence of a ballot number on the upper portion of the ballot also forecloses tracing when the voter number is placed on the stub end of absentee ballots, as required by Ark. Code Ann. § 7-5-416. We therefore hold that, in the absence of a statutory scheme that allows for the tracing of votes, compliance with Amendment 50's numbering requirement in elections by ballot mandates that the voter number be placed on the upper portion of the ballot so that the purpose of that amendment may be accomplished; that is, so that in an election contest it will be possible to determine how a voter voted.

With regard to the impact of this holding on secrecy, we acknowledge again, as we did in *City of Little Rock v. Henry, supra*, "that the secrecy of the ballot is better protected by the voting machine than by our traditional method of balloting, since the use of the machine prevents anyone else from ever discovering how an elector voted. But this circumstance is offset by the fact that the draftsmen of the constitution, with the knowledge available to them in 1874, chose to subordinate the secrecy of the ballot to the purity of the election." *Id.* Likewise, the drafters of Amendment 50, with the knowledge available to them in 1962, chose to continue to subordinate the secrecy of the ballot to the purity of the election in the case of elections by ballot.

In this case, the ballots for the March 30, 1999 runoff election for Ouachita County Municipal Judge were printed in accordance with the statutory provisions that foreclose the tracing

of votes. That is, the ballot numbers were printed only on the ballot stubs. On the day of the election, voter numbers were only recorded on the stubs and not on the upper portion of the ballots, thus making it impossible to trace votes in an election contest. Under these circumstances, we must conclude that Amendment 50's numbering requirement was violated by Ouachita County officials.

With regard to a remedy for this constitutional violation, Mr. Womack asks this court to void the entire election. It is well settled that prior to an election, the provisions of the election laws are mandatory. *Doty v. Bettis*, 329 Ark. 120, 947 S.W.2d 743 (1997). In contrast, after the election has occurred, the provisions of the election laws are directory only. *Id. See also Swanberg v. Tart*, 300 Ark. 304, 778 S.W.2d 931 (1989). It is also well settled that the courts do not favor disenfranchising a legal voter because of the misconduct of another person, such as an election official. *Ashcraft v. Cox*, 310 Ark. 703, 839 S.W.2d 219 (1992); *Allen v. Rankin*, 269 Ark. 517, 602 S.W.2d 673 (1980). In *Spires v. Compton*, 310 Ark. 431, 837 S.W.2d 459 (1992), we reiterated the election rule that applies when the results of an election are challenged after the election:

> [T]his court has held many times that elections will not be invalidated for alleged wrongs committed unless those wrongs were such to render the result doubtful. Put in other terms, we have said that the failure to comply with the letter of the law by election officers, especially in matters over which the voter has no control, and in which no fraud is perpetrated, will not as a general rule render an election void, unless the statute expressly makes it so. In sum, the courts do not favor disenfranchising a legal voter because of the misconduct of another person.

310 Ark. at 434, 837 S.W.2d at 461 (citations omitted).

In the case at hand, both parties alleged widespread fraud and misconduct with regard to the absentee votes that were cast in the election. Of the more than 6,000 votes cast in the election, about 1,000 votes were cast by absentee ballot; whereas, over 5,000 voters cast their votes at the polls, either on election day or during the early voting period. No fraud or misconduct was alleged regarding those votes. However, Mr. Womack seeks to have the entire

election voided.[4] To void the entire election because of the misconduct of the election officials would undermine the freely expressed will of the majority of the voters. This we cannot do. *Doty v. Bettis, supra; Reichenbach v. Serio*, 309 Ark. 274, 830 S.W.2d 847 (1992).

Failure of counterclaim and amended counterclaim to state a cause of action.

For his second point on appeal, Mr. Womack argues that the trial court erred in dismissing his counterclaim and amended counterclaim.[5] The trial court dismissed Mr. Womack's counterclaim and amended counterclaim pursuant to Ark. R. Civ. P. 12(b)(6) for failure to state facts upon which relief can be granted. The trial court ruled that Mr. Womack did not allege that by invalidating the votes of the voters named or referenced in the pleadings that a different election result would occur; and that in a majority of instances where voting irregularities were alleged to have occurred, the pleading did not allege for whom the voter voted.

Election contests are governed entirely by statute. *Reed v. Baker*, 254 Ark. 631, 495 S.W.2d 849 (1973). As such, they are statutory or special proceedings under Ark. R. Civ. P. 81. Thus, the rules of civil procedure do not apply where a statute specifically creates a right, remedy, or proceeding that provides a different procedure. *See Rubens v. Hodges*, 310 Ark. 451, 837 S.W.2d 465 (1992).

In construing Ark. Code Ann. § 7-5-801 (d) (Repl. 1993) (and its predecessor provision), this court has held that a claim for affirmative relief in an election contest must state a *prima facie* case and plead sufficient facts to give the other party reasonable information as to the grounds of the contest. *McClendon v. McKeown*, 230 Ark. 521, 323 S.W.2d 542 (1959). The pleading must do more than merely state generalities or conclusions of law to the effect that illegal votes were cast. *Jones v. Etheridge*, 242 Ark. 907, 416 S.W.2d 306 (1967). To state a cause of action for affirmative

[4] We note that he does not ask this court to void all of the absentee votes, probably because Mr. Foster would clearly be the winner of the runoff election if all absentee votes were excluded.

[5] We need not address the timeliness of Mr. Womack's counterclaim as an election-contest petition because that issue has not been raised in this appeal.

relief in an election contest, one must name the voters who allegedly cast invalid ballots, allege that they voted for the other candidate, and allege that the total of the invalid votes is sufficient to change the outcome of the election. *Id.*; *Files v. Hill*, 268 Ark. 106, 594 S.W.2d 836 (1980). We recently reaffirmed these requirements for stating a claim for affirmative relief in election-contest cases. *King v. Whitfield*, 339 Ark. 176, 5 S.W.3d 21 (1999). At a minimum, the complaint for affirmative relief must include the number of votes received by each candidate, so that it appears, after subtracting the alleged invalid votes, that the claimant has more votes than his opponent. *Id.*

In this case, Mr. Womack's counterclaim and amended counterclaim made several requests for affirmative relief. Specifically, he asked the trial court to invalidate all unchallenged absentee ballots that were not marked by election officials in accordance with Amendment 50, section 3, to the Arkansas Constitution.[6] He also asked the trial court to invalidate numerous absentee ballots because of alleged fraudulent and illegal acts on the part of Mr. Foster's campaign workers in the handling of applications for absentee ballots and absentee-ballot materials. Many of these allegations failed to name the voters who allegedly cast the invalid ballots. Voters alleged to have been wrongfully disenfranchised were also not identified. Moreover, in those instances where voters were identified by name, Mr. Womack failed to allege whom they voted for in the runoff election. Without that information, we cannot conclude from the face of the counterclaim and amended counterclaim whether Mr. Womack would have had more votes than his opponent. Finally, the concluding request for relief in both the counterclaim and the amended counterclaim stated as follows:

> Upon hearing the competent evidence in this cause, the Court will come to the conclusion that more qualified, proper votes were cast for Womack than were cast for Foster.

This conclusory statement clearly fails to state a cause of action.

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[6] Mr. Womack argues that the violation of Amendment 50 made it impossible for him to *allege* for whom the voters voted at the time he filed the counterclaim and amended counterclaim unless the votes were challenged. This argument, however, ignores the fact that at the pleading stage of an election contest, a contestant will not have access to the ballots. Only after the trial court hears the evidence and makes a determination that the ballots are invalid will the votes on those ballots be disclosed.

This case is controlled by our decision in *Wheeler v. Jones*, 239 Ark. 455, 390 S.W.2d 129 (1965), where the plaintiff omitted from his complaint which candidate benefitted from the illegal votes. Instead, the complaint set out the total votes per candidate and then asserted that 52 named persons voted in an absentee box and were not qualified electors and that 196 named persons voted in precincts in which they did not reside. The trial court sustained a demurrer, and we affirmed. We held that the complaint did not state a cause of action because the plaintiff did not allege whether the contested votes were cast for the other candidate or that the election results would be different if those votes were set aside. Likewise, Mr. Womack's counterclaim and amended counterclaim did not allege whether all of the contested votes were cast for his opponent or that, after subtracting the alleged invalid votes, he would have had more votes than his opponent.

Although Mr. Womack's counterclaim and amended counterclaim asserted numerous general and conclusory allegations of serious misconduct and fraud on the part of Mr. Foster's campaign workers, we conclude that neither pleading stated a cause of action for affirmative relief in an election contest. Thus, we affirm the trial court's dismissal of Mr. Womack's counterclaim and amended counterclaim.

Invalidation of 495 votes for failure to state a reason for voting absentee.

Based on the allegations set forth in Mr. Fowler's complaint and amended complaint, and the testimony and evidence presented at the trial, the trial court invalidated a total of 518 absentee votes, 517 of which were votes cast for Mr. Womack. 495 of those absentee votes were invalidated because the voters did not state a reason for voting absentee on their applications for an absentee ballot. Because these 495 votes for Mr. Womack make up the majority of the votes invalidated by the trial court, we consider them first.

Arkansas Code Annotated section 7-5-402 (Supp. 1999) provides that only the following persons may cast absentee ballots: "(1) Any person who will be unavoidably absent from his voting place on the day of the election; and (2) Any person who will be

unable to attend the polls on election day because of illness or physical disability." The absentee-ballot application form provided by the county clerk and used by the voters in this case was substantially similar to the form set out in Ark. Code Ann. § 7-5-405 (Supp. 1997). On that form, each voter was asked to check one of two reasons listed in section 7-5-402 that qualify a voter to cast an absentee ballot:

> Because I
>
> ___ will be unavoidably absent from my voting place on election day, OR
>
> ___ will be unable to attend the polls on election day because of illness or physical disability,
>
> I am requesting that you provide me with the appropriate absentee ballot(s) for the following elections.

The trial court did not err when it threw out 495 votes for Mr. Womack because the voters who cast those votes failed to indicate a statutory reason for voting absentee on their absentee-ballot application. In *Roach v. Kirk*, 228 Ark. 958, 311 S.W.2d 525 (1958), we held that a voter who failed to state a reason for being absent from the polls on his absentee-ballot application was disqualified from voting absentee. Likewise, in this case, the failure of 495 voters to indicate a statutory reason for voting absentee on their absentee-ballot applications disqualified them from casting absentee ballots.

Mr. Womack argues that even though these voters may have violated our election laws by not indicating a reason for voting absentee on their absentee-ballot applications, their votes should not be invalidated for such "technical failures." We disagree. We have held that there must be strict compliance with statutory provisions regarding the application for and casting of absentee ballots, even if the challenge is brought after the election has occurred. *Bingham v. City of Eureka Springs*, 241 Ark. 477, 408 S.W.2d 607 (1966). *See also Martin v. Hefley*, 259 Ark. 484, 533 S.W.2d 521 (1976); *Phillips v. Melton*, 222 Ark. 162, 257 S.W.2d 931 (1953); *Logan v. Moody*, 219 Ark. 697, 244 S.W.2d 499 (1952). Furthermore, there is no merit to the argument that these absentee votes should not be invalidated because voters filled out their absentee-ballot applications based upon incorrect advice given by the county

clerk's office. The absentee-ballot application form provided to each voter in this case was clear and accurate. Nothing on that form prevented a voter from knowing what information was being requested, or from properly inserting the requested information on the form.

Because we have determined that the trial court correctly invalidated 495 votes cast for Mr. Womack, only twenty-three votes remain at issue. Many of those votes were invalidated by the trial court for several reasons. We will now address various other reasons given by the trial court to invalidate votes cast for Mr. Womack.

Invalidation of 119 absentee votes for failure to attach medical affidavits.

The trial court also declared 119 votes cast in favor of Mr. Womack to be invalid because the absentee voters failed to attach medical affidavits to their absentee-ballot application forms. The trial court relied on Ark. Code Ann. § 7-5-405 (Supp. 1997) in ruling that the attachment of medical affidavits to absentee-ballot application forms was mandatory in certain circumstances. Mr. Womack contends that medical affidavits were not required. We disagree.

As previously stated, the absentee-ballot application form provided by the county clerk and used by the voters in this case was substantially similar to the form set out in Ark. Code Ann. § 7-5-405 (Supp. 1997). On that form, each voter must indicate one of five methods listed in section 7-5-405 for delivering the absentee-ballot application to the county clerk:

> I am delivering this application by: [please check which one]
>
> ___ personally delivering this application.
>
> ___ mailing this application.
>
> ___ authorizing my relative or designated bearer, (please insert name) _____, to deliver this application.
>
> ___ *authorizing (please insert name) _____ as my agent, to deliver this application, as I am medically unable to deliver it. An affidavit verifying my medical status as unable to*

deliver the application or to vote on the day of the election is attached.

___ I am transmitting a signed facsimile of this application by facsimile machine transmission over telephone lines to the office of the county clerk.

(Emphasis added.)

The plain language of section 7-5-405 and the absentee-ballot application form indicate that an affidavit verifying the voter's medical status is required when the absentee voter authorizes an agent to deliver his or her application to the county clerk. On the other hand, if the absentee voter chooses any of the other four methods for delivering the absentee-ballot application, a medical affidavit is not required by section 7-5-405. This interpretation is supported by Ark. Code Ann. § 7-5-403 (a)(2)(A) (Supp. 1997), which specifically lists the only ways that an application for absentee ballot may be delivered to the county clerk when the form prescribed in section 7-5-405 is used:

> (2) Delivery of the request for an absentee ballot to the county clerk may be made in one (1) of the following ways, and in no other manner:
>
> (A) For applications submitted using the form prescribed in § 7-5-405:
>
> (i) In person at the office of the county clerk . . .
>
> (ii) Applications by mail . . .
>
> (iii) A designated bearer may deliver the completed application to the office of the county clerk . . .
>
> (iv)(a) A person declared as the authorized agent of the applicant may deliver the application to the office of the county clerk . . .
>
> *(b) An authorized agent must submit to the county clerk an affidavit of the administrative head of a hospital or nursing home located in this state that the applicant is a patient of the hospital or nursing home and is thereby unable to vote on the election day at his or her regular polling site.*
>
> *(c) A copy of the affidavit shall be retained by the county clerk as an attachment to the application for an absentee ballot;*

> (v)(a) An application for absentee ballot may be requested by facsimile machine transmission . . .
>
> (b)(1) The completed facsimile-transmitted application must be received in the office of the county clerk . . . .

Thus, a medical affidavit is required only when the voter delivers the application by means of an authorized agent. Furthermore, in order to utilize that manner of delivery, the voter must be in a hospital or nursing home. Ark. Code Ann. § 7-5-403 (a)(2)(A)(iv).

The record in this case indicates that for all 119 absentee votes invalidated by the trial court, the voters indicated on their absentee-ballot applications that their applications would be delivered to the clerk by authorized agents. However, each of those voters failed to attach the required medical affidavit, notwithstanding the fact that such a requirement was clearly stated on the absentee-ballot application form. We reiterate once again that strict compliance with absentee voting laws is required under these circumstances. *Bingham v. City of Eureka Springs, supra.* Therefore, we hold that the trial court correctly invalidated 119 absentee votes cast in favor of Mr. Womack because the voters failed to attach medical affidavits to their absentee-ballot application forms.

Invalidation of four votes based on mental incompetency.

The trial court found that four absentee voters were incompetent and declared that their votes were invalid. Article 3, section 5, of the Arkansas Constitution states that "[n]o idiot or insane person shall be entitled to the privileges of an elector." Also, Amendment 51, section 11(a)(6), states that the registration of voters who have been adjudged mentally incompetent by a court of competent jurisdiction shall be canceled. Mr. Womack argues that there was insufficient evidence of incompetence to support the trial court's invalidation of these four votes. When a case is tried by a circuit court sitting without a jury, our inquiry on appeal is not whether there is substantial evidence to support the factual findings of the court, but whether the findings are clearly erroneous, or clearly against the preponderance of the evidence. *Springdale Winnelson Co. v. Rakes*, 337 Ark. 154, 987 S.W.2d 690 (1999); *Arkansas Dep't of Human Servs. v. Spears*, 311 Ark. 96, 841 S.W.2d 624 (1992). In reviewing the findings of fact by a trial court, we consider the

evidence and all reasonable inferences therefrom in a light most favorable to the appellee. *Jernigan v. Cash*, 298 Ark. 347, 767 S.W.2d 517 (1989).

Robert McKoin's vote was invalidated after the trial court heard testimony that he suffered from Alzheimer's disease and dementia and had no short-term memory. Beadie Sanders's vote was disqualified upon testimony that she was a severe stroke victim and could not walk or talk, was unaware of her surroundings, and had no awareness of the election. Merdis Moore's vote was disqualified due to evidence that she was afflicted with Alzheimer's disease and was unable to communicate or mark her own ballot. With regard to the competency of Annie Dempsey, the Ouachita County Probate Court entered an order on January 6, 1999, appointing a guardian for her because it found that she was "senile, and her intellectual capacity, ability to reason, and emotional status are markedly impaired to the point where she is no longer able to make decisions for herself."

Mr. Womack first argues that the appointment of a guardian does not mean that Annie Dempsey is incompetent. Incapacitated persons for whom a guardian is appointed are not presumed to be incompetent. Ark. Code Ann. § 28-65-106. However, the probate court made specific findings that Ms. Dempsey was incompetent. Thus, the trial court's finding of incompetency in this case was not based on a presumption. Mr. Womack also cites *Sparks v. First National Bank*, 242 Ark. 435, 413 S.W.2d 865 (1967), for the proposition that professional evidence is required in order for the court to find that someone is incompetent. The holding in that case is inapposite because it dealt with a statutory requirement in guardianship proceedings. Based upon the evidence noted above, we conclude that the findings of the trial court are not clearly erroneous.

Invalidation of four votes based on felony convictions.

The trial court invalidated the votes of four absentee voters because they were convicted felons. Amendment 51, section 11(a)(4), of the Arkansas Constitution, states that it is the duty of the registrar to cancel the registration of voters "who have been convicted of felonies and have not discharged their sentence or

been pardoned." Mr. Foster had the burden of proving that convicted felons voted in the election. *City of Newport v. Smith*, 236 Ark. 626, 367 S.W.2d 742 (1963). As previously mentioned, he introduced certified copies of the criminal judgments and commitment orders entered against four individuals, thereby disqualifying them as voters.

Mr. Womack contends on appeal that there was no proof that the individuals whose criminal records were introduced actually voted in the election by absentee ballot. However, as Mr. Foster points out, such evidence was introduced and it was sufficient. For each of these individuals, Mr. Foster introduced evidence showing that the birth date or address on the individual's absentee-ballot application or voter statement matched the birth date or address on the criminal records. The name on each individual's absentee-ballot application or voter statement also matched the name on his or her criminal record.

Once again, when a case is tried by a circuit court sitting as a jury, our inquiry on appeal is whether the findings are clearly erroneous, or clearly against the preponderance of the evidence. *Springdale Winnelson Co. v. Raker, supra.* There was abundant evidence from which the trial court could find that these four felons voted absentee. We conclude that the trial court's findings in that regard are not clearly erroneous.

Next, Mr. Womack argues that proof of a felony conviction alone is not sufficient to invalidate the votes. Amendment 51, section 11, requires the circuit clerk, upon the conviction of any person of a felony, to notify the registrar. The registrar then has a duty to cancel that voter's registration and notify the voter. Mr. Womack asserts that this process was not followed for these four voters, and as a result, they were still qualified to vote despite being felons. Specifically, he argues that "any individual is permitted to continue voting until his name is removed from the registration rolls and he is notified by the clerk of such action." However, Mr. Womack cites no authority in support of this argument. We have said on numerous occasions that we will not consider the merits of an argument if the appellant fails to cite any convincing legal authority in support of that argument. *Ellis v. Price*, 337 Ark. 542, 990 S.W.2d 543 (1999); *Craft v. City of Fort Smith*, 335 Ark. 417, 984 S.W.2d 22 (1998). Mr. Womack's failure to cite authority or

make a convincing argument is sufficient reason for affirmance of the trial court's ruling on this point. *Williams v. Martin*, 335 Ark. 163, 980 S.W.2d 248 (1998). It is certainly not apparent without further research that this argument is well-taken. *Id.*

Finally, Mr. Womack contends that Sheree Jenkins had completed her sentence at the time of the election and, thus, was able to vote. A felon who has discharged his or her sentence is able to vote. Arkansas Constitution, Amendment 5, section 11. We cannot say that Ms. Jenkins had discharged her sentence at the time of the election. The judgment and commitment order reflects that she was sentenced to the Arkansas Department of Correction on July 29, 1992, and that the circuit court suspended imposition of any additional sentence for a period of five years. We, therefore, conclude that it was not error for the trial court to invalidate the votes of four absentee voters because they were convicted felons.

Invalidation of three votes based on nonresidency.

The trial court invalidated the votes of four absentee voters because they were nonresidents of Ouachita County at the time their votes were cast. Mr. Womack argues that the trial court erred in canceling three of these votes. Specifically, he asserts that Franklin A. Gaston, Jr., Neva Jo Gaston, and Kelly Kendall intended to claim Ouachita County as their residence.

Arkansas Code Annotated § 7-5-201 (Supp. 1997) provides that:

> (a) . . . The person shall be eligible to vote only in the county in which he resides on the date thirty-one (31) calendar days prior to the election, unless specifically exempted under § 7-5-406.
>
> (b) Residency shall generally be that place where one lives and works for a period of time, notwithstanding that there may be an intent to move or return at some future date to another place. Persons who are temporarily living in a particular place because of a temporary work-related assignment or duty post, or as a result of their performing duties in connection with their status as military personnel, students, or office holders, shall be deemed residents of that place where they establish their home prior to beginning such assignments or duties.

> (c) No person may be qualified to vote in more than one (1) precinct of any county at any one (1) time.

We have previously stated that there are two factors to consider in resolving the validity of voting residence. *Pike Co. Sch. Dist. v. Pike Co. Ed. Bd.*, 247 Ark. 9, 444 S.W.2d 72 (1969). First, we look at the intent of the voter with respect to residency. *Id.* Second, the conduct of the voter must be reasonably consistent with his or her asserted residency. *Id.* This is a question of fact. Accordingly, we will affirm the trial court's findings unless they are clearly erroneous, giving due regard to the opportunity of the trial court to judge the credibility of witnesses. *Springdale Winnelson Co. v. Rakes, supra.*

There was testimony at the trial that Franklin A. Gaston, Jr., and Neva Jo Gaston sold their house in Ouachita County and moved to Garland County in August 1998. They had no plans to move back to Ouachita County. However, Mr. Gaston continued to work four days each month in Ouachita County. He also owned property in Ouachita County. There was also testimony that Kelly Kendall moved to Little Rock in June 1998, where she maintained her own apartment and worked five days a week. Her employment was considered to be on a trial basis, until such time as she proved her worth and was awarded a permanent position. She continued to assess her personal property in Ouachita County, receive mail there, and maintain phone service there. In view of this testimony, we cannot say that the findings of the trial court on residency are clearly erroneous. Nor can we say that the trial court erred in invalidating the votes of four absentee voters because of their nonresidency in Ouachita County at the time of the election.

In affirming the trial court's judgment in this case, we also note our agreement with the following conclusions expressed by the trial court in its findings of fact, conclusions of law, and judgment:

> The laws dealing with absentee voting have a very obvious purpose, and they cannot be ignored by the unscrupulous campaign worker, the County Clerk's office, or the Secretary of State. It borders on the absurd for anyone to assume that absentee voting and "early" voting should be governed by the same rules. "Early" voting does nothing more than offer the voter the opportunity to do early what he or she would otherwise do on election day: Go vote in person. It offers no additional opportunity for fraud. On

the other hand, absentee voting offers all sorts of opportunity for fraud, as was so vividly seen in this election. This can be no better illustrated than Sylvester Smith carrying around 30 unmarked absentee ballots, looking for the persons whom they were intended. Both election laws and criminal laws were violated in this election, none of which would have been possible had a strict adherence to the clear requirements of the statute been demanded. Ignoring the law by those chosen to enforce it, or even slack enforcement by those persons, invariably brings on increased violations — and the innocent voter suffers.

In all fairness, had the entire absentee box been challenged by the two contestants, as plaintiff offered to do on election night but which defendant was unwilling to do, the vast majority of all the absentee voters would have been invalidated. That's how widespread the abuse of the process was. While Sylvester Smith and Randall Ferguson were the most obvious and most active abusers, both sides are guilty, if not in a criminal sense, certainly in a practical sense. Both sides took advantage of the fact that the law wasn't being enforced, the defendant far more than the plaintiff. Without doubt, had the entire box been challenged, the ultimate result would have been the same, Foster would have won, but at least each voter could have been told why his or her ballot was invalid. Nevertheless, it is this court's hope that the next election will see every voter go to the polls in person on election day, vote early, or cast a valid absentee ballot which expresses the choice of the voter, not some vote hustler; that those charged with enforcing the election rules will do so; that those intent on abusing the rules will know that they will not succeed and that there is a price to pay for those trying.

Affirmed.

ARNOLD, C.J., BROWN, J., and SPECIAL JUSTICE BUD CUMMINS concur.

SPECIAL JUSTICE WALTER SKELTON joins the majority.

CORBIN and THORNTON, JJ., not participating.

ROBERT L. BROWN, Justice, concurring. The majority opinion places Womack in an untenable position in one respect. He was the certified winner of the election and had no incentive to challenge the results until after Foster filed his complaint. Then Womack filed his counterclaim. By that time the stubs had been torn from the ballots, and there was no way for him to

trace the ballots to particular voters he wished to challenge, short of subpoenaing each voter into court to testify under oath. Thus, there was no way to know whether a voter he contended was involved had cast a vote for Foster or for Womack. This, as the majority accurately points out, was due to the Election Commission's clerical foul-up and to the failure to comply with Section 3 of Amendment 50 by correctly numbering the ballots.

Despite this electoral rat's nest, the majority still would require Womack to allege the names of invalid voters and assert in his complaint how the election results would be different without their votes. I question the logic of this. Clearly, Womack would be hard pressed to ever prove a different election result when the ability to trace a ballot to a voter has been effectively removed due to the defective ballots.

In short, it seems that Womack's task in making a *prima facie* case in his counterclaim, as Ark. Code Ann. § 7-5-802 (Repl. 1993) requires, has been made immeasurably more difficult by the ballot-numbering snafu. I would not penalize him, under these circumstances, by affirming the dismissal of his counterclaim. However, I would void the entire absentee box due to the numbering error. This would mean that Foster still prevails.

Voiding the absentee box is appealing because that is exactly what the trial judge wanted to do. The judge specifically referred to widespread abuse by both candidates in connection with absentee voters and in effect pronounced "a pox on both your houses." He begged off in voiding the absentee box because the parties did not ask for that precise relief, though both parties prayed that illegal ballots not be counted. Pervasive abuse warrants such a remedy in my judgment. For that reason, I concur in the result.

ARNOLD, C.J., joins.

SPECIAL ASSOCIATE JUSTICE H.E. CUMMINS joins.

Corey SANDERS *v.* STATE of Arkansas

CR 99-628 8 S.W.3d 520

Supreme Court of Arkansas
Opinion delivered January 20, 2000

Walker & Dunklin, by: *Larry G. Dunklin* and *Bowden & Kendel*, by: *David O. Bowden*, for appellant.

Mark Pryor, Att'y Gen., by: *Michael C. Angel*, Ass't Att'y Gen., for appellee.

RAY THORNTON, Justice. Corey Sanders appeals his conviction for two counts of capital murder and sentence of life in prison from the Columbia County Circuit Court. Sanders raises two points on appeal: his challenge to the sufficiency of the evidence, and his contention that the trial court erred in admitting photographs of the victims' partially decomposed bodies, on the grounds that they were more prejudicial than probative. After a thorough review of the record, we find no error and affirm.

I. Facts

The Columbia County Sheriff's Office commenced an investigation into the disappearances of Lamarcio Lamont Griffin and

Arthur Blackmon. Pursuant to that investigation, the sheriff's department located the bloody registration papers of a car belonging to Omar Muqtasid at a house where the victims were last seen. Subsequently, officers learned that the bodies of the victims could be found at the old Dockery Place in McNeil. A trail of blood led officers to a well, where the bodies of the two victims were discovered. The medical examiner ruled that Griffin died as a result of two gunshot wounds to the back and neck and Blackmon was killed when he was shot once in the area of the left eye. Three bullets were recovered from the victims, and a firearms expert confirmed that all of the bullets were fired from the same gun, a .38 caliber handgun. Muqtasid's car was discovered, completely burned, in Free Hope, about eighteen miles from the house where the registration papers were found.

II. Sufficiency of the Evidence

For his first point on appeal, appellant contends that the state failed to produce sufficient evidence to prove that he committed the crimes in question beyond a reasonable doubt and that it was error for the trial court to have denied his motions for a directed verdict. We consider sufficiency of the evidence before addressing other alleged trial errors. *King v. State*, 338 Ark. 591, 999 S.W.2d 192 (1999). Appellant urges on appeal that there was little evidence connecting him with the death of Lamont Griffin and no evidence connecting him with the death of Arthur Blackmon, and that, as to either victim, there was no evidence of the requisite mental state or other elements of capital murder. At trial, appellant moved for a directed verdict at the close of the State's case and argued that the circumstantial evidence introduced by the State was not sufficient to overcome every other reasonable hypothesis consistent with innocence. After the State presented its case, appellant rested, offering no witnesses, and renewed his directed-verdict motion.

On appeal, we treat a motion for a directed verdict as a challenge to the sufficiency of the evidence. When we review a challenge to the sufficiency of the evidence, we will affirm the conviction if there is substantial evidence to support it, when viewed in the light most favorable to the State. *Bangs v. State*, 338 Ark. 515, 998 S.W.2d 738 (1999). Substantial evidence is that which is of sufficient force and character that it will, with reasona-

ble certainty, compel a conclusion one way or the other, without mere speculation or conjecture. The evidence may be either direct or circumstantial. Only evidence supporting the verdict will be considered. Circumstantial evidence can provide the basis to support a conviction, but it must be consistent with the defendant's guilt and inconsistent with any other reasonable conclusion. *Id.* Whether the evidence excludes every hypothesis is left to the jury to decide. *Williams v. State*, 338 Ark. 97, 991 S.W.2d 565 (1999). Guilt may be proved in the absence of eyewitness testimony, and evidence of guilt is not less because it is circumstantial. *McDole v. State*, 339 Ark. 391, 6 S.W.3d 74 (1999).

Pursuant to Ark. Code Ann. § 5-10-101(a)(4) (Repl. 1997), a person commits capital murder if "with the premeditated and deliberated purpose of causing the death of another person, he causes the death of any person." *Id.* The evidence presented by the State revealed that three witnesses heard Sanders confess to killing Lamont Griffin; one of those witnesses added that Sanders admitted to also killing Arthur Blackmon. Additional testimony provided evidence that Sanders owed Griffin money from a drug deal, thereby establishing a possible motive for the killing, and that appellant had been overheard discussing murdering Griffin with a co-defendant so that Sanders would not have to repay the money.

The State also produced substantial circumstantial evidence of appellant's guilt. The two victims were known to have been driving the car belonging to Muqtasid, and were seen in the company of Sanders in the car on the night the victims disappeared. Sanders was seen the next day in bloodstained clothing, and then asked a friend to get some gasoline for him. Sanders, driving a car matching the description of Muqtasid's burned Oldsmobile, had a friend follow him with the gas to a rural area outside Free Hope. The friends in question next saw flames from the area where Sanders had gone. Sanders got in the second car with his friends and returned to McNeil, telling his companions, "If I go down, we all go down."

Another witness, who testified that Sanders had asked him to drive the car to Chicago, reported seeing blood on the front seat of the car and said that Sanders told him he had shot Griffin and would dump the "bodies" somewhere they could not be found, such as a well. This witness had also previously seen Sanders in possession of a .38 caliber pistol. Sanders's grandmother admitted

that her grandson had lived with her at the old Dockery place and was familiar with the well where the bodies were found.

The trier of fact is free to believe all or part of a witness's testimony. Moreover, the credibility of witnesses is an issue for the jury and not for this court. *Bangs, supra.* Here, appellant argues that the evidence was insufficient to establish that he acted with premeditated and deliberate purpose in killing the victims, the required *mens rea* of capital murder. The jury declined to accept this possibility. The jury may resolve questions of conflicting testimony and inconsistent evidence and may choose to believe the State's account of the facts rather than the defendant's. *Stewart v. State*, 338 Ark. 608, 999 S.W.2d 684 (1999).

Premeditation is not required to exist for a particular length of time. It may be formed in an instant and is rarely capable of proof by direct evidence but must usually be inferred from the circumstances of the crime. *Bangs, supra.* Similarly, premeditation and deliberation may be inferred from the type and character of the weapon, the manner in which the weapon was used, the nature, extent, and location of the wounds, and the accused's conduct. *Id.*

Here, the evidence established not only that Sanders had every opportunity and motive to kill the victims, but also then destroyed evidence relating to their disappearance. Once the jury was convinced that appellant was responsible for the deaths, they then must determine whether the*mens rea* suggested by the details of the killings satisfied the requirements of premeditated and deliberate purpose. Griffin and Blackman were shot in the back and in the eye with the same gun. Their bodies were wracked with the force of the gunshots and the medical examiner's testimony supported the severity of their wounds. Their bodies were then dumped in a well. These details and actions supported the jury's determination that premeditation and deliberation were proven.

The court properly submitted the above evidence to the jury. When viewed in a light most favorable to the State, the evidence could be properly connected and did not leave the jury to speculation or conjecture. When circumstantial evidence rises above suspicion and is properly connected, and when, viewing that evidence in the light most favorable to the State, the jury is not left to speculation and conjecture alone in arriving at its conclusions, it

is basically a question for the jury to determine whether the evidence excludes every other reasonable hypothesis. *McDole, supra.* It is only every other reasonable hypothesis, not every hypothesis, that must be excluded by the evidence. *Id.* The jury certainly should test the reasonableness of any other hypothesis. In the instant case, substantial evidence supported the jury's verdict.

III. Photographs of the Victims

For his second point on appeal, appellant contends that the trial court erred in admitting three photographs of the bloated, decaying corpses of the victims pulled from the well. Appellant argues that they were not probative of any significant issue in the case, and, even if probative, their potential for unfair prejudice outweighed the probative value.

We have often stated that the admission and relevancy of photographs is a matter within the sound discretion of the trial court. Although highly deferential to the trial court's discretion in these matters, this court has rejected a *carte blanche* approach to admission of photographs. We have cautioned against "promoting a general rule of admissibility that essentially allows automatic acceptance of all photographs of the victim and crime scene the prosecution can offer." *Camargo v. State,* 327 Ark. 631, 940 S.W.2d 631 (1997). This court rejects the admission of inflammatory pictures where claims of relevance are tenuous and prejudice is great, and expects the trial court to carefully weigh the probative value of photographs against their prejudicial nature. We require the trial court to first consider whether such evidence, although relevant, creates a danger of unfair prejudice, and then to determine whether the danger of unfair prejudice substantially outweighs its probative value. *Id.* Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Ark. R. Evid. 403; *Camargo, supra.*

Even the most gruesome photographs may be admissible if they tend to shed light on any issue, to corroborate testimony, or if they are essential in proving a necessary element of a case, are useful to enable a witness to testify more effectively, or enable the jury to better understand testimony. Other acceptable purposes are to show the condition of the victims' bodies, the probable type or location

of the injuries, and the position in which the bodies were discovered. Of course, if a photograph serves no valid purpose and could only be used to inflame the jury's passions, it should be excluded. *Stewart v. State*, 338 Ark. 608, 999 S.W.2d 684 (1999); *Camargo, supra.*

[redacted] An essential element of these crimes was the degree of intent; to secure a conviction for capital murder, the State had to prove that appellant caused the victims' deaths "with [a] premeditated and deliberated purpose." Ark. Code Ann. § 5-10-101(1)(4). We have held that the nature and extent of a victim's wounds is relevant to a showing of intent, which may be inferred from the type of weapon used, the manner of use, and the nature, extent, and location of the wounds. *Camargo, supra.* In *Dansby v. State,* 319 Ark. 506, 893 S.W.2d 331 (1995), we pointed out that upon considering evidence of multiple wounds, the "jury could have easily inferred that appellant fired multiple shots into both victims in a premeditated and deliberated manner." *Id.*

[redacted] The photographs were evidence of Sanders's intent because they depicted the nature, extent, and location of the wounds that he inflicted upon the victims, and they corroborated the testimony of the medical examiner by depicting the wounds he found in conducting the autopsies. Further, the decay and decomposition of the bodies explained in part the medical examiner's inability to determine from what range the victims had been shot. In this manner, they also enabled the medical examiner to testify more effectively and the jury to better understand his testimony. The pictures helped the jury to understand the testimony about where and in what condition the bodies were found. *See Camargo, supra.* Although the photos were graphic and gruesome, they depicted locations and types of wounds and the location of the bodies; they corroborated the testimony of witnesses who claimed to have heard Sanders discuss hiding bodies in a well, and they tended to prove appellant's purposeful intent, an element of the crime. *See Baker v. State*, 324 Ark. 330, 974 S.W.2d 474 (1998). Sanders further contends on appeal that, because the cause of death was undisputed, the photos were essentially cumulative or irrelevant. However, he did not stipulate to this fact at trial, and, even if he had done so, a defendant cannot prevent the admission of a photograph by conceding the facts portrayed therein. *Baker, supra.* We cannot say, under these circumstances, that the photographs'

prejudicial effects outweighed their probative value, and affirm on this point as well.

IV. 4-3(h) Review

In accordance with Ark. Sup. Ct. R. 4-3(h)(1999), the record has been examined for all objections, motions, and requests made by either party that were decided adversely to appellant, and no error has been found.

Affirmed.

Verlon McKAY *v.* Debra McKAY

99-617 8 S.W.3d 525

Supreme Court of Arkansas
Opinion delivered January 20, 2000

Meredith Wineland, for appellant.

Virginia (Ginger) Atkinson, for appellee.

LAVENSKI R. SMITH, Justice. This is a domestic-relations case involving property division and alimony incident to a divorce and comes before this court on a Petition for Review from the Arkansas Court of Appeals. Appellant Verlon McKay ("Verlon") originally appealed the Saline County Chancery Court's decision in the divorce action, and Appellee Debra McKay ("Debra") cross-appealed. The Arkansas Court of Appeals issued a decision in this matter on May 12, 1999, in *McKay v. McKay*, 66 Ark. App. 268, 989 S.W.2d 560 (1999), affirming the chancellor in part and revers-

ing in part. Debra petitioned this court for review. We accepted the case for review pursuant to Supreme Court Rule 1-2(e).

Facts

Verlon and Debra were married on June 8, 1991, and divorced on March 12, 1998, by order of the Saline County Chancery Court. There were no children born of the marriage, but Debra had custody of two sons by a prior marriage. At trial, the parties gave conflicting testimony regarding their property. In particular, they disputed the appropriate disposition of a checking account to which both were signatories and a houseboat purchased in 1997. Following a hearing, the chancellor made the following specific findings. He found that the joint account, which had been solely Verlon's before marriage, remained separate property because all the funds deposited in the account derived from federal disability checks Verlon received from the Veterans Administration and the Social Security Administration.[1] Additionally, the court found that although the account was held in joint names, Verlon controlled the funds. Accordingly, the court also assigned to Verlon all property purchased through that account. With respect to the houseboat, the court found that it constituted marital property based upon a bill of sale issued in the name of both parties. The court did so even though Verlon purchased the boat with money he received by inheritance. The court found that the bill of sale was evidence of a gift by Verlon to his wife. The court also ordered that the stove, refrigerator, and dishwasher belonged to Debra, and that Verlon could either return those items to Debra or pay her $2,000 within the week. In addition, the court found that the parties would keep their own vehicles and would be responsible for their own payments. Finally, the court ordered that Verlon should continue paying alimony in the amount of $100 per week for the remainder of 1998, approximately nine months, and that the parties should each pay their attorney's fees.

Subsequent to the hearing and the final order filed on March 13, 1998, Verlon entered a Motion for Reconsideration claiming that the chancellor erred in awarding the temporary alimony

[1] Verlon received VA and Social Security Disability benefits due to an injury he received while serving in the military in 1961. This injury relegated him to a wheelchair.

because Debra never requested alimony in her complaint. As such, Verlon argued, the court had no jurisdiction to enter the alimony award. Debra answered, and also moved to show cause because Verlon had not only failed to pay alimony, but he had also failed to pay the $2,000 or return the appliances ordered by the court in the divorce decree. Upon consideration of the motion, the court set aside its order for alimony, agreeing with Verlon that Debra did not request the award in her pleadings, and that the court could not grant such an award on its own action.

Verlon then filed his Notice of Appeal on April 13, 1998, and Debra cross-appealed in a timely fashion. Specifically, Verlon argued on appeal that the trial court erred in ordering that the houseboat constituted marital property because he had adduced clear and convincing evidence that he did not intend to make a gift of the property. In her appeal, Debra argued that the trial court erred in ruling that none of the personal or real property acquired during the marriage through the joint checking account was marital property. Furthermore, Debra argued that the trial court erred in setting aside its original motion on the award of rehabilitative alimony, and that the court erred in failing to award payment of her attorney's fees.

In a decision dated May 12, 1999, the court of appeals affirmed the chancellor's determinations regarding the houseboat and the joint checking account. However, the court of appeals reversed the chancellor's order granting the Motion for Reconsideration regarding Verlon's alimony payments. The court based its holding on Rule 15 of the Arkansas Rules of Civil Procedure which allows for the amendment of pleadings to conform to the proof introduced at trial. Applying this rule, the appellate court held that the evidence presented at trial was sufficient to allow for an award of rehabilitative alimony, and the chancellor erred in finding that he did not have jurisdiction to make such an award. The court of appeals remanded that particular matter to the chancellor to compute the proper amount of alimony due Debra. Finally, the court of appeals found that Debra failed to obtain a ruling on her request for attorney's fees; as such, the issue was waived. We granted Debra's Petition for Review.

Standard of Review

When we grant a petition to review a case decided by the court of appeals, we review it as if it was originally filed in this court. *Youngman v. State Farm Mut. Auto. Ins. Co.*, 334 Ark. 73, 971 S.W.2d 248 (1998); *Malone v. Texarkana Pub. Schs.*, 333 Ark. 343, 969 S.W.2d 644 (1998) (citing *Williams v. State*, 328 Ark. 487, 944 S.W.2d (1997)). We hear chancery cases, including division of property cases, *de novo* on the record, but will not reverse a finding of fact by the chancellor unless it is clearly erroneous. *Webber v. Webber*, 331 Ark. 395, 962 S.W.2d 345 (1998); *Box v. Box*, 312 Ark. 550, 851 S.W.2d 437 (1993). The evidence on appeal, including all reasonable inferences therefrom, and the findings of fact by a judge must be reviewed in a light most favorable to the appellee. *Looper v. Madison Guar. Sav. & Loan Ass'n*, 292 Ark. 225, 729 S.W.2d 156 (1987). We will defer to the superior position of the chancellor to judge the credibility of witnesses. *Noland v. Noland*, 330 Ark. 660, 956 S.W.2d 173 (1997); *Holaday v. Fraker*, 323 Ark. 522, 920 S.W.2d 4 (1996). A grant of alimony or attorney's fees are issues within the sound discretion of the chancellor and will not be disturbed on appeal absent an abuse of discretion. *Burns v. Burns*, 312 Ark. 61, 847 S.W.2d 23 (1993).

Debra addresses three main points in her Petition for Review, all of which were raised below. First, Debra argues that the chancellor erred by finding that the bank-account property remained separate property. Second, Debra argues that the chancellor erred in reversing his decision to grant her rehabilitative alimony. Finally, Debra argues that the chancellor erred in failing to award her attorney's fees and costs due to the disparity between the parties' incomes and ability to pay.

Verlon argues that the chancellor erred in finding that the houseboat was marital property because there was no evidence which showed that the funds used to pay for the houseboat were ever processed through the joint account. Furthermore, Verlon argues that he changed the title to the boat from one which listed both his and Debra's names to one which only had his name once he registered the boat. Regarding alimony, Verlon argues that alimony should not have been awarded by the court of appeals after the chancellor vacated his order because Debra did not comply with the Rules of Civil Procedure in pleading her entitlement to ali-

mony. As such, the chancellor's decision to vacate his original award of alimony was proper.

I. Property Division

Any discussion of division of marital property should begin with the relevant statutory provision. Arkansas Code Annotated § 9-12-315 (Repl. 1998) defines "marital property" as "all property acquired by either spouse subsequent to the marriage," subject to certain exceptions. There is a presumption that all property acquired during a marriage is marital property. *McDermott v. McDermott*, 336 Ark. 557, 986 S.W.2d 843 (1999); *Layman v. Layman*, 292 Ark. 539, 731 S.W.2d 771 (1987); *Boggs v. Boggs*, 26 Ark. App. 188, 761 S.W.2d 956 (1988). The applicable exceptions listed in the statute include:

> (1) Property acquired prior to marriage, or by gift, or by bequest, or by devise, or by descent;
>
> (2) Property acquired in exchange for property acquired prior to the marriage or in exchange for property acquired by gift, bequest, devise, or descent.

Ark. Code Ann. § 9-12-315(b).

The general rule in Arkansas is that once property is placed in both spouses' names, there is a presumption that the property is held in tenancy by the entirety. *McEntire v. McEntire*, 267 Ark. 169, 590 S.W.2d 241 (1979). *Ramsey v. Ramsey*, 259 Ark. 16, 531 S.W.3d 28 (1975); *Lofton v. Lofton*, 23 Ark. App. 203, 745 S.W.2d 635 (1988); *Creson v. Creson*, 53 Ark. App. 41, 917 S.W.2d 553 (1996). As this court stated in *Ramsey*, "[t]his presumption is strong, and it can be overcome only by clear and convincing evidence, partially because the alternative is a resulting trust the establishment of which, under such circumstances, requires that degree of proof...." *Ramsey*, 259 Ark. at 19-20. In determining whether property remains under the control of one spouse upon divorce, or is the property of both spouses, "tracing" may be used by the court. "Tracing of money or property into different forms may be an important matter, but tracing is a tool, a means to an end, not an end in itself; the fact that one spouse made contributions to certain property does not necessarily require that those contributions be

recognized in the property division upon divorce." *Canady v. Canady*, 290 Ark. 551, 721 S.W.2d 650 (1986); *Cole v. Cole*, 53 Ark. App. 140, 920 S.W.2d 32 (1996).

A. The Joint Bank Account

The chancellor ruled that the bank account was not marital property because "all of the money was derived from either his Veterans Administration compensation disability benefits or from his Social Security disability benefits. The money was placed into an account that was held in joint names, and was under the control of the Defendant." In other words, the chancellor determined that Verlon succeeded in rebutting the presumption that the account was marital property held as tenants by the entirety. Debra argues that the court erred in so doing. We disagree and hold that the chancellor's decision was not clearly erroneous.

The chancellor, in part, held that *Cole* should control under the instant facts. In *Cole*, the court of appeals upheld the chancellor's finding that a joint account in both parties' names was actually the wife's account because the account was funded by inheritance money received by the wife. Additionally, the chancellor in *Cole* determined that the wife had complete control over the account, that the husband only wrote four or five checks total from the account and only with his wife's prior approval, and that the parties also had a separate joint account into which they deposited their paychecks and over which they both had control. The court of appeals, in affirming the chancellor's decision, found that there was clear and convincing evidence to support the chancellor's decision, and that that decision was not clearly erroneous.

Due to the nature of this case, a close examination of the facts is in order. Before and after their marriage, Verlon derived his income exclusively from disability benefits directly deposited into a checking account. Prior to the marriage that account was in his name only. After the marriage, Verlon added Debra's name to the account, thus making it a joint account. However, the account continued to be funded solely by Verlon's disability income. Debra maintained a separate checking account in her name only which she had prior to the marriage. It is undisputed that all of the funds deposited in Debra's account came from her employment as a driver

for Federal Express. During the marriage, the couple maintained two checking accounts. Debra deposited her paycheck from her job with Federal Express in an account for which she was the sole signatory. Verlon also maintained a savings account held in his name only.

At trial, the parties gave conflicting testimony regarding the joint account's use and control. Debra stated her belief that the account was marital property. She testified that she wrote checks on the joint checking account for groceries and to pay Verlon's portion of their gasoline credit card bills. She indicated that they had an agreement that Verlon would pay for the groceries out of the joint account. She testified that Verlon also paid for the utilities out of the joint account. She testified that if her children had a party, she would pay for that out of her own personal account. She testified that in the last year of the marriage, if she stopped by the store to pick something up and she paid for it out of her own account, "I had him reimbursing me. Before that, I would just pick it up and pay for it." Debra testified that it was their agreement that Verlon would pay for the groceries out of the joint account. Debra also testified that the house furniture was all paid for out of the joint account and that a bedroom suite for one of her children was bought out of the joint account. Debra acknowledged that she never put any of her paychecks into the joint account, nor did she ever deposit any other money into the joint account. She also acknowledged that the Cifra stock that Verlon bought with funds from joint checking account was in his name only.

Verlon gave a different version of the parties' ownership and use of the joint checking account. Verlon testified that Debra told him every time that she had written a check on the joint account because "it was understood that that account was mine and hers was hers." Verlon also testified that he made all of the mortgage payments from the joint account. He stated that he looked through all of his statements on the joint account, and Debra never made any deposits on the account. Verlon testified that Debra probably wrote approximately ten percent of the checks out of the account, but that she never wrote a check out of the account unless she first spoke to him about it. Verlon testified that he paid Debra back for the washer and dryer out of the joint account and produced the checks written to her to support his contention. When Debra filed for divorce,

Verlon withdrew the funds totaling approximately $12,800 in the joint account.

[redacted] On appeal, we defer to the trial court's credibility assessments. *Noland, supra.* The trial court heard all of the testimony and assessed the credibility of the witnesses. The trial court's findings indicate that the court chose to accept the testimony of Verlon that he alone controlled the expenditure of funds from the joint account funded by his disability income and that Debra had agreed to this arrangement. The trial court thus apparently found that when Debra expended funds from the account it was with Verlon's permission or at his direction. Accordingly, the trial court ruled that Verlon provided clear and convincing evidence that the account funds remained his separate property despite the account existing in both names. We cannot say that the trial court's decision was clearly erroneous and, therefore, affirm.

B. The Houseboat

In his order, the chancellor determined that the houseboat was marital property subject to a one-half division in the divorce. On appeal, Verlon argues that there was no evidence introduced at the divorce hearing which indicated that the money used for the houseboat came from the joint account, or that the inheritance he received from his mother, totaling $35,809.11, was ever commingled with the joint account to which Debra could attach any interest. Verlon argues that the funds are traceable to the inheritance money, and that he used cashier's checks, instead of checks from the account, to pay for the houseboat.

While it would appear that the ownership of the houseboat would fall under the second exception to marital property listed in Ark. Code Ann. § 9-12-315(b), Verlon misses the point in that the chancellor found that "the houseboat is marital property because it is in joint names although derived from benefits from inheritance. *The Court finds a gift was made.*" (Emphasis added.) The chancellor specifically found at the close of the hearing that the bill of sale, which was the only written evidence of the ownership of the houseboat, indicated that it was jointly owned by the parties, despite Verlon's testimony that he later transferred title into his name only. Verlon did not produce any documentation of a change

in the title of the boat. In other words, the chancellor found that while the property could be traced to an inheritance, Verlon made a gift to Debra of an interest in the property. The chancellor thereby found that Verlon did not rebut the presumption that once the property was placed in both his and Debra's names, the property was then held as tenants by the entirety. *See Ramsey, supra,* and *Lofton, supra.*

We discussed the situation of the purchase of property by one spouse with inheritance funds which have been processed through a joint account in *Jackson v. Jackson*, 298 Ark. 60, 765 S.W.2d 561 (1989). In *Jackson*, the wife used inherited funds to purchase her sister's one-half interest in real property to which the wife owned the other one-half interest in her name alone. When the wife received the inheritance, she deposited the money in a joint bank account which she held with her husband, and then several days later wrote a check out of that account to her sister for the property. The real property was titled in the wife's name only. Upon finding that the real property was not marital property, the court found that the wife merely "poured" the inheritance in and out of the joint account and then, significantly, only titled the property in her name upon purchase. We upheld the chancellor's finding that the husband never exercised any dominion or control over the funds in the joint account, and that the wife never intended to make a gift of an interest in the property to her husband. Applying the appropriate principles to the instant case, we cannot say that the trial court clearly erred in finding that the houseboat was marital property. While the chancellor's determinations on the houseboat and the joint checking account may appear inconsistent, they, in fact, underscore the fine factual distinctions that often characterize marital-property divisions.

II. Alimony

Verlon cross-appeals the court of appeals holding which reversed the chancellor's order denying an award of alimony. Verlon contends that Debra should not be provided alimony because she did not properly plead her claim for alimony under the Arkansas Rules of Civil Procedure. In response, Debra argues that she is allowed the rehabilitative alimony under Arkansas law, and that the chancellor erred in deciding that he did not have jurisdiction to

award alimony. We agree and reverse the chancellor's ruling that he lacked jurisdiction to award alimony.

An award of alimony is not mandatory but is a question which addresses itself to the sound discretion of the chancellor. *Wilson v. Wilson*, 294 Ark. 194, 199, 741 S.W.2d 640 (1987). Fault is not a factor in the award of alimony unless it meaningfully relates to need or ability to pay. *Murphy v. Murphy*, 302 Ark. 157, 159, 787 S.W.2d 684 (1990) (citing *Russell v. Russell*, 275 Ark. 193, 628 S.W.2d 315 (1982)). Below, the trial court's original decree of divorce ordered Verlon to pay Debra rehabilitative alimony through the end of 1998. Upon Verlon's motion, the court set aside the award of alimony finding that Debra's pleadings did not request an award of alimony and "it was therefore without authority to make such award." However, Rule 15(b)of the Arkansas Rules of Civil Procedure states, "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." Furthermore, this rule allows these amendments to relate back to the date of the original pleading when the claim or defense arose out of the conduct, transaction, or occurrence set forth in the original pleading. Rule 15(b) does not require that the claim be pled in writing at the time the parties actually try the issues.

It is apparent on the record that throughout the proceeding below the parties litigated the case with full knowledge of Debra's desire for alimony. In fact, the trial court originally awarded temporary alimony in the amount of $100 per week at a temporary hearing held on November 21, 1997, with no objection from Verlon. The record reflects that the trial court had before it adequate facts upon which to make a determination of Debra's entitlement to alimony. Rule 15(b) further provides that if the evidence is objected to at trial on the ground that it is not within the issues made by the pleadings, the trial court may nonetheless permit amendment of the pleadings in its discretion. We hold, therefore, that the trial court erred in granting Verlon's motion to set aside the award of alimony.

III. Attorney's Fees

Finally, Debra argues that she should have been awarded attorney's fees and costs due to the disparity in the parties' incomes and ability to pay these amounts. With regard to attorney's fees, Ark. Code Ann. § 9-12-309 (Repl. 1998) controls. Under this statute, the chancellor may award attorney's fees to either party, and will consider an award of additional fees should one party have to return for the enforcement of alimony, maintenance, and support provided for in the decree. A chancellor has considerable discretion to award attorney's fees in a divorce case. *Gavin v. Gavin*, 319 Ark. 270, 890 S.W.2d 592 (1995). In determining whether to award attorney's fees, the chancellor must consider the relative financial abilities of the parties. *Anderson v. Anderson*, 60 Ark. App. 221, 963 S.W.2d 604 (1998); *Paulson v. Paulson*, 8 Ark. App. 306, 652 S.W.2d 46 (1983); *see also, Lee v. Lee*, 12 Ark. App. 226, 674 S.W.2d 505 (1984). We hold the chancellor did not abuse his discretion by declining to award Debra attorney's fees and costs.

Affirmed in part and reversed in part.

Steven A. STEGGALL *v.* STATE of Arkansas

CR 99-712 8 S.W.3d 538

Supreme Court of Arkansas
Opinion delivered January 20, 2000

[redacted]

Val P. Price and *Scott Nance*; and *Terry Goodwin Jones*, Law Student Admitted to Practice Pursuant to Rule XV(E)(1)(6) of Rules Governing Admission to the Bar of the Arkansas Supreme Court; for appellant.

Mark Pryor, Att'y Gen., by: *Brad Newman*, Ass't Att'y Gen., for appellee.

LAVENSKI R. SMITH, Justice. Appellant Steven A. Steggall appeals his capital-murder conviction for the death of his three-month-old daughter, Haylee Brianne Stice ("Haylee"), who died of traumatic injuries to her head and body. The trial court sentenced Steggall to life in prison. Hence, we have jurisdiction under Ark. Sup. Ct. R. 1-2(a)(2). On appeal, Steggall argues that the prosecution adduced insufficient facts to support a capital-murder conviction, and that his statements to the police should have been suppressed because he requested that an attorney be present during the statements. We find no error and affirm.

Facts

On April 2, 1998, Steggall and Misty Stice ("Stice"), Haylee's mother, admitted Haylee to the emergency room of a Newport hospital. Steggall initially told investigators he had called 911 after

observing bleeding from the child's nose after he laid her down to sleep. Haylee was transported by helicopter shortly thereafter to Arkansas Children's Hospital in Little Rock, where she was first seen by Dr. Stephen Schexnayder, a pediatric critical-care and emergency-medicines physician. Dr. Schexnayder testified at trial that upon initial evaluation, he and his team found Haylee to be "a very severely ill child who was in shock." According to Dr. Schexnayder, she was "severely neurologically injured, meaning she was comatose."

Dr. Charles Albert James, a pediatric radiologist, conducted several diagnostic tests including a skeletal survey or full-body x-ray, a CT scan of Haylee's brain, and a bone scan to identify bone abnormalities. Dr. Schexnayder and Dr. James reviewed the test results. Both doctors noted that Haylee had suffered an "extensive skull fracture" on the right side of her head, resulting in hemorrhaging on the brain surface and damage to both frontal lobes of the brain. The x-rays and bone scan also revealed that Haylee suffered two occurrences of rib fractures — one occurrence approximately two weeks before this hospital admission and the other related to the April 2 occurrence. The tests also revealed that Haylee had suffered a fractured forearm, which was healing, indicating that it was over a week old at the time of admission on April 2. Both doctors opined that the old and new injuries were consistent with child abuse. Specifically, they believed the injuries reflected "shaken baby syndrome" and "shake and slam syndrome." Children's Hospital reported the incident to the Jackson County Sheriff's Department as suspected child abuse.

Steggall made three statements to the police regarding the incident on April 2, 1998. The police first questioned Steggall on the evening of April 3, 1998, at Arkansas Children's Hospital. Chief Deputy David Lucas and Detective Charles Vaughn with the Jackson County Sheriff's Department conducted the interview, which was audiotaped. Prior to conducting the interview, Lucas had Steggall answer and initial a standard *Miranda* rights form. The statement was later transcribed. In this first statement, Steggall recounted the events of the night before. He stated that he laid Haylee down in her bed on her stomach and finished some housecleaning. He stated he heard a choking sound, went to check on Haylee, and noticed when he rolled Haylee over on her side that some blood came out of her nose. Steggall stated that when he picked her up she was

limp, and he then called 911. Throughout this statement, Steggall denied ever shaking or dropping Haylee.

Steggall again met with the police investigators on the morning of April 8, 1998. State Police Investigator Charles Beall orally advised Steggall of his rights before taking the statement, and Steggall completed a standard *Miranda* waiver form provided by the police. Steggall indicated that he understood his rights and would waive them. Steggall dictated a statement to Beall which Beall transcribed by hand. In the handwritten statement, Steggall recounted that while he was feeding Haylee by bottle, she began spitting up and formula was coming out of her nose. Haylee vomited, and when she did, her head somehow fell upside down. Steggall stated:

> When I noticed that Haylee's head was upside down I grabbed her by her leg and jerked her up by her leg with my left hand. Haylee's head went down and popped. When I cleaned her up she started crying. I then a little while later started bouncing her on my knee probably too fast for Haylee. Her head was bouncing around.

Steggall said he noticed blood coming out of Haylee's nose about five to ten minutes later after he laid her in her bed. It was at that time that he and Stice called 911. Steggall also reported for the first time that Haylee's head had hit the front of the wood portion of a couch when he jerked her up by her leg, and that he "might have squeezed Haylee by her ribs too hard."

Lucas and Beall interviewed Steggall for the third time on April 9, 1998, at the Arkansas State Police headquarters in Little Rock. The officers used a standard *Miranda* form to advise Steggall of his rights before beginning the interview. Steggall, as previously, initialed and signed the form, indicating that he understood his rights and was willing to speak with the officers without counsel. The police videotaped the interview, made an audio tape, and later transcribed it. In that statement, Steggall generally recounted the events of April 2, 1998, again as he had stated in his April 8, 1998, written statement.

On April 14, 1998, the Jackson County prosecuting attorney charged Steggall by Information with battery in the first degree under Ark. Code Ann. § 5-13-201. Haylee died on May 3, 1998, from complications associated with her injuries. On May 5, 1998,

the prosecutor amended the Information filed against Steggall to state a charge of capital murder. The Jackson County Circuit Court tried Steggall on December 8, 1998. At the close of the State's evidence, the defense moved for a directed verdict, arguing that there was insufficient evidence to support a finding that Steggall acted "knowingly" as required under Ark. Code Ann. §§ 5-10-101 and 5-2-202. Instead, the defense argued that only circumstantial evidence existed and that this is not enough if any other reasonable conclusion exists. Here, the defense argued, the evidence could support a finding that Steggall acted recklessly. The court denied this motion, noting that the defendant's state of mind was an issue for the jury. The jury convicted Steggall of capital murder and sentenced him to life in prison. He filed a timely Notice of Appeal on December 18, 1998.

As noted, Steggall raises two points on appeal. First, Steggall argues that the trial court erred when it denied his motion for directed verdict because there was insufficient evidence to support a capital-murder conviction. Second, Steggall argues that the trial court erred in failing to suppress Steggall's three statements to police because Steggall contends that he requested an attorney during the interrogations.

Sufficiency of the evidence

When an appellant challenges the sufficiency of the evidence, we address the issue prior to all others. *Byrd v. State*, 337 Ark. 413, 992 S.W.2d 759 (1999). A directed-verdict motion is a challenge to the sufficiency of the evidence. *McDole v. State*, 339 Ark. 391, 6 S.W.3d 74 (1999); *Ayers v. State*, 334 Ark. 258, 975 S.W.2d 88 (1998). The test for determining sufficiency of the evidence is whether there is substantial evidence to support the verdict. On appeal,when a defendant challenges the sufficiency of the evidence convicting him, the evidence is viewed in the light most favorable to the State. *Windsor v. State*, 338 Ark. 649, 1 S.W.3d 20 (1999); *Dixon v. State*, 310 Ark. 460, 839 S.W.2d 173 (1992). Evidence is substantial if it is of sufficient force and character to compel reasonable minds to reach a conclusion and pass beyond suspicion and conjecture. *Ladwig v. State*, 328 Ark. 241, 943 S.W.2d 571 (1997). Only evidence supporting the verdict will be considered. *Hendrickson v. State*, 316 Ark. 182, 871 S.W.2d 362 (1994).

This court makes no distinction between circumstantial and direct evidence when reviewing for sufficiency of the evidence. However, for circumstantial evidence to be sufficient, it must exclude every other reasonable hypothesis consistent with innocence. Whether the evidence excludes every hypothesis is left to the jury to determine. *Williams v. State*, 338 Ark. 97, 991 S.W.2d 565 (1999). Guilt may be proved in the absence of eyewitness testimony, and evidence of guilt is not less because it is circumstantial. *Trimble v. State*, 316 Ark. 161, 871 S.W.2d 562 (1994). A criminal defendant's intent or state of mind is rarely capable of proof by direct evidence and must usually be inferred from the circumstances of the crime. *Byrd, supra; Green v. State*, 330 Ark. 458, 956 S.W.2d 849 (1997).

[redacted] In his directed-verdict motion, Steggall argued that this case is based on circumstantial evidence alone; therefore, if any other conclusions can be drawn from that evidence, besides that of "knowingly" causing injuries as defined by the statute, then the capital-murder sentence is not warranted. Ark. Code Ann. § 5-10-101(a)(9) (Repl. 1997), the capital-murder statute, states:

> (a) A person commits capital murder if:
>
> (9) Under circumstances manifesting extreme indifference to the value of human life, he knowingly causes the death of a person fourteen (14) years of age or younger at the time the murder was committed, provided that the defendant was eighteen (18) years of age or older at the time the murder was committed.

Ark. Code Ann. § 5-2-202 on culpable mental states defines "knowingly" as follows:

> (2) "KNOWINGLY." A person acts knowingly with respect to his conduct or the attendant circumstances when he is aware that his conduct is of the nature or that such circumstances exist. A person acts knowingly with respect to a result of his conduct when he is aware that it is practically certain that his conduct will cause such a result.

According to Ark. Code Ann. § 5-2-202 (Repl. 1993): "A person acts knowingly with respect to a result of his conduct when he is aware that it is practically certain that his conduct will cause such a result." A jury need not lay aside its common sense in evaluating the ordinary affairs of life, and it may infer a defendant's guilt from improbable explanations of incriminating conduct. *See e.g., Goff v.*

State, 329 Ark. 513, 953 S.W.2d 38 (1997); *Davis v. State*, 325 Ark. 96, 925 S.W.2d 768 (1996).

In *Byrd*, we dealt with "shaken baby syndrome" in a case in which a seven-month-old boy died after suffering a blunt-force trauma causing a skull fracture and brain swelling. The child in *Byrd* had suffered repeated episodes of abuse as evidenced by his medical history, including evidence of multiple healing rib fractures and a leg fracture. In that case, the defendant argued, as Steggall does now, that only circumstantial evidence existed and, as such, a finding of "knowingly" could not be established to support a capital-murder conviction. We especially noted that the medical evidence indicated that the injuries occurred during the time that the defendant was caring for the child, and that the injuries presented "uncontroverted evidence of child maltreatment." The court in *Ladwig* also came to the same conclusion in that "shaken baby syndrome" case, finding that the defendant struck and shook the child, knowing that the result would be serious injury or death.

Here, the evidence before the jury certainly provided them with ample evidence, circumstantial and direct, to find Steggall acted "knowingly" in causing the child's death. At trial, both Dr. Schexnayder and Dr. James testified about their opinions regarding the source of Haylee's injuries. Dr. James stated that the type of rib injuries Haylee sustained are not generally seen in accidental trauma. He stated:

> This site of bone injury is felt to be highly, highly specific for child abuse because we don't see this fracture in this location hardly ever in other forms of trauma, bad car wreck, bad fall, resuscitation. This site of bone injury is felt to be highly, highly specific that there was intentional trauma to the infant, which is what we term child abuse or non-accidental trauma.

He further stated:

> We know from the images now that we have severe force has (*sic*) been applied, traumatic force has been applied to the infant. We know from being able to age both on the head scan the hemorrhage, the blood, and the healing changes of bone, we have severe traumatic force applied to this child over different time periods, over different organ systems, the brain, the bones scattered throughout the body.

Dr. Schexnayder testified that "given the whole picture of some of the findings I've yet to get to, this is consistent with multiple repetitive injuries that were not accidentally inflicted. In other words, this child was abused." In response to a question regarding whether these findings are consistent with "shaken baby syndrome," Dr. Schexnayder responded that the skull fracture was actually part of a related syndrome called "shake and slam syndrome." Dr. Schexnayder stated:

> To get this skull fracture, the child had to have a high force impact with some solid object, be it, you know, a table, a fist, a wall, but the child not only had to be shaken but the child had to have some severe impact to the point that it caused a very large skull fracture.

The doctor summarized, stating:

> The bleeding in the eyes, the bleeding over the top of the brain, the rib fractures at the back, at the back part of the ribs that were fresh, those are consistent all with shaking. The old rib fractures are consistent with this child being shaken but at a different time, as is that healing rib fracture on the right, but to get that fresh skull fracture on the right, the child had to have a severe impact with something.

The State also offered the testimony of Dr. Charles Paul Kokes, who performed an autopsy on Haylee's body on May 4, 1998. Dr. Kokes, a specialist in the fields of anatomic and forensic pathology, testified regarding his findings from the autopsy, noting that Haylee suffered an "eleven centimeter long healing skull fracture which extended from the right front part of the skull back over the right side of the skull." Dr. Kokes also noted the subdural hematoma that Haylee's treating physicians saw on the CT scan. Dr. Kokes testified that he saw evidence of healing rib fractures on both sides of the chest wall and on four ribs. While Dr. Kokes did not see evidence of the arm or leg fractures, he attributed this to the time that had elapsed, over one month, from the time the injuries occurred to the time he performed the autopsy. Dr. Kokes testified that the injuries Haylee sustained were a result of "a blunt force trauma," which could consist of the child either being struck very forcibly or compressed in some manner. In Dr. Kokes's medical opinion, the cause of Haylee's death was the head injuries with complications, and the manner of death was due to homicide. Dr. Kokes stated:

> [I]f you consider in the context of a child with that sort of head trauma, older injuries sufficiently severe enough in different anatomic locations in that same individual at a different time, that simply means that this child was the victim of repetitive physical abuse, had been abused before the time she sustained the head injuries. In that context that makes the likelihood that the injuries were not accidental in nature very strong, and it's not (*sic*) likely even under those circumstances without consideration of other factors, that this death is in all likelihood a homicide.

Dr. Kokes further noted in his autopsy report, which was admitted into evidence at trial, the following:

> Healing fractures of the ribs and left radius are important in this case, not because they had adversely affected the infant, but because of what they say about the circumstances surrounding the traumatic incident. The initial story regarding what happened to this infant on April 2, 1998 is totally inconsistent with the clinical and pathologic findings. Subsequent statements given by the father, which admit some relatively mild head injuries took place, are also inconsistent with the findings. Mechanisms described by the father could not have caused the degree of head damage that was present. Nor does it explain the presence of healing rib fractures and a left wrist fracture at the time of the presentation to the hospital on April 2, 1998. The presence of healing fractures at that time indicates that this child was a victim of repetitive abuse. The head injuries which occurred on April 2, 1998 were the final injuries in a series of incidents which were sustained in this infant's short life.

In addition to Steggall's statements to the police, he also made a fourth statement to Dr. John R. Anderson, Ph.D., a staff psychologist at the Arkansas State Hospital, during a mental examination to determine whether Steggall was competent to stand trial and whether he was competent at the time of the April 2, 1998, incident to understand and conform his actions. Before the examination, Dr. Anderson advised Steggall that the statements he made during the interview would not be privileged. During the examination, when asked about the events of April 2, Stegall first denied he did anything to Haylee, but then recanted and said that she had been injured while he was feeding her. Dr. Anderson quoted Steggall as saying, "I dropped my daughter, I got frustrated and I shook my daughter." He further stated, "I tried to keep her from hitting the floor, and she hit the couch. When I realized what happened, I

got mad at myself." He also stated, "I realized what I had done and I laid her down in her crib."

As the State notes, the appellant's attorney conceded on closing arguments that Steggall had shaken Haylee to death. Steggall's attorney argued, however, that he did not "knowingly" shake her to death. However, Steggall's own conduct in giving different versions of the incidents of April 2, 1998, defy this assertion. A criminal defendant's intent or state of mind is seldom capable of proof by direct evidence and must usually be inferred from the circumstances of the crime. *Thompson v. State*, 338 Ark. 564, 999 S.W.2d 192 (1999); *Mulkey v. State*, 330 Ark. 113, 952 S.W.2d 149 (1997); *Williams v. State*, 325 Ark. 432, 930 S.W.2d 297 (1996). In *Thompson*, the verdict was based on circumstantial evidence, but the evidence excluded any other hypothesis consistent with innocence. Thompson's attempts to cover up his connection to the crime were before the jury, and the jury could have properly considered evidence of cover-up as proof of a purposeful mental state. *See also, Brenk v. State*, 311 Ark. 579, 847 S.W.2d 1 (1993); *Mulkey, supra*. Circumstantial evidence of a culpable mental state may constitute substantial evidence to sustain a guilty verdict. *Williams, supra*; *Crawford v. State*, 309 Ark. 54, 827 S.W.2d 134 (1992). Here, there was ample evidence for the jury to find that Steggall knowingly caused the death of the infant. Therefore, denial of the directed-verdict motion was proper, and the court was correct in allowing the jury to consider the evidence.

Suppression Motion

Prior to the start of trial, the defense moved for suppression of Steggall's three statements, arguing that Steggall believed he was coerced and was not given the right to counsel. At the suppression hearing, the State presented testimony by the investigating officers regarding the circumstances surrounding the taking of Steggall's statements. Each officer testified that Steggall orally and in writing waived his rights, and voluntarily agreed to speak to the police regarding the case. The officers testified that Steggall did not seem to be under the influence of any drugs or alcohol, and that he seemed to understand the protections he was waiving. Furthermore, the officers testified that Steggall did not request the presence of an attorney at any time prior to, during, or after making the

statements to them. Steggall testified at the suppression hearing that he was advised of his rights at each of the three meetings with the police, and that he voluntarily waived his rights. However, Steggall stated that at the second meeting in Little Rock, he asked for an attorney twice, but that the officers seemed like they "wanted to get it done and over with." Steggall could not remember exactly what they said, but he stated that he "felt pressure" from the officers. Steggall also testified that he would have requested an attorney at the third meeting on April 9 had he known that he was being videotaped. The trial court denied the motion to suppress the statements at trial.

In his second point on appeal, Steggall argues that the trial court erred in denying his motion to suppress the statements he made to police regarding the events of April 2, 1998. Specifically, Steggall argues that he asked for an attorney when he was questioned by the police on April 8, 1998, and when videotaped on April 9, 1998, and that their failure to stop the questioning and allow him the opportunity to speak to counsel rendered those statements inadmissable. The State responds by arguing that the issue before the trial court was essentially one of credibility, and that the appellate court defers to the trial judge in such matters. Here, the trial judge believed the three police officers and the various recorded statements and videotape to determine that the statements should be admitted at trial.

When we review a trial court's ruling on a motion to suppress, we review the evidence in the light most favorable to the State and make an independent determination based upon the totality of the circumstances. *Bangs v. State*, 338 Ark. 515, 998 S.W.2d 738 (1999); *Wright v. State*, 335 Ark. 395, 983 S.W.2d 397 (1998). Further, this court will only reverse a trial court's ruling on a motion to suppress if the ruling was clearly erroneous. *Phillips v. State*, 321 Ark. 160, 900 S.W.2d 526 (1995).

Although Steggall argues that he requested the presence of an attorney, it is undisputed that he signed *Miranda* waiver forms notifying him of his right to counsel and, apparently on three occasions, gave the police statements without exercising those rights. In fact, as the State notes, the only evidence that Steggall presents that he asked for an attorney is his own testimony. This issue then turned on credibility, and it is in the province of the

finder of fact to determine the credibility of witnesses. *Bryant v. State*, 314 Ark. 130, 862 S.W.2d 215 (1993); *Atkins v. State*, 310 Ark. 295, 836 S.W.2d 367 (1992).

[redacted] The burden is on the State to show that a defendant's confession was made after a voluntary, knowing, and intelligent waiver of his rights. *Rushing v. State*, 338 Ark. 277, 992 S.W.2d 789 (1999); *Cagle v. State*, 267 Ark. 1145, 594 S.W.2d 573 (1980). As was the case in *Cagle*, appellant's confession was given without counsel. The test is whether appellant was effectively warned of his rights and knowingly and willingly decided to waive them. *Id.* (citing *United States v. Harden*, 480 F.2d 649 (8th Cir. 1973)). The assertion of the right to counsel and the right to remain silent must be made with specificity. *Bowen v. State*, 322 Ark. 483, 911 S.W.2d 555 (1995) (citing *Davis v. United States*, 512 U.S. 452 (1994)).

[redacted] In *Clay v. State*, 318 Ark. 122, 883 S.W.2d 822 (1994), this court noted that there are two separate issues regarding the waiver of Miranda rights:

> Only if the 'totality of the circumstances surrounding the interrogation' reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived.

Id. (citing *Moran v. Burbine*, 475 U.S. 412 (1986)). The court in *Clay* further noted that the "totality of the circumstances" review mandated an inquiry into an evaluation of

> age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights. A court must look at the totality of the circumstances to see if the State proved that a defendant had the requisite level of comprehension to waive his Fifth and Sixth Amendment rights.

Here, Steggall was read his rights on three occasions, and he indicated on each occasion that he understood those rights. In fact, Steggall was audio- and videotaped on two out of three of these occasions, and there is no indication in the transcripts of these statements that he requested an attorney during the questioning. Considering Steggall's age, education, and experience, no special circumstances existed to invalidate his waiver. He was an adult who

had graduated high school and had completed some college credits. During these interviews, he showed no signs of being under the influence of any drug or delusions. Steggall also had prior experience with law enforcement as a child and teenager, as indicated in the psychological report generated in this case, and was placed on probation for shoplifting and stealing a truck. In his prior marriage, Steggall also had a run-in with law enforcement for alleged child abuse perpetrated against his stepdaughter. While those charges were dropped, he did deal with the police in that instance, as well. Based upon the foregoing, we conclude the trial court was not clearly erroneous in denying Steggall's Motion to Suppress. Accordingly, the judgment of the trial court is affirmed.

Rule 4-3(h)

In compliance with ark. Sup. Ct. R. 4-3(h), the record has been examined for all objections, motions, and requests made by either party that were decided adversely to appellant, and no error has been found.

Affirmed.

Carolyn ARNETT *v.* STATE of Arkansas

CR 99-1442 8 S.W.3d 34

Supreme Court of Arkansas
Opinion delivered January 20, 2000

Wright & VanNoy, by: *Herbert T. Wright, Jr.*, for appellant.

No response.

PER CURIAM. Carolyn Arnett, by her attorney, has filed a motion for rule on the clerk.

Her attorney, Herbert T. Wright, Jr., admits in his motion that the record was tendered late due to a mistake on his part.

We find that 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.

Ron OLIVER, President,
First Arkansas Bail Bonds, Inc., *Petitioner v.* PULASKI COUNTY CIRCUIT COURT, *Respondent*; Jamie Mann and Affordable Bail Bonds, Inc., *Interveners*

00-33 8 S.W.3d 35

Supreme Court of Arkansas
Opinion delivered January 20, 2000

Gruber Law Firm, by: *Wayne A. Gruber*, for petitioner.

No response.

PER CURIAM. On January 11, 2000, Ron Oliver, president of First Arkansas Bail Bonds, Inc., filed a petition for writ of prohibition in this court pertaining to the taking of his deposition by Jamie Mann and Affordable Bail Bonds, Inc. (hereinafter referred to as Mann). Oliver contends in his petition that the circuit court lacks jurisdiction to subpoena him and his records for a deposition once that court remands the matter to an administrative board. Oliver also filed an Application for Temporary Relief to stay all further action relating to the deposition pending a decision on his prohibition petition.

The facts leading up to Oliver's petition are these. Mann received an adverse decision from the Professional Bail Bondsman

Licensing Board and filed a petition for judicial review in the Pulaski County Circuit Court with the Licensing Board and Arkansas Professional Bail Bond Company as respondents. On September 14, 1999, the circuit court, by agreement of the parties, remanded the matter back to the Licensing Board for the presentation of additional evidence and for additional findings by that board, if necessary. Thereafter, Mann sought to take Oliver's deposition, and on September 23, 1999, a subpoena duces tecum was issued to Oliver by the Pulaski County Circuit Clerk and served by the Pulaski County Sheriff's office. Mann's notice of the Oliver deposition which was rescheduled for January 12, 2000, was filed on January 10, 2000, with the Pulaski County Circuit Clerk. Oliver moved to quash the deposition, and the circuit court denied the motion. Oliver's petition for a writ of prohibition followed.

Oliver's petition in this court raises the novel issue of whether the circuit court loses jurisdiction once the matter is remanded to the administrative board for additional proceedings. We ask for simultaneous briefs on this issue to be filed with this court by the parties and interveners no later than close of business on Thursday, February 3, 2000, and reply briefs filed by Thursday, February 10, 2000. Mann has filed a motion to intervene in the matter now pending before this court. That motion is granted.

The deposition of Oliver pursuant to the subpoena issued by the circuit clerk is temporarily stayed pending the resolution of the jurisdictional question. The motion for clarification filed by the interveners with respect to a hearing to be held before the Licensing Board on January 14, 2000, is denied.

Regina Padgett OSBURN, *et al. v.* ARKANSAS DEPARTMENT of HUMAN SERVICES

99-1296 8 S.W.3d 533

Supreme Court of Arkansas
Opinion delivered January 20, 2000

Appellants, pro se.

Kathy L. Hall, for appellee.

PER CURIAM. This case involves a dependency-neglect and termination-of-parental-rights action brought by the Department of Human Services (DHS); the case involves three minor children, Brandon Lee Padgett, Anthony Dennis Padgett, and Alexander William Padgett. Regina and Phillip Osburn, William Padgett, and Irving Moreno were respectively named in this proceeding as mother, father or putative fathers; Charles and Angela Young were allowed to intervene pro se as grandparents. A considerable number of pleadings, reports, and hearings have taken place, since the initial petition for dependency-neglect was filed on January 8, 1998. An order was eventually entered terminating parental rights and granting DHS the power to consent to adoption on August 2, 1999. The August 2 order set out the trial court's reasons and findings for terminating the parents' parental rights. The order further held that the Youngs, as grandparents, should have no further contact with the children. The trial court retained jurisdiction

for a hearing on the termination of parental rights of Irving Moreno and Anthony Padgett, which was scheduled to be heard on August 26, 1999. The partial record fails to reveal what action, if any, was taken in connection with the hearing.

The Youngs appear to have filed a notice on August 2, 1999, of their "intent to appeal." They also filed a notice of appeal on August 20, 1999. Neither notice designated what order the Youngs appealed; presumably, their appeal is from the August 2 order. The Osburns appealed from the August 2, 1999 order, but later asked the trial court to dismiss the appeal, which the trial court did on October 12, 1999. The Youngs continued to pursue their appeal by filing a partial record with this court's clerk and asked to proceed in forma pauperis and to be appointed counsel. We granted their in forma pauperis request on November 19, 1999. However, we decline to appoint counsel for the Youngs, since we are unaware of any law that provides they are entitled to appointment of counsel.

In addition, upon review of the partial record provided us, it is not entirely clear that the August 2, 1999, order from which they appeal is a final order that discharges all parties. As previously mentioned above, the trial court retained jurisdiction on the termination of parental rights as to Irving Moreno and Anthony Padgett on August 26, 1999, but we find nothing in the partial record where that matter has been concluded. For this reason, we direct the Youngs and DHS's counsel, who has made her appearance in the appellate proceeding, to show whether a final order was entered in this case and a timely notice of appeal was filed. Also, from our review, it does not appear that the record has been timely filed with the clerk in this court in accordance with Rule 5 of the Arkansas Rules of Appellate Procedure—Civil, nor is it clear any extension was requested and received as is provided under Rule 5.

The Youngs will have fifteen days from the date of this per curiam to provide a brief on the jurisdiction issues; DHS's counsel will have fifteen days in which to respond. If this court is shown to have no jurisdiction, the Youngs' appeal must be dismissed.

CITY of CADDO VALLEY *v.* Joan GEORGE

99-182 9 S.W.3d 481

Supreme Court of Arkansas
Opinion delivered January 27, 2000

M. Keith Wren, for appellant.

Boswell, Tucker & Brewster, by: *Dennis J. Davis*, for appellee.

TOM GLAZE, Justice. This case began as a tort suit filed in Hot Spring County Circuit Court by Joan George against two officers of the Caddo Valley Police Department. It is now before us following certification from the Court of Appeals pursuant to Ark. Sup. Ct. R. 1-2(b)(1) and (6) as that court found that the appeal involved an issue of first impression and questions of statutory construction.

The following events led to this litigation: Officer John Whittle of the Caddo Valley Police Department heard a BOLO (be on the lookout) report regarding a truck stolen from the parking lot of a gas station in Malvern. When Whittle saw the truck, driven by Patrick Sherman, pass through Caddo Valley, he flipped on his police vehicle's siren and lights and began pursuit. After hearing Whittle's radio call that he was in pursuit, Sergeant John Kelloms also joined in the chase. As the pursuit reached speeds of somewhere between seventy-five and ninety miles per hour, the officers heard radio reports from Arkadelphia that police there were in the process of setting up a roadblock across Highway 67. Sergeant Kelloms told Officer Whittle to back off from the fleeing truck in the hopes that they could get Sherman to slow down before reaching town. When Whittle did not back off far enough, Kelloms told him to do so again. Despite Whittle's eventual backing off, however, Sherman failed to slow down.

Meanwhile, in Arkadelphia, Lieutenant Mike Smith and Officer David Turner had positioned their cars partially across the highway, with one vehicle blocking a portion of the northbound lane and the other blocking part of the southbound lane. There was just enough room between the police vehicles for a car to pass through if it were going at a slow, safe speed. Several cars had made it through before Sherman arrived. Plaintiff Joan George's Jeep was caught between the police cars when Sherman crested the hill just

above the roadblock. Lieutenant Smith was standing on the center line with his pistol drawn, hoping to slow Sherman down. However, Sherman accelerated the stolen vehicle, forcing Smith to jump out of the way, and slammed it into George's car. The impact threw the Jeep off the road and tossed George out of the vehicle and into the ditch.

George filed her complaint in September of 1998, naming as defendants, among others, Sherman, Whittle, and Kelloms. She alleged negligence on the parts of Whittle and Kelloms, claiming that they pursued Sherman at a high rate of speed when they knew, or should have known, that the pursuit was likely to injure innocent victims; that they failed to disengage from the pursuit when they knew, or should have known that the Arkadelphia police were setting up a roadblock; and that they failed to end the pursuit when they knew, or should have known, it was no longer prudent to chase Sherman under the conditions.

Whittle and Kelloms denied negligence, and in addition, they argued that they were immune from liability or damages because they were acting in their official capacities as employees of Caddo Valley. Eventually, they filed a motion for summary judgment on these same grounds. In response, George asserted that the officers were indeed negligent because they were engaged in conduct which gave rise to her injuries. She also pointed out that the officers were not protected by tort immunity only to the extent that they had minimum liability insurance as required by Arkansas law. The trial court denied the summary-judgment motion, but did permit the City of Caddo Valley to substitute itself as the real party in interest, in place of the two officers.

The case proceeded to trial. At the close of George's case, Caddo Valley moved for a directed verdict, arguing that there was no evidence that the officers had been negligent in the operation of a motor vehicle, that Sherman's actions constituted an intervening cause which superseded the officers' liability, and that even if they were negligent, they were immune from suit. The court denied the motion at this time and again at the close of trial. The case was submitted to the jury, which found that Sherman, Whittle, and Kelloms were all negligent, and that liability should be apportioned ninety percent to Sherman and five percent each to Whittle and Kelloms. At a posttrial hearing, the trial court determined that

Caddo Valley was jointly and severally liable for the judgment, but limited their liability to $25,000.00, the amount of the minimum required insurance coverage. George contended that, because there were two police cars involved, she should get twice that amount, but the court rejected that argument.

On appeal, Caddo Valley now argues that (1) the trial court erred in ruling that the city is not immune from liability in tort; (2) the court erred in denying the city's motion for a directed verdict on the basis that any liability of the officers was cut off by the efficient intervening cause of the acts of Patrick Sherman; (3) no evidence was presented that Officers Whittle and Kelloms negligently operated their motor vehicles; and (4) no evidence was presented indicating that the officers' negligent operation of their motor vehicles, if any, proximately caused Joan George's damages. On cross-appeal, George argues that the trial court erred in limiting Caddo Valley's liability to $25,000.00.

Caddo Valley's first argument is that the police officers were immune from suit. Ark. Code Ann. § 21-9-301 (Supp. 1999) provides that it is the "declared . . . public policy of the State of Arkansas that all . . . *municipal corporations . . . shall be immune from liability and from suit for damages except to the extent that they may be covered by liability insurance.* No tort action shall lie against any such political subdivision because of the acts of its agents and employees." (Emphasis added.) The immunity granted to municipalities extends to the city's officials and employees when they are being sued in their official capacities. *Matthews v. Martin*, 280 Ark. 345, 346, 658 S.W.2d 374, 375 (1983). However, that same subchapter of the code also provides that "[a]ll political subdivisions shall carry liability insurance on their motor vehicles or shall become self-insurers, individually or collectively, for their vehicles, or both, in the minimum amounts prescribed in the Motor Vehicle Safety Responsibility Act, § 27-19-101 et seq." Ark. Code Ann. § 21-9-303(a) (1996). Under this section, "[t]he combined maximum liability of local government employees . . . and the local government employer in any action involving the use of a motor vehicle within the scope of their employment shall be the minimum amounts prescribed in the Motor Vehicle Safety Responsibility Act . . . ." Ark. Code Ann. § 21-9-303(b). The minimum amount defined in that act is $25,000.00 per vehicle insured. Ark. Code Ann. § 27-19-713(b)(2) (Supp. 1999).

Thus, a municipal corporation's immunity for negligent acts only begins where its insurance coverage leaves off. An instructive case is *City of Little Rock v. Weber*, 298 Ark. 382, 767 S.W.2d 529 (1989). There, Weber was injured when a Little Rock police officer, driving a city police car with the lights flashing and siren running, ran a red light and struck her vehicle. The city had moved for summary judgment, which was denied, and Weber won a jury verdict for $4,750.00. On appeal, the city argued that it was absolutely immune from tort liability arising out of a city policeman's negligent operation of an authorized emergency vehicle. *Weber*, 298 Ark. at 383-84, 767 S.W.2d at 530. This court rejected the city's reliance on earlier cases which held that immunity could be broached only when the public employee breached a duty imposed on him by law in common with all other people, as opposed to a situation in which the negligent conduct arose out of a duty peculiar to his employment. The *Weber* court explained, stating the following:

> The city's reliance on these cases is misplaced. The test used previously in those cases allowed an injured party to side step governmental immunity and seek relief against the employee when the duty the employee breached was common to all people. It cannot be used by the city to create governmental immunity not otherwise available, *as where a statute specifically provides that all political subdivisions shall carry liability insurance on their motor vehicles.*
>
> There is no indication in § 21-9-303 that the legislature intended to distinguish in any manner the circumstances to which it applied. In any event, we see no reason why a person injured by an emergency vehicle should be left without a remedy while persons may seek redress against a municipality for its employees' negligence in the operation of all other vehicles.

Weber, 298 Ark. at 385, 767 S.W.2d at 531 (emphasis added).

Although *Weber* is factually distinguishable (there, the police car was physically involved in the accident), the underlying principle is the same. A city is not immune to the extent that it has liability insurance. Here, Caddo Valley strenuously urges that it was not the officers' negligent operation of their motor vehicles that caused the accident in this case; rather, it says, it was an exercise of discretion in the performance of their official duties that led to the wreck. However, the question of negligence is not so easily divisible

from the question of discretion. In *Weber*, the officer had also, for some reason, made a decision to turn on his lights and sirens prior to his collision with Weber, and that decision, as in the instant case, involved an exercise of discretion; nonetheless, this court held that he was not immune from suit. In other words, once the officers here exercised their discretion and made the decision to pursue the stolen vehicle, any actions taken subsequent to that decision were required by law to be taken with ordinary care. AMI Civ. 3d 911, which was given in this case without objection, speaks to this very question as follows:

> The driver of an emergency vehicle is relieved of the obligation to obey a speed limit[, but t]he existence of this privilege does not relieve the driver of an emergency vehicle of the duty to exercise ordinary care for the safety of others using the highway.

It was the officers' failure to exercise ordinary care, once the decision to pursue Sherman was made, that led to the accident; therefore, to the extent of the city's liability coverage, they are not immune from suit and may be found liable for their negligence.

Caddo Valley argues that two cases from other jurisdictions should control our decision here. However, both of those cases are distinguishable. In the first, *Thornton v. Shore*, 666 P.2d 655 (Kan. 1983), the Kansas Supreme Court held that an officer pursuing a fleeing vehicle was immune from suit on the basis of a Kansas statute, similar to Ark. Code Ann. § 27-51-202 (Repl. 1994), which relieves drivers of emergency vehicles of the responsibility to obey speed limits. However, in *Thornton*, there was no finding that the police officer was driving negligently. Here, the trial court found sufficient evidence of the officers' negligence to place that issue before the jury. In addition, the Kansas statute provides that the emergency vehicle privilege does not relieve the driver of the duty to "drive with due regard for the safety of all persons." Kan. Stat. Ann. § 8-1506(d) (1982). The "due regard" language was interpreted in *Thornton* to be some degree of care less stringent than the standard of "ordinary negligence." *Thornton*, 666 P.2d at 661. To the contrary, Arkansas law, as applied by our court in *Weber*, requires an ordinary-care standard. Thus, the logic of *Thornton* does not control the situation here.

Nor do we find Caddo Valley's reliance on the case of *Kelly v. City of Tulsa*, 791 P.2d 826 (Okla. Ct. App. 1990), controlling. First,

we emphasize that, to the extent that *Kelly* can be read to immunize an officer when he or she is negligent during a hot pursuit, Arkansas law is well settled, as discussed above, that such officers must exercise ordinary care. In any event, the *Kelly* case differs factually from the case at hand. There, the driver of the fleeing vehicle lost control and swerved into the plaintiff's car, resulting in injury. Thus, in *Kelly*, it was simply the police officer's decision to initiate pursuit which was the basis of the plaintiff's complaint, and the Oklahoma Supreme Court found that this was "not the consideration addressed by [Oklahoma's emergency vehicle statute]." *Kelly*, 791 P.2d at 828. In the present case, however, the police officers continued to pursue Sherman at a high rate of speed even after they knew that Arkadelphia police officers were setting up a roadblock a short distance down the highway. Arkadelphia police officer Mike Smith testified that the there was only enough room for a vehicle traveling at a slow, safe rate of speed to pass between the police vehicles making up the roadblock. In sum, the question here was whether the officers were negligent in continuing the pursuit once they knew of conditions which could create a danger to innocent bystanders. It was their failure, once they knew of the roadblock, to exercise ordinary care for the safety of others using the highway, that leads to the conclusion that they were negligent.

This leads us to Caddo Valley's second argument, *i.e.*, that the officers were not negligent, and that the trial court erred in refusing to direct a verdict in its favor on that point. Our standard of review of the denial of a motion for directed verdict is whether the jury's verdict is supported by substantial evidence, which is evidence that goes beyond suspicion or conjecture and is sufficient to compel a conclusion one way or the other. *Ouachita Wilderness Inst. v. Mergen*, 329 Ark. 405, 947 S.W.2d 780 (1997) (citing *Southern Farm Bureau Casualty Ins. V. Allen*, 326 Ark. 1023, 934 S.W.2d 527 (1996)). It is not this court's province to try issues of fact; we simply review the record for substantial evidence to support the jury's verdict. *Id.* In determining whether there is substantial evidence we view the evidence in the light most favorable to the party against whom the motion is sought and give the evidence its strongest probative force. *Id.* Stated another way, if there is any substantial evidence to support the verdict, we affirm the trial court. *Grendell v. Kiehl*, 291 Ark. 228, 723 S.W.2d 830 (1987).

Negligence is the failure to do something which a reasonably careful person would do and a negligent act arises from a situation where an ordinarily prudent person in the same situation would foresee such an appreciable risk of harm to others that he would not act or at least would act in a more careful manner. *Mergen*, 329 Ark. at 412, 947 S.W.2d at 784. While a party can establish negligence by direct or circumstantial evidence, that party cannot rely on inferences based on conjecture or speculation. *Id.*

Once again, the evidence presented at the trial of this case showed that the two Caddo Valley officers in pursuit knew that a roadblock was being set up in Arkadelphia. Officer Whittle stated that he was approximately 100 feet behind the fleeing vehicle while the suspect was driving at approximately 90 to 100 miles an hour. He was twice told by his superior officer, Kelloms, to back off. This was Whittle's first high-speed pursuit, and he had been given no training or instructions on "what factors to consider when pursuing a high-speed pursuit."

Sergeant Kelloms joined the pursuit after having told Officer Whittle to back off. Testimony of Arkadelphia Police Officer Jackie Woodall revealed that the Caddo Valley officers were only about four or five car lengths behind the stolen truck, which was being driven at an estimated 75 to 80 miles an hour. On cross-examination, Woodall stated that it was only a matter of seconds from the time he heard the radio transmission telling Whittle to back off until the moment of the collision.

The foregoing is substantial evidence from which the jury could have concluded, without resort to speculation or conjecture, that the Caddo Valley officers were pursuing the suspect too closely at high speeds, and continued to do so after they knew of the presence of the roadblock in Arkadelphia. An ordinarily prudent person in the same situation could have foreseen an appreciable risk of harm to others; thus, we hold that there was sufficient evidence of negligence from which the jury could have reasonably found the officers to be at least partially or minimally at fault in the accident with George.

For its next two points on appeal, Caddo Valley argues that the trial court erred in refusing to direct a verdict in its favor on the question of proximate causation and on the issue of whether

Patrick Sherman's actions constituted an efficient intervening cause. Because these two issues are so closely intertwined, we consider them together. Proximate cause has been defined as "that which in a natural and continuous sequence, unbroken by any efficient intervening cause, produced the injury, and without which the result would not have occurred." *Union Pac. R. R. Co. v. Sharp*, 330 Ark. 174, 181, 952 S.W.2d 658, 662 (1997). Proximate causation is usually an issue for the jury to decide, and when there is evidence to establish a causal connection between the negligence of the defendant and the damage, it is proper for the case to go to the jury. *Id.* In other words, proximate causation becomes a question of law only if reasonable minds could not differ. *Id.*

On the issue of whether or not there was an efficient intervening cause, this question is "simply . . . whether the original act of negligence or an independent intervening cause is the proximate cause of an injury. Like any other question of proximate causation, the question whether an act of omission is an intervening or concurrent cause is usually a question for the jury." *Hill Constr. Co. v. Bragg*, 291 Ark. 382, 385, 725 S.W.2d 538, 540 (1987) (quoting from *Larson Machine v. Wallace*, 268 Ark. 192, 600 S.W.2d 1 (1980)). The *Bragg* court went on to say that the "original act or omission is not eliminated as a proximate cause by an intervening cause unless the latter is of itself sufficient to stand as the cause of the injury. The intervening cause must be such that the injury would not have been suffered except for the act, conduct or effect of the intervening agent *totally independent* of the acts of omission constituting the primary negligence." *Bragg*, 291 Ark. at 385, 725 S.W.2d at 540 (emphasis added).

In this case, there was evidence to establish a causal connection between the actions of the police officers and the injuries to Joan George. But for their actions in continuing to pursue Sherman, the jury could have reasonably found that the accident likely would not have happened. The events occurred in a natural and continuous sequence, thus making the officers' acts a proximate cause of George's injuries. In short, the jury could have easily concluded that the actions of Sherman, while admittedly an intervening cause, were not totally independent of the acts of negligence performed by the Caddo Valley police officers. As already discussed, the questions of proximate cause and the presence of an intervening cause were proper questions for the jury. As there was sufficient

evidence from which the jury could have found negligence, the trial court did not err in refusing to direct a verdict on these two issues.

Caddo Valley's last argument is that the trial court erred in finding it to be jointly and severally liable for the $150,000.00 judgment rendered against it and Sherman. The jury had assessed Sherman to be ninety percent at fault in the accident, and Whittle and Kelloms to each be five percent at fault (making Caddo Valley's total liability ten percent). At a posttrial hearing on the form of the judgment, the trial court ruled that Caddo Valley, like any other corporate entity, could be jointly and severally liable. *See Walton v. Tull*, 234 Ark. 882, 356 S.W.2d 20 (1962) (when the combined negligence of all joint tortfeasors exceeds the negligence of the plaintiff, each tortfeasor is jointly and severally liable for the plaintiff's damages after they have been reduced in proportion to the degree of his own negligence); *see also* AMI Civ. 3d 2111. Following Arkansas's law of joint and several liability, if George could not recover any of her loss from Sherman, she could look to Caddo Valley for satisfaction of the $150,000 judgment. Even so, the court limited Caddo Valley's total liability to $25,000.00, the maximum liability of a local government employer in an action involving the use of a motor vehicle. Ark. Code Ann. § 21-9-303(b). In its brief, Caddo Valley argues that it is immune from suit and that there is no exception to tort immunity which permits a plaintiff to collect more than the amount actually owed by a local government. However, the city cites no authority which compels such a conclusion, and, therefore, we reject its argument. We have stated on occasions too numerous to count that we will not reverse where the appellant has offered no convincing argument or authority and it is not apparent without further research that the argument is well taken. *See McGehee v. State*, 338 Ark. 152, 992 S.W.2d 110 (1999).

On cross-appeal, George presents us with a related question. She argues that because there were two police vehicles involved in the accident, she should be able to recover $50,000.00 — twice the amount determined by the trial court to be Caddo Valley's maximum liability, or $25,000.00 for each police car. The trial court interpreted Ark. Code Ann. § 21-9-303 to read in terms of an "occurrence" involving a city vehicle (or vehicles), rather than applying the insurance requirements to each vehicle involved in an accident. The trial court reads language into § 21-9-303 that is not

there. Arkansas's motor vehicle liability insurance statute plainly provides that a vehicle owner's insurance policy must insure the policy-holder "against loss from the liability imposed by law for damages arising out of the ownership, maintenance, or use of the vehicle or vehicles..., *with respect to each vehicle*" for a minimum of $25,000.00. Ark. Code Ann. § 27-19-713(b)(2) (emphasis added). Thus, because there were two Caddo Valley vehicles involved in the accident, and each officer was found five percent at fault, Caddo Valley, as a joint tortfeasor, would be jointly and severally liable in the amount of $25,000.00 for each of the city's vehicles. George therefore should recover $50,000.00 against Caddo Valley, and the trial court erred in ruling otherwise.

For the foregoing reasons, the decisions of the court below are affirmed on direct appeal and reversed on cross-appeal.

ARNOLD, C.J., not participating.

THORNTON and SMITH, JJ., dissent.

RAY THORNTON, Justice, dissenting. I respectfully dissent. The rule in Arkansas has long been that local governments are generally immune from tort liability. Ark. Code Ann. § 21-9-301 (Repl. 1996). However, this unlimited immunity was modified in 1968 to permit recovery for damages in *Parrish v. Pitts*, 244 Ark. 1239, 429 S.W.2d 45 (1968), where the plaintiff was injured when her vehicle was stuck as a result of negligence on the part of a city's garbage truck driver. The Legislature's response to *Parrish* was Act 165 of 1969, which provided that all local governments "shall be immune from liability and suit, except to the extent that they may be covered by liability insurance, for damages." *Id.* This act also provided that all political subdivisions carry liability insurance or become self-insurers to the legal requirement of $25,000. Based on these enactments we have allowed recovery for damages when a municipal vehicle is involved in an accident. *See Sturdivant v. City of Farmington*, 255 Ark. 415, 500 S.W.2d 769 (1973).

This is the first case in Arkansas presenting the issue whether immunity from suit is waived when a municipal vehicle is pursuing a suspect's vehicle in accordance with the officer's duty under Ark. Code Ann. § 14-52-203 (Repl. 1998). Notwithstanding the duty to apprehend a fleeing suspect, and the statutory authorization for an

emergency vehicle to exceed speed limits under certain circumstances, the majority's decision imposes liability upon the City of Caddo Valley for the actions of the city's employees where the city's vehicles were not involved in the collision itself.

Faced with a similar issue, our neighboring courts in Oklahoma and Kansas have determined that a city emergency vehicle may not be held responsible for an accident caused by a fleeing suspect. In adopting their rule, these states accepted the general rule expressed by New Jersey in *Roll v. Timberman*, 229 A.2d 281, *cert. denied* 232 A.2d 147 (1967), and I agree that the views of the New Jersey Superior Court are very persuasive. That court stated:

> The decisive issue in this case is whether a police officer is liable for damage caused by a vehicle operated by a fleeing law violator who is being pursued by the officer in the performance of his duty. The precise question has not been dealt with in any of the reported decisions in our State. However, the majority view expressed in other jurisdictions in similar cases holds that the police officer is not liable.

Id. (citations omitted).

The New Jersey Superior Court opinion points out that:

> When Officer Martin observed Timberman violate the motor vehicle laws it became the officer's duty to apprehend him. When he pursued Timberman the officer was exempt from speed regulations. He was performing his duty when Timberman, in gross violation of the motor vehicle laws, crashed into plaintiff's car. To argue that the officer's pursuit caused Timberman to speed may be factually true, but it does not follow that the officer is liable at law for the results of Timberman's negligent speed. Police cannot be made insurers of the conduct of the culprits they chase.

Id. (citations omitted). Similar analysis has been made by many other jurisdictions. Contrary to the opinion issued today by the majority, the general rule relative to the liability of municipalities in such circumstances is that a municipality responsible for the conduct of a police officer is nevertheless not liable for personal injuries, death, or property damage inflicted by a vehicle being pursued by a police vehicle where the police vehicle is only involved to the extent that it was being driven in pursuit of the fleeing vehicle which actually causes the injury or damage complained of. *See*

Thornton v. Shore, 666 P.2d 655 (1983). *See e.g., Chambers v. Ideal Pure Milk Co.*, 245 S.W.2d 589 (Ky.Ct.App.1952); *Morris v. Coombs' Adm'r*, 304 Ky. 187, 200 S.W.2d 281 (Ct.App.1947); *Pagels v. City and County of San Francisco*, 135 Cal.App.2d 152, 286 P.2d 877 (D.Ct.App.1955); *Draper v. City of Los Angeles*, 91 Cal.App.2d 315, 205 P.2d 46 (D.Ct.App.1949); *United States v. Hutchins*, 268 F.2d 69, 83 A.L.R.2d 447 (6 Cir. 1959); *Wrubel v. State of New York*, 11 Misc.2d 878, 174 N.Y.S.2d 687 (Ct. Claims 1958).

To extend the test of due care to include acts of fleeing motorists whom an officer is attempting to apprehend has the effect of making the officer, and the municipality, the insurer of the fleeing violator — or, in this case, the insurer as well of the actions of another police department. As the Kansas court noted in *Thornton, supra*, "who can say whether the greater harm would result from the imposition or nonimposition of a duty upon municipalities to refrain from pursuing a lawbreaker already engaged in reckless and dangerous operation of a motor vehicle on the public streets?"

The reasoning underlying the rejection of liability in these cases is twofold: (1) "[I]t is the duty of a police officer to apprehend those whose reckless driving makes use of the highway dangerous to others; (2) the proximate cause of the accident is the reckless driving of the pursued, notwithstanding recognition of the fact that the police pursuit contributed to the pursued's reckless driving." *Thornton, supra.* Here, the proximate cause of the accident also included the actions of the Arkadelphia police in setting up the roadblock (though they were not named as defendants in the underlying complaint). The Caddo Valley officers were engaged in pursuit as required of them by statute, but, according to their own testimony, they had begun backing off the pursuit for safety considerations. Our inquiry should be whether the officer's pursuit was so extreme or outrageous as to pose a higher threat to public safety than that ordinarily incident to a high-speed chase. I would hold that the actions of the Caddo Valley officers, under this analysis, did not meet the test of negligent conduct and that a directed verdict in favor of Caddo Valley should have been granted.

Lastly, even if the majority is not mistaken in adopting the rule that the city becomes the insurer for a fleeing violator, I cannot understand the reasoning leading to the majority's decision that the

insurance policy limits should be applied to both police cars. The trial judge had determined that the real party in interest was the city of Caddo Valley, and there was absolutely no showing that the pursuit by two cars rather than one caused the fleeing suspect to travel any faster or drive more recklessly. As the majority has determined that liability is to be imposed, I would affirm the trial court's determination that there was only one occurrence. For the above stated reasons, I respectfully dissent.

SMITH, J., joins in this dissent, but because he does not believe any negligent acts of the officers caused the injuries to the plaintiff, he would not reach the issue of insurance liability limits.

Dissent.

Alfredo Trejo MUÑOZ *v.* STATE of Arkansas

CR 99-432 9 S.W.3d 497

Supreme Court of Arkansas
Opinion delivered January 27, 2000

Longino & Morton, by: *George B. Morton* and *James H. Longino*; *R. Charles Wilkins III*, Rule XV, for appellant.

Mark Pryor, Att'y Gen., by: *Sandy Moll*, Ass't Att'y Gen., for appellee.

TOM GLAZE, Justice. Appellant Alfredo Trejo Muñoz brings this appeal from a conviction of the rape of the three-year-old baby of Muñoz's girlfriend, Michelle Araujo. We accepted the appeal from the court of appeals because the case involves the question of first impression as to whether an indigent criminal defendant has a right, under *Ake v. Oklahoma*, 470 U.S. 68 (1985), to have the State pay for an independent expert DNA analysis. Upon review of the case, we are unable to reach the merits of the question as certified because it was not properly preserved at trial.

On July 23, 1998, Muñoz followed Michelle home from work in case her car ran out of gas.[1] On the way home, Michelle picked up her baby at day care, went home, and temporarily left her baby with Muñoz at Michelle's house while Michelle went to put gas in her car. When Michelle returned about ten or fifteen minutes later, the baby was upset and was having difficulty sitting on the couch.

[1] Much of what we relate that occurred on July 23 and the following day has not been abstracted, and since we affirm this appeal, we have gone to the transcript so the reader will have sufficient information to understand what led to the filing of felony charges against Muñoz.

Muñoz told Michelle that he had spanked the baby because she would not stop crying. Michelle noticed a stain on Muñoz's jeans, which Muñoz said was chocolate syrup. Later that evening after Muñoz left, the baby went to her mother crying and said that her "butt was bleeding." She told Michelle that "Fredo spanked me." Michelle examined the baby's bottom and saw blood in her panties. Michelle asked her baby what Muñoz had spanked her with, and the baby replied, "He spanked me with his weewee." Michelle then gathered the baby's clothing and took the child to the Washington Regional Medical Center. However, before Michelle had left her house, Muñoz called her and instructed her to stay home, and if she was not there when he returned, "you know what will happen." Michelle proceeded to the Center's emergency room where a nurse assisted in performing a rape kit on the child. A doctor examined the baby and found peri-rectal lacerations consistent with penetration and which were suspicious for sexual abuse. While Michelle and her child were in the emergency room, Muñoz was seen in his vehicle outside the Medical Center circling the parking lot. He was arrested and found to have a .22 rifle and lead pipe in his possession.

On the following day, July 24, Muñoz was formally charged with rape. On July 27, he was arraigned, appointed counsel, and the prosecutor filed a motion for Muñoz to give blood, saliva, semen, and hair samples. Muñoz was taken immediately to the Medical Center, where the samples were obtained.

On November 6, 1998, Muñoz obtained private counsel, who later, on December 8, moved to exclude all hair and bodily fluid samples taken on the day of arraignment. He contended that the samples had been taken before the court's July 27 order had been entered, and Muñoz's counsel had not been afforded the opportunity to be present when the samples were taken. Muñoz's new attorney also moved to exclude from the State's evidence the .22 rifle and lead pipe found in his possession when he was arrested. Finally, Muñoz's counsel moved that, in order to prepare his defense, he needed a DNA expert to interpret the fluid tests, to give an independent analysis, and to testify at trial.

On December 14, two days before trial, the trial court heard Muñoz's motions, and denied his three requests. The trial court refused to exclude the State's fluid tests because Muñoz's counsel had agreed to the taking of Muñoz's hair and fluid samples on July

27, the arraignment date. It further denied excluding the .22 rifle and lead pipe because those items were relevant to show consciousness of guilt. The trial court also denied the appointment of a DNA expert, finding his request was untimely. He further ruled that even if his motion had been timely, the court did not believe *Ake* required a DNA expert.

On December 15, 1998, Muñoz moved for a continuance and retesting of forensic evidence, basing his motion on a new blood test that had been conducted by his expert, Captain Charles Rexford of the Washington County Sheriff's Department. Rexford ran a test on Muñoz's jeans worn on July 24, 1998, and said three of his tests showed negative for the presence of blood and one test showed marginally positive for blood. The trial court denied the continuance request because Rexford had tested a different piece of the jeans than the State's experts had tested, and because the blood tests had nothing to do with the DNA analysis, which had been conducted from the semen taken from the baby's panties, her rectal swab, and Muñoz's fluid samples.

The Muñoz case proceeded to trial on December 16, when the State presented six witnesses and Muñoz offered only one witness, Captain Rexford. The jury returned its verdict of guilty, and then the sentencing phase was conducted. During that phase, Muñoz sought reassurance that his motion to exclude the weapons found in his possession, when he was arrested, had been ruled on. The trial court denied Muñoz's motion, and the State introduced testimony of the .22 rifle and lead pipe during the sentencing phase. On appeal, Muñoz only argues two points — the trial court erred (1) in refusing him the assistance of a DNA expert and (2) in allowing the weapons' evidence during the sentencing phase.

In addressing Muñoz's first point for reversal, we must first consider the trial court's ruling that Muñoz was too late in raising the question of whether he was entitled to the appointment of a DNA expert. Muñoz was well aware that the State had taken fluid samples from him in July 1998, and the prosecutor indicated those lab results were obtained in August of 1998. And while Muñoz complains that the prosecutor never objected to Muñoz's failure to make a timely request for a DNA expert, the prosecutor very plainly stated Muñoz's motion was tantamount to requesting a continuance, which the trial court should not grant. The trial court

ruled it did not think Muñoz's motion was timely, and it denied his motion.

In *Swanson v. State*, 308 Ark. 28, 823 S.W.2d 812 (1992), we held that the denial of a continuance which would deprive an accused of the chance to have an independent review of DNA analysis will be closely examined. *See also Hunter v. State*, 316 Ark. 746, 875 S.W.2d 63 (1994). In making such an examination in the present case, we cannot conclude the trial court abused its discretion in denying any continuance so a DNA expert could be appointed. As already noted above, the State's results from its test samples taken from Muñoz were available in August of 1998, or approximately four months prior to the trial date of December 16, 1998. Nevertheless, Muñoz waited until about one week before trial to request a DNA expert and did not obtain a ruling until two days before trial. Like the appellant in the *Swanson* case, Muñoz had months to locate an expert witness and make a tentative arrangement for an independent review, yet Muñoz could not offer the name of a potential expert witness, nor did he offer any hope of procuring the attendance of such a witness in the near future. *Id.* at 35; *but see Hunter*, 316 Ark. at 751, 875 S.W.2d at 66 (where this court distinguished *Swanson*, reversing the trial court for failing to grant Hunter a continuance when (1) Hunter's DNA expert had no chance to examine the State's evidence, procedures, and protocol, and (2) Hunter had located an expert, but could not take advantage of her expertise without being provided the State's information). In the circumstances before us, Muñoz's motion was tantamount to a continuance request, and we cannot say the trial court abused its discretion denying his requests.

We next turn to Muñoz's second argument wherein he claims the trial court erred in refusing to exclude evidence of the .22 rifle and lead pipe during the sentencing phase of his trial. Muñoz submits that these weapons were "other crimes" evidence that was more prejudicial than probative. However, Muñoz abstracts very little of the testimony presented at either the guilt or sentencing phase. Nonetheless, as we set out above, the record reflects that Muñoz told Michelle on the evening the offense took place that she "had better be home when he got there or else," and related to that threat, he was found that evening, with the weapons in his car, circling the hospital. The trial court concluded that such actions by

Muñoz were relevant since they indicated a consciousness of guilt. We hold the trial court did not abuse its discretion.

For the reasons above, we affirm.

Erich Lynn DIEMER *v.* STATE of Arkansas

CR 99-638 9 S.W.3d 490

Supreme Court of Arkansas
Opinion delivered January 27, 2000

Meredith Wineland, for appellant.

Mark Pryor, Att'y Gen., by: *Mac Golden*, Ass't Att'y Gen., for appellee.

ROBERT L. BROWN, Justice. This is an appeal from a judgment of conviction where the appellant, Erich Lynn Diemer, was convicted of rape, kidnapping, and residential burglary.[1] He was sentenced to two life terms for rape and kidnapping, and 240 months for residential burglary, with the sentences to run concurrently. He raises two points on appeal: (1) the evidence supporting the convictions for rape, kidnapping, and residential burglary was insufficient; and (2) the trial court erred when it denied his motion to suppress his confession.[2] Neither point has merit, and we affirm.

At trial, the victim in this matter, J.G., testified to the following events. On May 22, 1997, she was sixteen years old and living with her mother and stepfather in a house located on Highway 298 in Saline County. That morning between eight and nine o'clock,

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[1] He was also convicted of two misdemeanors — assault in the first degree and criminal trespass with sentences in the Saline County jail. Those convictions and sentences are not an issue in this appeal.

[2] The Point To Be Relied On in Diemer's brief refers to aggravated assault rather than residential burglary, but the argument relates to the residential burglary conviction.

she was wearing a one-piece bathing suit under sweat pants and a tee shirt in her house. She saw a car pass by and stop, and Diemer, whom she knew, walked up to her porch. J.G. went outside, and Diemer asked her to go swimming. She refused, and he persisted. When she turned to go back into the house, he pulled the back of her hair and grabbed her from behind.

Diemer forced her into his car and tried to kiss her, which she protested. He drove her to his house, took her into his bedroom, and began fondling her. She told him to stop. They got back in his car, drove by the house of one of his friends, and ultimately drove down a dirt road in the woods. Diemer forced her out of the car and took her to a clearing in the woods by the river. He pulled her over into a mud puddle, turned her on her stomach, pulled out a knife (she had seen a knife in his car), and put it to her throat. He then pulled her sweat pants down, ripped her bathing suit at the bottom, rubbed mud between her legs, and raped her anally. She screamed and tried to get away, and he threatened to cut her. He turned her over and raped her vaginally and finally ejaculated in her mouth.

When he was through, he took her to the river bank and threatened to have "some friends in a white van" take her to Cuba. He also said he would kill her if she came back or told anyone in her family what had happened. Next, he tied her hands behind her back with his shoestrings and rifled through her purse. He took her house key, money, jewelry, and a photograph of her daughter. He then choked her until she blacked out. When she came to, he said: "You're a hard bitch to kill." He choked her again, and she passed out for a second time. When she awoke, he had gone. She walked down the road to a house, freed her hands, and called her mother and 911. A deputy sheriff from the Saline County Sheriff's Department arrived at the scene, and she was taken to the hospital. According to witnesses and photographs introduced into evidence, her wrists were bleeding, she was covered in mud, and she had cuts, bruises, and scrapes on her legs.

Later that same day, J.G.'s stepfather, Bryant Kendall Riggin, came home for lunch and found the door open. Diemer was in the house and pointed one of Riggin's own pistols, a Ruger semi-automatic, at him. Diemer was acting "crazy," according to Riggin, and told Riggin he wanted to kill him. Riggin grabbed the gun,

pushed Diemer down, and forced him out of the house. He described Diemer as being barefoot, muddy, and wearing short pants.

That afternoon, Diemer was arrested by Saline County deputy sheriffs. According to Sergeant Troy White of the Sheriff's Department, Diemer told him after his arrest: "I fucked up this time, didn't I, sarge?" Diemer was interrogated by Detective Kevin Thompson. According to the detective, Diemer first signed a form waiving his *Miranda* rights and then admitted that he tried to have anal sex with J.G. and had vaginal sex with her. He also admitted, in the detective's words, that he "copulated on her mouth." He further stated that he knocked her out down by the river and tied her up with shoestrings. He also said that he tried to steal Riggin's pistols, but Riggin grabbed him and threw him out of the house.

At trial before a jury, Diemer testified that he and J.G. had consensual sex at his house after drinking alcohol and playing pool. They then went to the river and sniffed crystal methamphetamine, after which she started throwing rocks at him. He hit her and knocked her out, and when she began foaming at the mouth from what he believed to be a drug overdose, he tied her wrists with his shoelaces to keep her from running out into the road. Diemer was convicted and sentenced as previously set out in this opinion.

Diemer raises sufficiency of the evidence as his second point on appeal, but double jeopardy considerations require this court to consider sufficiency of the evidence before the other points raised. *See Jones v. State*, 336 Ark. 191, 984 S.W.2d 432 (1999); *Conner v. State*, 334 Ark. 457, 982 S.W.2d 655 (1998).

Diemer challenges the sufficiency of the State's proof relative to the rape, kidnapping, and residential burglary convictions. We do not reach the merits of this challenge, however, because we conclude that Diemer waived consideration of this issue at trial.

Rule 33.1 of the Arkansas Rules of Criminal Procedure requires that a defendant in a jury trial move for a directed verdict on insufficiency of the evidence at the conclusion of the State's case and again at the close of the case. Failure to do so constitutes a waiver of the issue. Diemer moved for a directed verdict at the end of the State's case on the counts of kidnapping and residential burglary only and then failed to make any directed-verdict motion

at the close of the case. Hence, his waiver of the issue for purposes of this review is clear and obvious. *See, e.g., King v. State*, 338 Ark. 591, 999 S.W.2d 183 (1999); *Smith v. State*, 324 Ark. 74, 918 S.W.2d 714 (1996); *Davis v. State*, 320 Ark. 329, 896 S.W.2d 438 (1995).

Diemer next contends that the trial court clearly erred in denying his motion to suppress his confession. The State argues in its brief that Diemer's abstract was deficient in that essential matters relating to this issue such as the suppression motion were omitted in contravention of Ark. Sup. Ct. R. 4-2(a)(6). We further note that the trial court's ruling on the suppression question also was not abstracted. This case, however, involves a sentence of life imprisonment, and, as a consequence, we must review all errors prejudicial to Diemer under Ark. Sup. Ct. R. 4-3(h). Under this rule, it is incumbent on the appellant to abstract all rulings adverse to him on all motions, and it is incumbent on the Attorney General to make certain and certify that this has been done and to brief all points argued by the appellant "and any other points that appear to involve prejudicial error." When the record is reviewed, it is obvious that a motion to suppress the confession was made and that a ruling by the trial court occurred. Thus, we will address the suppression issue.

The trial court ruled that Diemer made a knowing and intelligent waiver of his *Miranda* rights and, therefore, his confession was voluntary. Our law is clear that confessions made in police custody are presumed to be involuntary, and the burden is on the State to prove the confession was voluntary and that any waiver of *Miranda* rights was knowingly and intelligently made. *See Riggs v. State*, 339 Ark. 111, 3 S.W.3d 305 (1999). This proof must be by a preponderance of the evidence. *Id.* In order to determine whether a waiver of *Miranda* rights is voluntary, one must decide whether the confession was the product of free and deliberate choice rather than intimidation, coercion, or deception. *Riggs v. State, supra*; *Britt v. State*, 334 Ark. 142, 974 S.W.2d 436 (1998). In making this determination, we review the totality of the circumstances and reverse the trial court only if its decision was clearly erroneous. *Riggs v. State, supra*; *Rankin v. State*, 338 Ark. 723, 1 S.W.3d 14 (1999). This court considers the following factors in making its decision — age, education, and intelligence of the accused; the lack of advice as to his constitutional rights; the length of the detention; the repeated and prolonged nature of the questioning; the use of mental or

physical punishment; and statements made by the interrogating officers and the vulnerability of the defendant. *Rankin v. State, supra.*

Diemer was twenty years old when he was interrogated and had an I.Q. of 77. He was reading on a third-grade level, according to State Psychiatrist Dr. Paul DeYoung. Age and mental capacity are factors to be considered, but they alone do not suffice to warrant the suppression of a confession. *See Wright v. State*, 335 Ark. 395, 983 S.W.2d 397 (1998). In *Misskelley v. State*, 323 Ark. 449, 915 S.W.2d 702, *cert. denied*, 519 U.S. 898 (1996), for example, this court affirmed the trial court's admission of a confession when the defendant was age 17, had an I.Q. of 72, and was reading on a third-grade level.

Various law enforcement officers testified that Diemer was nervous but that he did not appear to be intoxicated at the time he confessed. Detectives Kevin Thompson and Mark Knowles testified that he received the *Miranda* warnings, signed a waiver form, and acknowledged that he understood his rights. Detective Thompson testified that Diemer was not coerced or threatened to induce a confession. Detective Knowles, who watched the interrogation on a TV monitor in the next room, confirmed that fact.

Diemer testified that the detectives told him what to say before his confession and that Detective Thompson wore his pistol during the interrogation, fidgeted with it, and laid it on the table. This was intimidating, according to Diemer. Detective Thompson testified that wearing a pistol during interrogations was normally not the office policy but that he did not recall whether he was wearing a pistol at the time. He stated that he did not know if he touched his pistol during the interrogation, but that there was no reason for him to be "fidgety." He denied telling Diemer what to say in his confession. Both Detective Thompson and Detective Knowles denied that any threats were made.

The circumstances surrounding the taking of Diemer's confession are certainly in conflict, but we have said: "When testimony on the circumstances surrounding the taking of a custodial confession is conflicting, it is the trial court's province to weigh the evidence and resolve the credibility of the witnesses." *Wright*, 335 Ark. at 408, 983 S.W.2d at 403; *see also Riggs v. State, supra.* As in the *Wright* case, no other credible evidence was presented that Diemer

was coerced or threatened outside of his own testimony. The trial court heard testimony from Diemer and the police officers involved, assessed their credibility, and denied the motion to suppress. We cannot say that the trial court's denial of the motion to suppress was clearly erroneous.

The record in this case has been reviewed for other prejudicial error in accordance with Ark. Sup. Ct. R. 4-3(h), and none has been found.

Affirmed.

STATE of Arkansas *v.* Timothy Mark STEPHENSON and Jonathan Fries

CR 99-967 9 S.W.3d 495

Supreme Court of Arkansas
Opinion delivered January 27, 2000

Mark Pryor, Att'y Gen., by: *James R. Gowen, Jr.*, Ass't Att'y Gen., for appellant.

Frank Shaw, for appellee.

ANNABELLE CLINTON IMBER, Judge. Appellees, Timothy Mark Stephenson and Jonathon Fries, were convicted of possession of a controlled substance with intent to deliver, and simultaneous possession of drugs and firearms. Each appellee was originally sentenced by the trial court to a term of ten years' imprisonment on the simultaneous-possession charge. Upon motion by the appellees, the trial court set aside their respective sentences and entered amended orders of conviction, in which it sentenced each appellee to ten years' imprisonment, but suspended the sentences conditioned upon the successful completion of other

requirements. The State appeals from the trial court's decision to amend the appellees' sentences, asserting that the suspended sentences were unauthorized and illegal. We agree and therefore reverse.

The State appeals pursuant to Ark. R. App. P.—Crim. 3(b) and (c) (1999), which authorizes review when the Attorney General, after inspecting the trial record, is satisfied that error has been committed to the prejudice of the State and that the correct and uniform administration of the criminal law requires such review. We accept appeals by the State when our holding would be important to the correct and uniform administration of Arkansas criminal law. Ark. R. App. P.—Crim. 3(c); *see also, State v. Stephenson*, 330 Ark. 594, 955 S.W.2d 518 (1997). We have previously held that "sentencing and the manner in which such punishment provisions can be imposed arise in every criminal case where a conviction is obtained, and the application of these statutory sentencing procedures to convict defendants requires uniformity and consistency." *State v. Freeman*, 312 Ark. 34, 846 S.W.2d 660 (1993). Likewise, it is well settled that the State may appeal the imposition of a void or illegal sentence by the trial court. *See, e.g., State v. Kinard*, 319 Ark. 360, 891 S.W.2d 378 (1995); *State v. Rodriques*, 319 Ark. 366, 891 S.W.2d 63 (1995); *State v. Brummett*, 318 Ark. 220, 885 S.W.2d 8 (1994). Thus, we accept jurisdiction of this appeal.

The relevant facts are not in dispute. On April 13, 1999, the appellees were found guilty of possession of a controlled substance with intent to deliver, a Class B felony, in violation of Ark. Code Ann. § 5-64-401 (Repl. 1997), and simultaneous possession of drugs and firearms, a Class Y felony, in violation of Ark. Code Ann. § 5-74-106 (Repl. 1997). The trial court originally sentenced each appellee to probation on the Class B felony charge, and to ten years' imprisonment in the Arkansas Department of Correction on the Class Y felony charge. The appellees then filed motions to set aside verdict and sentence, in which they urged the trial court to impose a sentence of years on the Class Y felony charge, but suspend "all or a portion thereof." After a hearing on the motions, the trial court amended each appellee's sentence in amended orders of conviction which state in pertinent part as follows:

> The Court finds that on the Simultaneous Possession of Drugs and Firearms charge a sentence for a period of 10 years in the Arkansas Department of Correction shall be imposed but suspended upon successful completion of other requirements, terms and conditions contained in this order.

On June 23, 1999, the trial court filed amended judgment and disposition orders in accordance with its amended orders of conviction. The State contends that the amended sentences on the Class Y felony charge of simultaneous possession are illegal and void.

In Arkansas, sentencing is entirely a matter of statute. *Meadows v. State*, 320 Ark. 686, 899 S.W.2d 72 (1995). Accordingly, sentencing may not be other than in accordance with the statute in effect at the time of the commission of the crime. *Id.* Where the law does not authorize the particular sentence pronounced by a trial court, that sentence is unauthorized and illegal, and the case must be reversed and remanded. *Id.*

When a defendant is convicted of a Class Y felony, the General Assembly has specifically provided that a trial court shall not suspend imposition of sentence as to a term of imprisonment or place the defendant on probation. Ark. Code Ann. § 5-4-104(e)(1)(A)(iii) (Repl. 1997); *see also* Ark. Code Ann. § 5-4-301(a)(1)(C) (Supp. 1999). Furthermore, section 5-4-104(e)(1)(B)(ii) (Repl. 1997) prohibits a trial court from suspending execution of sentence. When a sentence is pronounced and then suspended, the trial court has suspended execution of sentence. *Meadows v. State, supra; Lewis v. State,* 336 Ark. 469, 986 S.W.2d 95 (1999).

Here, the appellees were convicted of simultaneous possession of drugs and firearms, a Class Y felony. Ark. Code Ann. § 5-74-106(b)(Repl. 1997). The trial court was therefore mandated by the General Assembly to sentence the appellees to a term of imprisonment of "not less than ten (10) years and not more than forty (40) years, or life." Ark. Code Ann. §§ 5-4-104(c), 5-4-401 (Repl. 1997). The trial court had no statutory authority to suspend the imposition of sentence or to suspend execution of sentence. Ark. Code Ann. §§ 5-4-104(e)(1)(A)(iii), 5-4-104 (e)(1)(B)(ii). Because the trial court exceeded its statutory authority by imposing and suspending each appellee's ten-year sentence, we must reverse and remand. In doing so, we instruct the trial court to reinstate its

original sentences of ten years' imprisonment on the Class Y felony charge of simultaneous possession of drugs and firearms.

Reversed and remanded.

The ARKANSAS PUBLIC DEFENDER COMMISSION *v.* The Honorable David BURNETT

99-1262 12 S.W.3d 191

Supreme Court of Arkansas
Opinion delivered January 27, 2000
[Petition for rehearing denied March 2, 2000.]

Mark Pryor, Att'y Gen., by: *Robert Russell*, Chief Deputy Att'y Gen., and *Patricia Van Ausdall Bell*, Ass't Att'y Gen., for petitioner.

Sloan, Rubens & Peeples, by: *Kent J. Rubens*; and *McDaniel & Wells, P.A.*, by: *Dustin McDaniel*, for respondent.

RAY THORNTON, Justice. The petitioner, The Arkansas Public Defender Commission (the Commission), asks this court to issue a writ of prohibition against respondent, Craighead County Circuit Judge David Burnett, and in its petition alleges that the judge was wholly without jurisdiction to order the Commission to pay legal fees for attorneys the trial court appointed to represent two minors in a civil action. We granted the Commission's request for expedited consideration of the matter and had the parties brief the issues for our review. We treat the petition as one of *certiorari* and grant the writ in the Commission's favor.

The issue in this petition arises from a civil suit filed in Craighead County (the county) against Mitchell Johnson and Andrew Golden, the minors convicted of the March 1998 killings of four students and a teacher in Jonesboro. The suit, filed by the victims' families, also named the minors' parents, the gun manufacturer, and several other parties as defendants in the suit.

At the time the civil suit was filed, Johnson and Golden were in the custody of the Department of Human Services's Division of Youth Services (DHS). DHS petitioned the trial court to appoint lawyers for the minor defendants, contending that as an arm of the executive branch it could not provide a defense in a civil action. Relying upon Ark. Code Ann. § 14-20-102 (Repl. 1998), which established a county fund providing, among other things, for the discretionary appointment of counsel for minors in a civil action, the trial court appointed attorneys *ad litem* for the minors.

The county sought to intervene, seeking reconsideration of the court's order and contending that the applicable statute relating to payment for counsel was Ark. Code Ann. § 16-61-109 (1987) which provides that plaintiffs in the civil suit should be required to pay the attorney's fees for minors in a civil action. The county then filed a supplemental motion to reconsider or clarify the original

orders appointing attorneys *ad litem*. The county argued that the original orders did not specifically detail who was responsible for covering the cost of the minors' attorneys.

On October 11, 1999, the trial court entered an order of clarification that denied the county's request to intervene and noted that a substantial portion of the funds which had been established in the county for the purposes stated in Ark. Code Ann. § 14-20-102 had been allocated to the Commission pursuant to Ark. Code Ann. § 16-10-307 (Supp. 1999). The court then ordered the Commission to pay the attorneys' fees for the minors in the civil suit.

The Commission had not participated in any way in either the underlying civil action or in the proceedings relating to the appointment and payment of attorneys for the minor defendants. Contending that the trial court's order violated the constitutional protection of sovereign immunity, the Commission filed a petition for a writ of prohibition against the trial court's order in this court. The trial court's order appears to have transferred the statutory authority of the county to pay such fees to the Commission, but does not reflect any consideration of other alternatives, such as the appointment of guardians *ad litem*, or charging attorney's fees to the plaintiffs.

We hold that although the Commission has sought a writ of prohibition, a writ of *certiorari* is the more appropriate remedy. A writ of prohibition cannot be invoked to correct an order already entered, and where, as here, the lower court's order has been entered without or in excess of jurisdiction, we carve through the technicalities and treat the application as one for *certiorari*. *Bates v. McNeil*, 318 Ark. 764, 888 S.W.2d 642 (1994). A writ of *certiorari* lies only where it is apparent on the face of the record that there has been a plain, manifest, clear, and gross abuse of discretion, and there is no other adequate remedy. *Hanley v. Arkansas State Claims Comm'n*, 333 Ark. 159, 970 S.W.2d 198 (1998). These principles apply when a petitioner claims that the lower court did not have jurisdiction to hear a claim or to issue a particular type of remedy. *Id.* We also note that neither the county nor DHS are participating in this proceeding, and on the record before us we cannot evaluate DHS's appearance in the case.

We choose to treat the petition as a writ of *certiorari* and determine only whether the Commission was protected by the doctrine of sovereign immunity, thereby rendering the trial court's order for the Commission to pay attorneys' fees a plain, manifest, clear, and gross abuse of its discretion. Article 5, Section 20, of the Arkansas Constitution provides that "the State of Arkansas shall never be made defendant in any of her courts." *Id.* We have held that this constitutional prohibition is not merely declaratory that the state could not be sued without her consent, but that all suits against the state were expressly forbidden. *Brown v. Arkansas State HVACR Lic. Bd.*, 336 Ark. 34, 984 S.W.2d 402 (1999); *Beaulieu v. Gray*, 288 Ark. 395, 398, 705 S.W.2d 880, 881 (1986); *Page v. McKinley*, 196 Ark. 331, 336, 118 S.W.2d 235 (1938). Where the pleadings show that the action is, in effect, one against the state, the trial court acquires no jurisdiction. *Brown, supra.* Further, where a suit is brought against an agency of the state with relation to some matter in which the appellee represents the state in action and liability, and the state, though not a party of record, is the real party in interest so that a judgment for the plaintiff would operate to control the action of the state or subject the state to liability, the action is, in effect, one against the state and is prohibited by the constitutional bar. *Id.*

We have also held that tapping the State's treasury for payment of damages will render the State a defendant and violate the principles of sovereign immunity. *Newton v. Etoch*, 332 Ark. 325, 965 S.W.2d 96 (1998); *State Office of Child Supp. Enforcem't v. Mitchell*, 330 Ark. 338, (1997); *Arkansas Dep't of Human Servs. v. State*, 312 Ark. 481, 850 S.W.2d 847 (1993). Unless sovereign immunity is waived, the doctrine prohibits imposing liability upon the State. We have recognized two exceptions to the doctrine of sovereign immunity: (1) where the State is the moving party seeking specific relief; and (2) where an act of the legislature has created a specific waiver of immunity. *Cross v. Arkansas Livestock & Poultry Comm'n*, 328 Ark. 255, 943 S.W.2d 230 (1997); *Fireman's Ins. Co.*, 301 Ark. 451, 784 S.W.2d 771; *Parker v. Moore*, 222 Ark. 811, 262 S.W.2d 891 (1953).

In the present case, the Commission's sovereign immunity has not been waived. First, the Commission, which is not a party to the civil suit, neither entered its appearance in the matter nor sought specific relief from the trial court. Further, the Commission's sovereign immunity has not been waived statutorily by the General Assembly. The two statutes relied upon by the trial court

do not impose an obligation upon the Commission to provide attorneys' fees for minors in civil suits. Specifically, Ark. Code Ann. § 14-20-102 states:

> (a)(1) There is hereby created on the books of the treasurer of each county in the state a fund to be used for the purpose of paying reasonable and necessary costs incurred in the defense of indigent persons accused of criminal offenses and in the representation of persons against whom involuntary admissions procedures for mental health or alcohol and narcotic commitments or criminal commitments have been brought, and for representation *in civil and criminal matters* of persons deemed incompetent by the court due to *minority* or mental incapacity, which have been brought in any trial courts, chancery courts, juvenile courts, probate courts, or city or county division of municipal courts, including, but not limited to, investigative expenses, expert witness fees, and legal fees.

Id. (Emphasis added.) The statute that allocated a portion of county funds established by Ark. Code Ann. § 14-20-102 to the Commission, Ark. Code Ann. § 16-10-307, does not contain language authorizing the Commission to expend public funds for civil representation of a minor. The duties of the Commission in Ark. Code Ann. § 16-87-306 (Supp. 1999) are stated as follows:

> The public defender in each judicial district shall have the following duties:
>
> (1) Defend indigents within the district as determined by the circuit, municipal, city, police, juvenile, probate, or chancery courts in the district in *all felony, misdemeanor, juvenile, guardianship, and mental health cases, all traffic cases punishable by incarceration, and all contempt proceedings punishable by incarceration;*

Id. (Emphasis added.)

There is no declaration of legislative intent to waive the Commission's sovereign immunity, nor is there any requirement that the Commission have responsibility for attorney's fees in civil cases. Specifically, the instruction of Ark. Code Ann. §§ 16-10-307 and 16-87-306 is to provide representation for indigents in cases in which there is a potential for loss of liberty. The provision of Ark. Code Ann. § 14-20-102, granting authority for the trial court to appoint attorneys for minors in civil litigation to be paid by county funds, was not incorporated in the statutes establishing and defining the duties and responsibilities of the Commission.

As the county is not a party to this proceeding, we make no determination as to whether the county may be required to pay the attorneys' fees under the provisions of Ark. Code Ann. § 14-20-102. Neither do we address questions relating to the responsibility of the parents, the plaintiffs, the custodians, or the guardians of the minor defendants.

From the record before us we conclude that there has been no waiver of the Commission's sovereign immunity. It follows that the Commission is protected by the doctrine of sovereign immunity and is not responsible for paying the minors' attorneys' fees. Accordingly, the trial court's order forcing the Commission to pay the minors' attorneys' fees was a plain, manifest, clear, and gross abuse of its discretion requiring the issuance of a writ of *certiorari* to protect the sovereign immunity of the Commission.

Writ of *certiorari* granted.

CORBIN, J., not participating.

IMBER, J. concurs.

Louis Kenjuan COBB *v.* STATE of Arkansas

CR 99-631 12 S.W.3d 195

Supreme Court of Arkansas
Opinion delivered January 27, 2000

[redacted]

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

Mark Pryor, Att'y Gen., by: *Kelly S. Terry*, Ass't Att'y Gen., for appellee.

RAY THORNTON, Justice. Appellant, Louis Kenjuan Cobb was convicted of capital murder and sentenced to life imprisonment without the possibility of parole. Pursuant to *Anders v. California*, 386 U.S. 738 (1976) and our Sup. Ct. R. 4-3(j)(1), his attorney has filed a motion to withdraw and a brief stating that there is no merit to the appeal. Appellant's brief filed by counsel outlines the four adverse rulings and states that there are no meritorious grounds for appeal. The State agrees that there is no merit to appellant's appeal. Appellant has not filed a *pro se* brief arguing additional points for reversal. We conclude that there are no meritorious issue raised from the rulings that were adverse to appellant. Accordingly, we grant counsel's motion to withdraw and affirm appellant's conviction and sentence.

Appellant's conviction resulted from the shooting death of Steven Tyler on March 16, 1998. The testimony presented at trial established that Mr. Tyler was dating the mother of appellant's child. Appellant was upset with the victim, whom he thought was taking too much parenting responsibility for appellant's child. On the night of the murder, appellant followed Mr. Tyler to his home, and, armed with a gun, went inside to discuss the matter. An argument occurred and Mr. Tyler, who was unarmed, was shot twice, once in

the back and once in the chest. Mr. Tyler's body was discovered by his roommate, Napoleon Tillman.

At trial, appellant admitted to shooting Mr. Tyler. However, he argued that he was acting only in self-defense and that the killing was not premeditated or deliberated. The trial court denied appellant's motion for directed verdict. At the close of the evidence, appellant requested that the trial court give the jury an instruction on manslaughter. The trial court, finding that manslaughter was inconsistent with appellant's defense of self-defense, declined to give the instruction. The jury found appellant guilty of capital murder.

Sufficiency of the Evidence

The first adverse ruling we must discuss is the trial court's denial of appellant's motion for a directed verdict. Double jeopardy considerations require this court to consider a challenge to the sufficiency of the evidence before all other points raised. *Jones v. State*, 336 Ark. 191, 984 S.W.2d 432 (1999). At the close of the State's case, appellant moved for a directed verdict arguing that the evidence was insufficient to establish that he had acted with premeditation and deliberation. The trial court denied the motion. As we find no error in this ruling, we affirm.

On appeal, we treat a motion for a directed verdict as a challenge to the sufficiency of the evidence. When we review a challenge to the sufficiency of the evidence, we will affirm the conviction if there is substantial evidence to support it, when viewed in the light most favorable to the State. *Bangs v. State*, 338 Ark. 515, 998 S.W.2d 738 (1999). Substantial evidence is that which is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other, without mere speculation or conjecture. The evidence may be either direct or circumstantial. Only evidence supporting the verdict will be considered. Circumstantial evidence can provide the basis to support a conviction, but it must be consistent with the defendant's guilt and inconsistent with any other reasonable conclusion. *Id.* Whether the evidence excludes every hypothesis is left to the jury to decide. *Williams v. State*, 338 Ark. 97, 991 S.W.2d 565 (1999). Guilt may be proved in the absence of eyewitness testimony, and evidence of guilt is not less because it is circumstantial. *McDole v.*

State, 339 Ark. 391 , 6 S.W.3d 74 (1999). The trier of fact is free to believe all or part of a witness's testimony. Moreover, the credibility of witnesses is an issue for the jury and not for this court. *Bangs, supra*. The jury may resolve questions of conflicting testimony and inconsistent evidence and may choose to believe the State's account of the facts rather than the defendant's. *Stewart v. State*, 338 Ark. 608, 999 S.W.2d 684 (1999).

The evidence presented at trial was sufficient to support appellant's capital murder conviction. First, Napoleon Tillman, Mr. Tyler's roommate, testified. He stated that when he came home from work on March 16, 1998, he found Mr. Tyler's dead body on the floor of their apartment. He also testified that neither he nor Mr. Tyler owned a gun.

Next, Lori Baker, appellant's former girlfriend and Mr. Tyler's girlfriend at the time of his death, testified. She stated that on the night of the murder she called Mr. Tyler's residence and was informed that appellant was there. She further testified that later that night appellant came to her home and informed her he had met with Mr. Tyler. Finally, she testified that appellant told her he knew where Mr. Tyler lived because he had followed him home from work.

Then, Detective Kevin Simpson from the Little Rock Police Department testified. He stated that he found a .9mm semi-automatic pistol, with one loaded black clip, along with two live rounds in the case in appellant's car.

Doctor William Sturner, the Chief Medical Examiner for the Arkansas State Crime Laboratory, also testified. He stated that it was more likely than not that the first gunshot wound Mr. Tyler suffered caused him to suffer paralysis and put him in a state of shock such that the victim would not be able to fend off the shooter or protect himself in any way. Doctor Sturner further testified that the second wound had been inflicted while Mr. Tyler was lying on his back with the shooter standing at contact range directly over him.

Finally, appellant, Lewis Cobb testified. He stated that on the day of the murder he had gone to Mr. Tyler's home to have a conversation regarding his relationship with appellant's daughter. Appellant noted that he had been wanting to have this conversation with Mr. Tyler "for a while". He further testified that he had a gun,

which he had purchased seven days before the murder, when he went into Mr. Tyler's home. Appellant then stated that he did not know whether Mr. Tyler had a gun when he went into his home but that based on his clothing he would have had no place to hide a gun on his person. He also testified that he shot Mr. Tyler and "he fell down" and that he did not know why he shot him the second time— "there was no reason." Appellant finally stated that he left the house after the murder and did not try to get help for Mr. Tyler.

Pursuant to Ark. Code Ann. § 5-10-101(a)(4) (Repl. 1997), a person commits capital murder if "with the premeditated and deliberated purpose of causing the death of another person, he causes the death of any person." *Id.* Premeditation is not required to exist for a particular length of time. *McFarland v. State*, 337 Ark. 386, 989 S.W.2d 899 (1999). It may be formed in an instant and is rarely capable of proof by direct evidence but must usually be inferred from the circumstances of the crime. Similarly, premeditation and deliberation may be inferred from the type and character of the weapon, the manner in which the weapon was used, the nature, extent, and location of the wounds, and the accused's conduct. *Id.*

We conclude that according to these standards, the State introduced sufficient evidence to show that appellant acted with premeditation and deliberation when he shot Mr. Tyler. Specifically, it was possible for the jury to have found that appellant, who had wanted to talk with the victim "for a while" and went to Mr. Tyler's home with a recently purchased gun, acted with premeditation and deliberation when he shot the unarmed victim in the back causing him to suffer paralysis, and then shot him a second time at point-blank range in the chest and left him to die. Accordingly, the trial court's denial of appellant's request for a directed verdict was not erroneous.

Lesser Included Offense Instruction

Following the presentation of evidence, the court instructed the jury on capital murder and the lesser included offenses of first degree and second degree murder. Noting that the manslaughter instruction was inconsistent with the justification defense, the court refused appellant's proffered manslaughter

instruction. It is reversible error to refuse to give an instruction on a lesser included offense when the instruction is supported by even the slightest evidence. *Spann v. State*, 328 Ark. 509, 944 S.W.2d 537 (1997). We will affirm a trial court's decision to exclude an instruction on a lesser included offense only if there is no rational basis for giving the instruction. *Id.* Pursuant to Ark. Code Ann. § 5-10-104 (Repl. 1997), and appellant's proffered jury instruction, an individual commits manslaughter if "he recklessly causes the death of another person." *Id.* In this case, where appellant admitted to shooting the unarmed victim once in the back causing paralysis and shooting the victim a second time while he was incapable of moving or causing harm to appellant, it is clear that a justification defense is inconsistent with the "recklessly causing" element found in the offense of manslaughter. Thus, there was no rational basis for giving the manslaughter instruction and the trial court did not err.

Relevancy of Mr. Tillman's Testimony

Counsel next contends that the trial court did not abuse its discretion when it overruled an objection to a statement made by Mr. Tillman during his testimony. The exchange in dispute is as follows:

> Q: [PROSECUTOR JOHN JOHNSON] Did he [MR. TYLER] have any other interests?
>
> A: [NAPOLEON TILLMAN] He loved music.
>
> Q: Was he involved in any aspects of music?
>
> A: Yeah, he does. [*sic*]
>
> JEFF WEBER [*defense attorney*]: Object to the relevance of this.
>
> THE COURT: Overruled.

Arkansas Rule of Evidence 401 states " 'relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Arkansas Rule of Evidence 402 states "all relevant evidence is admissible, except as otherwise provided by statute or by these rules or by other rules applicable in the courts of this State. Evidence which is not relevant is not admissible." *Id.* Additionally, we

have held that a ruling on the relevancy of evidence is discretionary, and we will not reverse absent an abuse of discretion. *Easter v. State*, 306 Ark. 615, 816 S.W.2d 602 (1991). Moreover, we note that we have held that when the evidence of guilt is overwhelming and the error is slight, we can declare that the error was harmless and affirm. *Johnson v. State*, 337 Ark. 477, 989 S.W.2d 525 (1999); *see also Criddle v. State*, 338 Ark. 744, 1 S.W.3d 436 (1999). We apply this standard of review to evidentiary rulings made in the guilt phase of capital cases. *Id.* Thus, in this case, where appellant has admitted to killing Mr. Tyler, and it has been established by sufficient evidence that he acted with premeditation and deliberation, whatever harm may have resulted from Mr. Tillman's testimony about Mr. Tyler's interest in music was harmless.

Prosecutor's Statement

The final ruling adverse to appellant resulted from an objection made following a question posed by Prosecutor John Johnson during cross examination of appellant. Mr. Johnson's question referenced the fact that appellant's first criminal act was murder. He asked; "Mr. Cobb, when you embarked on a life of crime you certainly picked the big time, didn't you?" Appellant's attorney objected to this question and the trial court overruled the objection. We have noted that trial courts, must be, and are, vested with wide discretion in determining whether the remarks of counsel are within their legitimate scope, or whether they transcend the bounds set for them by the well established rules of practice. *Adams v. State*, 176 Ark. 916, 5 S.W.2d 946 (1928). We will always reverse where counsel goes beyond the record to state facts that are prejudicial to the opposite party, unless the trial court, by its ruling, has removed the prejudice. But we do not reverse for the mere expression of opinion of counsel in their argument before juries, unless the expression is so flagrant as to arouse passion and prejudice, made for that purpose, and necessarily having that effect. *Id.* Here, it is difficult to see how the prosecutor's question was harmful to appellant because appellant had previously testified to the facts noted in the question and the testimony was already before the jury. Specifically, appellant admitted that he killed Mr. Tyler and testified that he had been convicted of no other crimes prior to the murder and the prosecutor's question simply reiterated facts already in evidence.

Accordingly, the trial court did not abuse its discretion in overruling appellant's objection.

4-3(h) Review

In compliance with Ark. Sup. Ct. R. 4-3(h), the record has been examined for all objections, motions, and requests made by either party that were decided adversely to appellant, and no error has been found.

From the review of the record and the briefs before us, we find the appeal to be without merit. Counsel's motion to be relieved is granted and the judgment is affirmed.

Affirmed.

Steven E. HILL *v.* STATE of Arkansas

CR 99-1341 13 S.W.3d 142

Supreme Court of Arkansas
Opinion delivered January 27, 2000

Petitioner, pro se.

No response.

PER CURIAM. Steven E. Hill was found guilty by a jury of murder in the second degree and was sentenced to eighteen years' imprisonment. The court of appeals affirmed. *Hill v. State*, 64 Ark. App. 31, 977 S.W.2d 234 (1998). The mandate of the court of appeals was issued on November 24, 1998. Sixty-five days later, on January 28, 1999, Hill filed in the trial court a motion seeking an extension of time to file a petition for postconviction relief pursuant to Criminal Procedure Rule 37. The motion was granted, and Hill filed his petition on February 24, 1999. The petition was denied, and Hill lodged an appeal of the order in this court. The appeal was dismissed on the ground that the petition filed in the trial court was untimely. *Hill v. State*, CR 99-1341 (December 9, 1999). Now before us is appellant Hill's *pro se* motion seeking to have the appeal reinstated.

As we said when the appeal was dismissed, Criminal Procedure Rule 37.2(c) provides in pertinent part that a petition under the rule is untimely if not filed within sixty days of the date the mandate was issued upon affirmance of the judgment. The mandate in appellant's case was issued on November 24, 1998, but appellant did not file his petition under the rule until February 24, 1999, which was ninety-two days after the mandate was issued. Appellant argues that it constitutes an injustice for his petition to be considered untimely because he was hampered in various ways in his effort to prepare the petition; and, furthermore, he relied on the fact that the lower court granted his motion for extension of time to file the Rule 37 petition.

Neither argument can excuse the failure to file the petition within the sixty-day period provided in the rule inasmuch as the time limitations imposed in Criminal Procedure Rule 37 are jurisdictional in nature, and a circuit court cannot grant relief on an untimely petition. *Benton v. State*, 325 Ark. 246, 925 S.W.2d 401 (1996); *Hamilton v. State*, 323 Ark. 614, 918 S.W.2d 113 (1996); *Harris v. State*, 318 Ark. 599, 887 S.W.2d 514 (1994); *Maxwell v. State*, 298 Ark. 329, 767 S.W.2d 303 (1989). In *Benton v. State*, *supra*, the Rule 37 petition was delivered to the circuit judge who ruled on it, but it was never filed with the circuit clerk. We held that

filing the petition with the circuit clerk was critical for purposes of establishing jurisdiction. Similarly, in the case before us the Rule 37 petition was not timely filed to establish jurisdiction. Because the time limits set forth in the rule are jurisdictional in nature, a trial court cannot extend the time to file a Rule 37 petition even if a motion for extension of time is filed before the the sixty-day period allowed by Rule 37.2(c) elapses.

Motion denied.

L. Lynn HOGUE, Individually, and the People of the State of Arkansas, Upon the Relation of L. Lynn Hogue *v.* James NEAL, In His Capacity as Executive Director of the Arkansas Supreme Court Committee on Professional Conduct; and Carlton Bailey, Sue Winter, Dr. Patricia Youngdahl, Richard A. Reid, Kenneth Reeves, Bart Virden, and Win A. Trafford, In Their Capacity as Members of the Arkansas Supreme Court Committee on Professional Conduct

99-1451 12 S.W.3d 186

Supreme Court of Arkansas
Opinion delivered January 27, 2000

L. Lynn Hogue, Southeastern Legal Foundation, Inc., for petitioners.

James A. Neal, Executive Director, Arkansas Supreme Court Committee on Professional Conduct, by: *Lynn Williams*, for respondents.

PER CURIAM. Petitioner L. Lynn Hogue, an Arkansas licensed attorney, petitions this court for a writ of mandamus against respondents, James Neal, as Executive Director of the Arkansas Supreme Court Professional Conduct Committee (Committee), and the seven committee members, to compel them to perform their duties required under the Procedures of the Arkansas Supreme Court Regulating Professional Conduct of Attorneys at Law. Hogue filed his complaint with Neal and the Committee on September 15, 1998, regarding Arkansas licensed attorney William Jefferson Clinton, Arkansas Bar No. 73019. Hogue alleged Mr. Clinton's misconduct included conduct inimical to, and destructive of, the administration of justice, such as lying, deceit, perjury, fraud, dishonesty, untrustworthiness, obstruction of justice, subornation of perjury, and witness tampering. In support of his allegations, Hogue filed with his complaint (1) the Referral to the United States House of Representatives from the Office of Independent Counsel; (2) a copy of the Affidavit of Monica Lewinsky, dated January 7, 1998; (3) an excerpt from the transcript of Mr. Clinton's deposition testimony in *Jones v. Clinton* dated January 17, 1998; and (4) an exhibit to that deposition, containing the court's definition of "sexual relations." Hogue alleged Neal acknowledged receipt of Hogue's complaint by letter dated September 23, 1998, but took no further action. Hogue further asserts that, on February 18, 1999, he sent a letter requesting that action be taken on his complaint, but none was taken by Neal and the Committee.

Hogue also points to United States District Judge Susan Webber Wright's April 12, 1999 opinion and order in *Jones v. Clinton*, 36 F. Supp.2d 1118, holding Mr. Clinton in contempt for willful failure to obey the court's discovery orders and finding that Mr. Clinton willfully lied under oath in his deposition and in sworn interrogatory responses. Apparently, Judge Wright's order was mailed to Neal and the Committee on April 13, 1999. Hogue asserts that, as of the filing of his petition for writ of mandamus, on December 13, 1999, Neal and the Committee have taken no action

on his complaint, have refused to provide Hogue with any information, have not assigned Hogue's case a docket control number, and have not taken any action with regard to Judge Wright's complaint. Hogue seeks to compel Neal and the Committee to take action on his and Judge Wright's complaints as provided by the Disciplinary Procedures and Model Rules adopted by this court.

Neal and the Committee responded to Hogue's petition on December 20, 1999, stating that matters before the Committee are confidential unless specifically excepted under Section 4 of the Procedures of the Arkansas Supreme Court Regulating the Professional Conduct of Attorneys at Law. They further allege Hogue has failed to state an established right to enforce and a ministerial duty to be compelled by a writ of mandamus. Neal and the Committee assert they have acted solely within their authority and discretion.

Neal and the Committee are correct that, initially, formal complaints are absolutely privileged under Section 4A(1), as are actions and activities arising from or in connection with an alleged violation of the Model Rules by an attorney licensed to practice law in this state. *Id.* 4A(2). However, the Executive Director and Committee do have certain mandates they must follow once a complaint is initiated under this court's regulations. We attempt to summarize the ones pertinent to Hogue's (and Judge Wright's) complaint(s).

First, the Executive Director has the duty to receive all complaints, and once he determines the complaint is supported with sufficient evidence, the Director *shall* process a formal complaint, direct it to the attorney for response, and assign the case a docket control number. Section 3(B). If the Director decides the complainant's allegations fall outside the purview of the Committee, the complaining party may request a review before the Alternate Committee on Professional Conduct. *Id.* Once the Executive Director determines a complaint should be processed, the Director *shall* advise the attorney and furnish him or her a copy of the formal complaint. It is significant to note that our procedures mandate that the Committee accept and treat as a formal complaint any writing signed by a judge of a court of record in this state. Section 5A. Thus, a judge's complaint requires little or no action by the Executive Director or Committee before the Committee must begin its procedures in notifying the attorney of the charges against him or her, so the attorney can explain or refute them. Section 5E. The

attorney's mailing address on record with this court's clerk constitutes the address for service of mail. *Id.* In this case, Mr. Clinton's address is listed with the clerk's office as follows: White House, Room 214, East Wing, Washington, D.C. 20500.

Upon service of the formal complaint, the attorney shall have twenty days in which to file a written response, but is allowed thirty days when she or he is a non-resident. Section 5F. If the Director has not received a timely response, the Director shall proceed to issue ballots to the Committee members.[1] The Director *shall* provide a copy of the attorney's response to the complainant within ten days of receiving it and advise that the complainant has seven days in which to rebut or refute any allegations or information contained in the attorney's response. *Id.*[2]

The next stage or procedure requires the Executive Director to provide Committee members copies of pertinent pleadings and other information specified in Section 5G, and each member is to vote on the action to be taken on the formal complaint. If the Committee votes to take no disciplinary action against the attorney, the Executive Director shall so notify the complainant and attorney. Section 5H. If the Committee votes to impose a sanction, the attorney shall be notified of the Committee's findings and decision and advised that he or she has a right to a hearing before the Committee. The attorney shall also be advised that in the absence of a request for a hearing, such findings and order will be entered in the Committee files and filed as a public record with the clerk's office. *Id.*

From the facts as we know them, Hogue filed his complaint on September 15, 1998, and Neal, as Executive Director, was then required to furnish Mr. Clinton with a copy of that complaint. Service should have been performed under Section 5E, as we discussed above. Also, as already discussed, Neal was *mandated* to provide the attorney's response to the complainant within ten days from receiving it. Hogue asserts that no docket control number has been assigned his complaint, nor has he received any information from Neal or the Committee about any action taken regarding his

[1] A reasonable extension may be granted by the Director or chairperson of the Committee in accordance with Section 5F(2).

[2] Other rebuttal, surrebuttal, and calculation of time limitation provisions are contained in Section 5F, but we need not address those specific provisions at this point.

allegations. Neal and the Committee offer no explanation except to indicate that confidentiality controls the information at this stage of the proceedings and that their duties are discretionary and not ministerial in nature. While what Neal and the Committee argue is a correct statement of our procedures in Sections 2, 3, and 4, Neal and the Committee have mandatory duties that they must initiate under other procedures discussed above, in order to afford Hogue an opportunity to respond to Mr. Clinton's response, if he files one. Certainly, the same can be said of the complaint and referral from Judge Wright.

If Neal and the Committee have failed to initiate the procedures required to initiate and process Hogue's and Judge Wright's complaints, then we order they take such action forthwith. *See Sexton v. Arkansas Supreme Court Comm. on Professional Conduct*, 299 Ark. 439, 774 S.W.2d 114 (1989) (the supreme court is affirmatively charged with the duty of making and, by implication, of enforcing rules governing the practice of law and the conduct of lawyers). If Neal and the Committee have initiated such action already, Hogue and Judge Wright can expect to receive that notice and information called for under this court's procedures as discussed above. Once the court's rules and procedures are complied with and the parties are permitted to join issues, the Committee can then properly consider the allegations and arguments on their merits.

ARNOLD, C.J., and THORNTON, J., concur.

RAY THORNTON, Justice, concurring. I agree with the conclusion that the Committee should follow its rules and procedures in processing this complaint as they would any other. However, I write to emphasize that we are not deciding any issues concerning the merits of the complaint and nothing in this opinion should be construed as commenting upon the merits. I am authorized to state that Chief Justice ARNOLD joins in this concurrence.

Concurrence.

STATE of Arkansas *v.* Robert A. ROBBINS;
Bobbye Jeanne Robbins, Next Friend and Intervenor

CR 98-1394 9 S.W.3d 500

Supreme Court of Arkansas
Opinion delivered January 27, 2000

Mark Pryor, Att'y Gen., by: *David R. Raupp*, Ass't Att'y Gen., for appellant.

No response.

Jeff Rosenzweig, for next friend and intervenor.

PER CURIAM. On December 2, 1999, we issued a writ of *certiorari* for the record in this case so that a review for prejudicial errors could be conducted. *See State v. Robbins*, 339 Ark. 379, 5 S.W.3d 51 (1999) (*Robbins*). Following the issuance of the

writ, we received numerous motions filed by the State as well as a number of motions filed by Mr. Rosenzweig on behalf of Bobbye Jeanne Robbins.

First, we note that the State incurred no new responsibilities pursuant to our opinion in *Robbins*, but continues to have the responsibilities previously articulated by court rules. Specifically, as we stated in *Robbins*, the Attorney General's office will continue to be responsible for certifying to us that all objections have been abstracted and will retain the duty of briefing any other points that appear to involve prejudicial errors. *See* Ark. Sup. Ct. R. 4-3(h).

[redacted] Next, we note that it was the intent of this court that the counsel appointed pursuant to our decision in *Robbins* would not serve as a representative of a party but rather would assist the court in its review. Because of Mr. Rosenzweig's representation of Bobbye Jean Robbins, a conflict of interest exists and that conflict prevents Mr. Rosenzweig's appointment to perform the mandatory review duties set out in *Robbins*. Accordingly, we relieve Mr. Rosenzweig and hereby appoint Ms. Lea Ellen Fowler to perform the duties outlined in *Robbins* to assist this court in its review of the record. Specifically, appointed counsel shall abstract the record and assist the court in its determination (1) whether any errors raised in the trial court are prejudicial to the defendant, in accordance with Ark. Code Ann. §16-91-113(a) (1987) and Ark. S. Ct. R. 4-3 (h); (2) whether any plain errors covered by the exceptions outlined in *Wicks v. State*, 270 Ark. 781, 606 S.W.2d 366 (1980) have occurred; and (3) whether other fundamental safeguards were followed. *See Robbins, supra.*

[redacted] Finally, noting that the court reporter has assured the parties that the record will be available in February 29, 2000, we stay the briefing time of this case until the record is filed with this court and the clerk has established a briefing schedule.

Motion to stay briefing schedule granted and counsel appointed.

STATE of Arkansas *v.* Clay King SMITH

CR 99-353 12 S.W.3d 629

Supreme Court of Arkansas
Opinion delivered January 27, 2000

Mark Pryor, Att'y Gen., by: *Todd L. Newton*, Ass't Att'y Gen., for petitioner.

No response.

PER CURIAM. On March 18, 1999, judgment was entered reflecting that Clay King Smith had been found guilty by a jury of five counts of capital murder and sentenced to death. Counsel for Mr. Smith lodged a partial record on appeal from the judgment, and we granted a stay of execution on April 15, 1999. Mr. Smith subsequently filed a *pro se* motion to withdraw the appeal and have the matter remanded to the trial court for execution of the death sentence. In an unpublished *per curiam* order entered on July 8, 1999, we remanded the matter to the trial court for a hearing on whether Mr. Smith has the capacity to understand the choice between life and death and to knowingly and intelligently waive his right to appeal his sentence of death. Pursuant to our decision in *Franz v. State*, 296 Ark. 181, 754 S.W.2d 839 (1988), the State now submits to this court a transcript of the lower court's proceedings on remand, along with its petition for writ of certiorari, and requests that we review those proceedings and affirm the trial court's finding that Mr. Smith is competent to waive his appeals, including his postconviction remedies under Ark. R. Crim. P. 37.5.

The State filed its petition for writ of certiorari in this case before our decision in *State v. Robbins*, 339 Ark. 379, 5 S.W.3d 51 (1999), was handed down on December 2, 1999. We held in *Robbins* that this court has an affirmative duty to review the record in all death-penalty cases for egregious and prejudicial errors. *State v. Robbins, supra.* In so holding, we modified and overruled *Franz* to the extent that it conflicts with the *Robbins* decision. *Id.* However, we noted that "a person sentenced to death may waive his *personal* right to appeal" and that an automatic review of the record by this court "does not interfere with a competent defendant's right to waive his right to appeal." *Id.* at 386, 5 S.W.3d at 55. We concluded that an automatic review of the entire record would be useful when we are evaluating whether a defendant's waiver of his right to appeal was proper under *Franz*. *Id.* Furthermore, we held that such a review of the entire record would enable us to determine (1) whether any errors raised in the trial court are prejudicial to the defendant, in accordance with Ark. Code Ann. § 16-91-113 (a) (1987) and Ark. Sup. Ct. R. 4-3(h); (2) whether any plain errors covered by the exceptions outlined in *Wicks v. State*, 270 Ark. 781, 606 S.W.2d 366 (1980), have occurred; and (3) whether other fundamental safeguards were followed. *Id.*

Pursuant to our decision in *Robbins v. State, supra*, we conclude that an automatic review is necessary in this case where the death penalty has been imposed and where Mr. Smith has expressed his desire to waive his right to appeal the death sentence. Accordingly, we issue a writ of certiorari directing the Jefferson County Circuit Clerk and the court reporter for the Jefferson County Circuit Court, Second Division, to prepare and file the complete record in this case within ninety days from the date of this order. We also appoint Tammy Harris, 212 Center St., Suite 100, Little Rock, AR 72201, to assist this court in its review of the record as outlined in *State v. Robbins, supra*. Specifically, appointed counsel shall abstract the record pursuant to Ark. S. Ct. R. 4-3(h) and argue any errors prejudicial to Mr. Smith.

Writ of Certiorari issued; appointment of counsel.

Oscar STILLEY *v.* Sharon PRIEST, In Her Official Capacity as Secretary of State of the State of Arkansas

99-1387 12 S.W.3d 189

Supreme Court of Arkansas
Opinion delivered January 27, 2000

[redacted]

Petitioner, pro se.

Mark Pryor, Att'y Gen., by: *Dennis Hansen*, Ass't Att'y Gen., for respondent.

PER CURIAM. On November 29, 1999, petitioner Oscar Stilley filed an original action, requesting our court to enter a declaratory judgment determining the legality of the sufficiency of the ballot title and popular name of a proposed constitutional amendment attached with an initiative petition filed by the Arkansas Casino Corporation (ACC) with the Secretary of State. Stilley seeks the relief under Amendment 7 to the Arkansas Constitution and Act 877 of 1999 (codified at Ark. Code Ann. §§ 7-9-501 - 7-9-506 (Supp. 1999)). He contends the popular name and ballot title of ACC's proposed constitutional measure are materially incomplete, deficient, and defective. The respondent Secretary of State filed a motion to dismiss Stilley's action on December 22, 1999, arguing that (1) this court lacks subject-matter jurisdiction, (2) Stilley has failed to exhaust his remedies, and (3) Stilley's action is not ripe for review by this court until the Secretary of State has completed her review of ACC's initiative petition as required by Act 877.

Once ACC filed its initiative petitions, a taxpayer and voter, like Stilley, was authorized to petition the Secretary of State to determine the legal sufficiency of ACC's initiative petitions. § 7-9-503(a)(1). The taxpayer was then required to notify ACC, by certified mail, that he had filed a petition for sufficiency determination. § 7-9-503(a)(2). Thirty days after receipt of the taxpayer's petition, the Secretary of State, after consultation with the Attorney General, must decide and declare the following issues:

> (1) Whether the popular name and ballot title of the measure are fair and complete; and
>
> (2) Whether the measure, if subsequently approved by the electorate, would violate any state constitutional provision or any

federal constitutional, statutory, or regulatory provision or would be invalid for any other reason.

After deciding the foregoing issues, the Secretary of State must, in writing, notify the taxpayer and the measure's sponsor of her decisions. § 7-9-503(d).[1] If the Secretary of State declares the popular name or ballot title on the initiative measure legally insufficient, the sponsor — here ACC — may then attempt to cure that insufficiency. § 7-9-504(a).[2] After the Secretary of State issues her decision, the petitioner/taxpayer (Stilley), sponsor of the measure (ACC), and any Arkansas taxpayer and voter shall have the right to petition our court to review the Secretary of State's decisions. § 7-9-505.

In this case, ACC complains that Stilley never filed a petition with the Secretary of State questioning the popular name and ballot title of ACC's initiative measure. Instead, after ACC filed its initiative petitions, the Attorney General issued an opinion on August 31, 1999, approving and certifying ACC's measure's popular name and ballot title, which the Secretary of State immediately approved and certified, as well. Rather than follow the Act 877 procedures discussed above that requires a taxpayer to petition the Secretary of State, requesting her to determine the legal sufficiency of ACC's initiative petitions, Stilley waited until after the Attorney General and the Secretary of State approved ACC's proposed measure's popular name and ballot title before raising any question concerning ACC's initiative petition's legal sufficiency. Moreover, he did so by filing an original action in this court, rather than petitioning our court for review as is provided under § 7-9-505.

Stilley clearly failed to follow the dictates of Act 877 as we have fully set out above, thus we are unable to address the ballot-title and popular-name issues he seeks to resolve by original action in this court. On January 25, 2000, Stilley actually arrived at this result by joining in a motion with the Secretary of State to dismiss this action. Of course, we agree with Mr. Stilley's and the Secretary

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[1] Section 7-9-503(d) specifically limits the Secretary of State to review and decide the two issues set out above in § 7-9-503(b) and *excludes questions regarding the sufficiency or validity of the initiative petitions* — here submitted by ACC. (Emphasis added.)

[2] Within fifteen days after a correction or amendment is filed with the Secretary of State, the Secretary of State must notify the taxpayer and sponsor of the measure, Stilley and ACC, of her declaration by certified mail when her decision is issued § 7-9-504(b).

of State's joint motion. Therefore, we dismiss this case without prejudice.

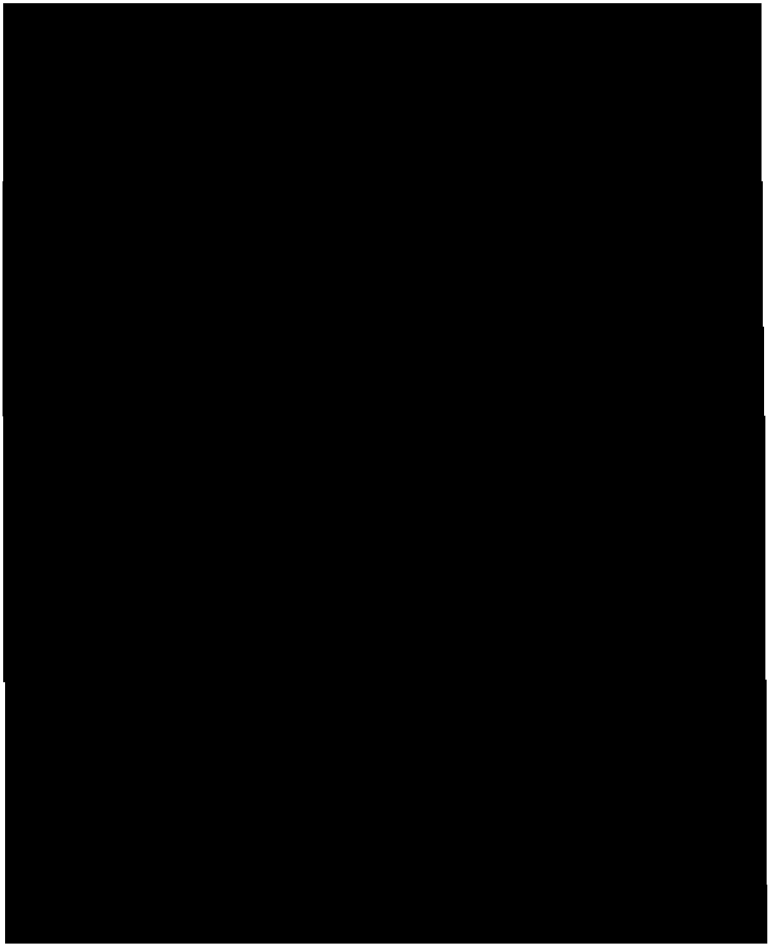
In dismissing the action, we feel obliged to point out the case of *Finn v. McCuen*, 303 Ark. 418, 798 S.W.2d 34 (1990), where the court considered Act 280 of 1989 (codified at Ark. Code Ann. § 7-9-107(e) (Repl. 1993)), and which, like Act 877 of 1989, established an early timetable by which an initiative measure's popular name and ballot title could be certified by the Secretary of State and reviewed by the Supreme Court. In a split decision, the *Finn* court held Act 280 unconstitutional, because the Act purported to permit this court to review a decision of the Secretary of State with respect to the ballot-title portion of an initiative petition; however the only authority given this court by Amendment 7 is the authority to review the Secretary of State's certification of a "petition" which includes both the ballot title *and* the signatures.[3] The *Finn* case is still cited as precedent. *Roberts v. Priest*, 334 Ark. 503, 975 S.W.2d 850 (1998), *but see* GLAZE and CORBIN, JJ., concurring.

[3] In 1995, the General Assembly tried to remedy this ballot title/popular name problem by a proposed Constitutional Amendment 3, but that proposed amendment was defeated at the November 5, 1996, General Election. In view of the rationale in the *Finn* case, the question arises whether an act like Act 877 of 1999 passes constitutional muster.

Tiny Standoak BABB, Gregory Franks, Shilena Easter, Michael Easter, Felisha Easter, Frederick Easter, and Daryl Standoak *v.* Leanna MATLOCK and Curtis Standoak

99-127 9 S.W.3d 508

Supreme Court of Arkansas
Opinion delivered February 3, 2000
[Petition for rehearing denied March 9, 2000.]



Willie E. Perkins, Jr., for appellants.

Brent Baber, for appellees.

DONALD L. CORBIN, Justice. This is a wrongful-death case in which we are asked to interpret the term "beneficiaries," as provided in Ark. Code Ann. § 16-62-102(d) (Supp. 1999). Appellants Tiny Standoak Babb, Gregory Franks, Shilena Easter, Michael Easter, Felisha Easter, Frederick Easter, and Daryl Standoak are the grandchildren of Allean Standoak, who died on March 29, 1997. Allean had four children: Appellee Leanna Matlock, Appellee Curtis Standoak, Theadoris Standoak, and Shirley Standoak. Appellants are the children of Theadoris Standoak and Shirley Standoak, both of whom predeceased Allean. In December 1997, Appellee Leanna Matlock was appointed special administratrix of Allean's estate for the purpose of bringing a wrongful-death suit. In August 1998, the Garland County Probate Court entered an order of settlement in the wrongful-death action. The order

reflected that after payment of attorney's fees and satisfaction of liens held by Medicare and Medicaid, the remainder of the settlement was divided between Appellees, the two surviving children. Appellants subsequently filed a motion to intervene in the wrongful-death action, claiming that they were Allean's heirs at law and thus beneficiaries of the settlement. The probate judge denied intervention, and this appeal followed. Our jurisdiction of this case is pursuant to Ark. Sup. Ct. R. 1-2(b)(1), as it involves issues of first impression. We affirm.

We review probate proceedings *de novo*, and we will not reverse the decision of the probate court unless it is clearly erroneous. *Buchte v. State*, 337 Ark. 591, 990 S.W.2d 539 (1999); *Barrera v. Vanpelt*, 332 Ark. 482, 965 S.W.2d 780 (1998). When reviewing the proceedings, we give due regard to the opportunity and superior position of the probate judge to determine the credibility of the witnesses. *Id.* The questions presented by this appeal are: (1) whether the definition of "children" as used in section 16-62-102(d) should be interpreted broadly so as to include the descendants of those children of the deceased who predeceased the deceased; and (2) whether the relationship of *in loco parentis* continues past the age of majority for purposes of claiming as a beneficiary to a wrongful-death suit. We conclude that the answer to both questions is "No."

There was no cause of action for wrongful death at common law. *Simmons First Nat'l Bank v. Abbott*, 288 Ark. 304, 705 S.W.2d 3 (1986); *McGinty v. Ballentine Produce, Inc.*, 241 Ark. 533, 408 S.W.2d 891 (1966). Thus, because the action is a statutory creation and is in derogation of or at variance with the common law, we construe the wrongful-death statute strictly. *Id.* Strict construction necessarily "requires that nothing be taken as intended that is not clearly expressed." *Lawhon Farm Servs. v. Brown*, 335 Ark. 272, 279, 984 S.W.2d 1, 4 (1998). Given that narrow standard, we must reject Appellants' first argument, that we should broadly construe the class of statutory beneficiaries to include persons not specifically named.

Section 16-62-102(d) provides:

> The beneficiaries of the action created in this section are the surviving spouse, children, father and mother, brothers and sisters of the deceased person, persons standing in loco parentis to the

> deceased person, and persons to whom the deceased stood in loco parentis.

Clearly, grandchildren of the deceased person are not included in the group of statutory beneficiaries. It is equally clear that the term "children" means living children, as the entire group of beneficiaries is qualified by the term "surviving." Thus, children who are not living at the time of the deceased person's death are not among the statutory beneficiaries, and, correspondingly, neither are the deceased children's heirs at law. Accordingly, we reject Appellants' assertion that they are beneficiaries to the wrongful-death settlement.

We also reject the claim raised by Appellants Tiny Standoak Babb and Gregory Franks that they are beneficiaries because they are persons to whom the deceased stood *in loco parentis*. Their claim is based on the fact that Allean raised them after each of their mothers had died. Appellees argue that this fact is of no consequence to the wrongful-death action, because both Babb and Franks were over the age of eighteen and were not disabled at the time of Allean's death. Thus, Appellees assert that the relationship of *in loco parentis* terminates at the time the children reach the age of majority, unless they are disabled. The probate court agreed with Appellees.

Babb and Franks do not dispute that they were both adults at the time of Allean's death and that neither one of them suffers from any disability. They maintain, however, that the loss they suffered as a result of Allean's wrongful death is not lessened by the fact that Allean was no longer supporting them, financially or otherwise, at the time of her death. In this respect, they contend that their legal position is no different from that of Appellees, who were also adults at the time of Allean's death. We disagree.

This court has defined the term "*in loco parentis*" as "in place of a parent; instead of a parent; charged factitiously with a parent's rights, duties, and responsibilities." *Standridge v. Standridge*, 304 Ark. 364, 372, 803 S.W.2d 496, 500 (1991) (quoting *Black's Law Dictionary* 708 (5th ed. 1979)). One who stands *in loco parentis* to a child puts himself or herself "in the situation of a lawful parent by assuming the obligations incident to the parental relation without going through the formalities necessary to a legal adoption." 59 AM. JUR.2D *Parent and Child* § 75, at 217 (1987) (footnote omitted).

The relationship may be abrogated at will by either the person assuming the parental duties or the child. *Id.* Thus, the relationship is a temporary one, unlike that of adoption. *Bryant v. Thrower*, 239 Ark. 783, 394 S.W.2d 488 (1965). The question then is when does the relationship end, provided that it is not voluntarily abrogated by either party.

Although this court has not specifically addressed this issue, the general rule appears to be that the relationship of *in loco parentis* ends when the child reaches the age of majority and is not disabled. *See* 67A C.J.S. *Parent & Child* § 154, at 551 (1978) (footnote omitted) (providing that "[o]rdinarily, a person cannot stand in loco parentis to an adult who is not mentally or physically incapacitated from providing for himself"). This is consistent with the general rule that a parent is legally obligated to support his or her child at least until the time the child reaches majority. *See Towery v. Towery*, 285 Ark. 113, 685 S.W.2d 155 (1985). Once a child reaches majority and is physically and mentally capable, the legal duty of the parent to support that child ceases. *Id.* Conversely, the duty of support does not cease at majority if the child is mentally or physically disabled and needs support. *Id.*

Here, there is no evidence that Babb or Franks, both of whom were adults and suffered from no disability, were relying on Allean's support at the time of her death. Thus, they are not beneficiaries under the wrongful-death statute, as Allean did not stand *in loco parentis* to them at the time of her death. We are aware of the impact that this decision may have on the ever-increasing number of children in this state who are being raised, but not formally adopted, by grandparents and other relatives. Indeed, we may be tempted to sympathize with Appellants' position that their loss is in no way lessened merely because Allean was no longer contributing to their support. Nevertheless, we believe that any expansion of the right of recovery under the wrongful-death statute lies within the province of the General Assembly, not this court. We thus affirm the probate court's ruling on this point. Accordingly, because we conclude that all Appellants lacked standing to claim any interest in the settlement procured as a result of Allean's wrongful death, we summarily affirm the remaining points on appeal.

BROWN and IMBER, JJ., concur.

ARNOLD, C.J., and THORNTON, J., dissent.

ANNABELLE CLINTON IMBER, Justice, concurring. I agree with the result reached by the majority based upon the plain language of Ark. Code Ann. § 16-62-102 (Supp. 1999). Section 16-62-102(d) provides for two categories of *in loco parentis*-beneficiaries: "persons standing *in loco parentis* to the deceased person," and " persons to whom the deceased stood *in loco parentis*." The first category is written in the present tense. Thus, beneficiary status in that category is accorded only to persons who stand *in loco parentis* to the deceased at the time of death. The statute's next phrase defining the second category of *in loco parentis* beneficiaries can be and should be similarly construed to refer only to persons to whom the deceased stood *in loco parentis* at the time of death. The use of the past tense in the latter phrase merely indicates that a deceased person cannot stand *in loco parentis* to anyone following his or her death. Both categories of *in loco parentis* beneficiaries are thereby capable of being construed consistently and harmoniously. Inequities would necessarily result if the statute were construed otherwise, with beneficiary status being limited to an *in loco parentis* relationship at the time of death as to one *in loco parentis* category, but not as to the other *in loco parentis* category.

For these reasons, I would affirm the probate court's ruling based upon the plain language of section 16-62-102(d) and our case law interpreting the term *in loco parentis*.

BROWN, J., joins in this concurrence.

W. H. "DUB" ARNOLD, Chief Justice, dissenting. I disagree with the majority in holding that the relationship of *in loco parentis* does not continue past the age of majority for purposes of claiming as a beneficiary to a wrongful-death suit. Appellants Tiny Standoak Babb and Gregory Franks were raised by their grandmother, Allean Standoak, after their parents died. "Raise" is defined in the dictionary as: "to give (children) a parent's fostering care : bring up : NURTURE, REAR." *Webster's Third New International Dictionary* 1877 (1986).

Appellees argue that the relationship of *in loco parentis* terminated at the time each of the children reached their majority. The wrongful-death statute sets forth those who are considered as beneficiaries. Section 16-62-102(d) provides:

> The beneficiaries of the action created in this section are the surviving spouse, children, father and mother, brothers and sisters of the deceased person, persons standing *in loco parentis* to the deceased person, *and persons to whom the deceased stood in loco parentis.*

(Emphasis added.)

This Court has not specifically addressed this issue until this case. The majority now holds that the relationship ends when the child for whom the deceased stood *in loco parentis* reaches the age of majority but not when the natural child reaches the age of majority. The statute makes no distinction as to children, whether natural or those for whom the deceased has stood *in loco parentis*, regarding whether they are beneficiaries even after reaching the age of majority. Therefore, I fail to see why the majority has made such a distinction. I, therefore, respectfully dissent.

THORNTON, J., joins.

Tamara NATION *v.* Bill AYRES and Carol Ayres, Husband and Wife; Edward A. Allen and Elizabeth Buchanan Allen, Husband and Wife

99-497 9 S.W.3d 512

Supreme Court of Arkansas
Opinion delivered February 3, 2000

Andy E. Adams, for appellant.

Robert J. Gladwin, for appellees.

DONALD L. CORBIN, Justice. This is an appeal from an order of the Washington County Circuit Court, finding that Appellees Bill and Carol Ayres and Edward and Elizabeth Allen were entitled to the establishment of a private road over property belonging to Appellant Tamara Nation. This case was certified to us from the Arkansas Court of Appeals as Appellant urges this court to overrule precedent dating from 1906. Our jurisdiction is thus pursuant to Ark. Sup. Ct. R. 1-2(b)(5). For reversal, Appellant argues that the court below erred in laying a private road across her property where the road did not produce the least inconvenience to her as required by Ark. Code Ann. § 27-66-402(c) (Repl. 1994). We find no error and affirm.

The record reflects that Appellant purchased land in rural Washington County in 1993. After conducting a title search, Appellant determined that there were no easements on the land. There was, however, an abandoned railroad bed running across Appellant's land. Appellees, who are adjacent landowners, are landlocked. Appellee Dr. Edward Allen testified that until 1993, he had traveled across the railroad bed in order to reach his land. At that time, however, Appellant placed a pile of rubble on the railroad bed to prevent his passage across the railroad bed.

Appellees subsequently filed a petition in the county court to establish a private road over Appellant's land. Pursuant to Ark. Code Ann. § 27-66-401 (Repl. 1994), the county court appointed three viewers to determine the necessity of a private road. After investigating three possible routes for a private road, the viewers determined that a path following the abandoned railroad bed would provide the least inconvenience to all parties involved. The county court recognized that the route suggested by the viewers would place the road near Appellant's home. Concerned with the inconvenience such a route might cause Appellant, the county court ordered the viewers to consider whether an alternative route could be brought in from County Road 33 and then intersect with the railroad bed farther away from Appellant's home. After reexamining this possibility, the viewers determined that such a route was not feasible because it was too steep and required a significant amount of dirt work and clearing.

The county court agreed with the determination of the viewers and ordered that the private road should follow the abandoned railroad bed. In reaching its conclusion, the court considered the benefit of the road to Appellees, as well as the inconvenience it would cause Appellant. To accommodate any inconvenience resulting from the road passing near Appellant's home, the court ordered that the road should narrow from thirty feet to twenty feet in the area near Appellant's home. Appellant was also awarded damages in the amount of $1,500.00. Appellant appealed the decision of the county court to the circuit court. After conducting a trial *de novo,* the circuit court upheld the order of the county court. This appeal followed. In reviewing this matter, we consider the evidence in a light most favorable to appellees and affirm unless the decision of the trial court is clearly erroneous. Ark. R. Civ. P. 52; *Bean v. Nelson*, 307 Ark. 24, 817 S.W.2d 415 (1991); *Armstrong v. Harrell,* 279 Ark. 24, 648 S.W.2d 450 (1983).

The circuit court relied on the controlling statutory provision, as well as this court's interpretation of that statute, in determining that a private road across Appellant's land was necessary. Section 27-66-402(c) governs the duties of viewers and provides as follows:

> If they or a majority of them shall be of the opinion that a private road is necessary and proper, as prayed in the petition, they

> shall lay out the road in a manner that produces the least inconvenience to the parties through whose land the road shall pass.

This court's case law interpreting and applying this statute dates back to the decision in *Pippin v. May*, 78 Ark. 18, 93 S.W. 64 (1906). In *Pippin,* this court held:

> In determining whether such a road is necessary, the court must, of course, take into consideration, not only the convenience and benefit it will be to the limited number of people it serves, but the injury and inconvenience it will occasion the defendant through whose place it is proposed to extend it. After considering all these matters, it is for the court to determine whether the road is, within the meaning of the law, necessary or not.

Id. at 21, 93 S.W. at 65. The rule as set forth in *Pippin* has been consistently followed by this court in all subsequent cases involving the establishment of a private road. *See, e.g., Bean*, 307 Ark. 24, 817 S.W.2d 415; *Castleman v. Dumas*, 279 Ark. 463, 652 S.W.2d 629 (1983); *Armstrong*, 279 Ark. 24, 648 S.W.2d 450; *Ahrens v. Harris*, 250 S.W.2d 938, 468 S.W.2d 236 (1971); *Riggs v. Bert*, 245 Ark. 515, 432 S.W.2d 852 (1968); *McVay v. Stupenti*, 227 Ark. 224, 297 S.W.2d 769 (1957); *Roth v. Dale*, 206 Ark. 735, 177 S.W.2d 179 (1944); *Mohr v. Mayberry*, 192 Ark. 324, 90 S.W.2d 963 (1936); *Houston v. Hanby*, 149 Ark. 486, 232 S.W. 930 (1921).

Appellant, however, now urges this court to overturn this line of cases. She argues that this court's interpretation of section 27-66-402(c) is an improper extension of the plain and ordinary meaning of the statute. Appellees argue in response that the trial court did in fact apply the correct standard in establishing the private road over Appellant's land. Appellees further argue that this court has previously held that where a statute has been construed and that construction consistently followed for many years, such construction should not be changed. *See O'Daniel v. The Brunswick Balke Collender Co.*, 195 Ark. 669, 113 S.W.2d 717 (1938). We agree with Appellees.

[redacted] This court has held that a basic rule in construing a statute is to give consistent and uniform interpretations to that statute so that it does not mean one thing at one time and something else at another time. *Arkansas Dep't of Human Servs. v. Harris*, 322 Ark. 465, 910 S.W.2d 221 (1995). Furthermore, this court has

said that as time passes, the interpretation given a statute becomes a part of the statute itself. *Id*; *Gibson v. Gibson*, 264 Ark. 418, 572 S.W.2d 146 (1978).

Such reasoning certainly applies in the present situation. The language in section 27-66-402 is virtually identical to the language of the statute as it was originally enacted. Considering the fact that our case law on this subject has been consistent for almost one hundred years, logic dictates that if the General Assembly believed that we were incorrectly interpreting the statute, it would have taken the opportunity to draft new statutory language to prevent such an incorrect interpretation. This court has often held that the General Assembly is presumed to have enacted a law with full knowledge of court decisions on the subject, and enacted the law with reference to those decisions. *Harris*, 322 Ark. 465, 910 S.W.2d 221; *Smith v. Ridgeview Baptist Church, Inc.*, 257 Ark. 139, 514 S.W.2d 717 (1974); *J.L. McEntire & Sons, Inc. v. Hart Cotton Co., Inc.*, 256 Ark. 937, 511 S.W.2d 179 (1974). Appellant has failed to present a compelling argument warranting reversal of this court's case law. Accordingly, we decline to overturn our precedent.

Our review of this matter, however, does not end with our refusal to overturn precedent. Appellant argues in the alternative that our interpretation of the statute should not be applied to her case. Appellant contends that the trial court erred in placing the road as it did because there is another possible route coming off County Road 33 and intersecting with the railroad bed that would cause her less inconvenience. This court has previously rejected similar arguments, however. *See Bean*, 307 Ark. 24, 817 S.W.2d 415; *Castleman*, 279 Ark. 463, 652 S.W.2d 629. In *Bean*, this court upheld the circuit court's finding that a private road was necessary even though alternative routes were available, noting that such an alternative route would prove costly to the appellees. Likewise, in *Castleman*, this court rejected the appellant's contention that another route was available because there was no evidence in the record to support such a contention.

[redacted] Here, while Appellant did present some evidence regarding the location of another possible route across her land, such evidence was in conflict in the court below. One of the viewers testified that they considered this alternate route and determined that it was not feasible and that Appellant would only gain a

few extra feet from this route. The viewer further testified that it was obvious that the railroad-bed route had been in place and used as a road for some time, thus making it the best alternative for a private road. To the contrary, Appellant presented testimony of a contractor that such a route could be cleared for approximately $2,500.00. The contractor's testimony, however, was couched in general terms. This court has held that disputed facts and determinations of the credibility of witnesses are within the province of the factfinder. *Ford Motor Credit Co. v. Ellison*, 334 Ark. 357, 974 S.W.2d 464 (1998). The circuit court clearly gave more weight to the findings of the appointed viewer than to the testimony of the private contractor. Based on the evidence presented below, we cannot say that the circuit court clearly erred in determining that a private road following the railroad bed was necessary.

Affirmed.

Betty DICKEY, Jefferson County Prosecuting Attorney *v.* SIGNAL PEAK ENTERPRISES, *et al.*

99-57 9 S.W.3d 517

Supreme Court of Arkansas
Opinion delivered February 3, 2000
[Petition for rehearing denied March 9, 2000.]

Mark Pryor, Att'y Gen., by: *Lori L. Freno*, Ass't Att'y Gen., for appellant.

Louis L. Loyd, for appellees.

ANNABELLE CLINTON IMBER, Justice. In this appeal, the Jefferson County Prosecuting Attorney challenges the jurisdiction of the Jefferson County Chancery Court to enjoin a potential criminal prosecution. The appellees own and operate amusement machine vending businesses in various locations within the City of Pine Bluff, Arkansas. The following notice was sent by

the Jefferson County Prosecuting Attorney to appellees on September 23, 1998:

> Dear Bingo and/or Arcade Operator: Take this as notice that any operation that constitutes gambling as described in the Arkansas Constitution, Article 19, [s]ection 14, and more specifically defined in Arkansas Code Annotated 5-66-101, et [seq] *must cease immediately*. Effective October 5[,] 1998, any such operations will be subject to the full extent of prosecutory enforcement.

On October 5, 1998, appellees John and Kathy Erwin, Signal Peak Enterprises, and B & B Enterprises filed a petition and application for temporary restraining order, injunctive relief, and declaratory judgment in the Chancery Court of Jefferson County, Arkansas, against the City of Pine Bluff, Betty Dickey, in her official capacity as the Jefferson County Prosecuting Attorney, and W.C. Brassell, in his official capacity as the Sheriff of Jefferson County ("the Respondents").[1] The appellees alleged in the petition that the action threatened by the Prosecuting Attorney in the above-quoted notice, if taken against them, would be in contravention of the law, and that the amusement machines used in their respective businesses were legal. [2] Furthermore, appellees argued that they would suffer immediate and irreparable harm to their vested property rights, including their businesses, their business relations, and their good will, if the respondents were not immediately restrained from taking prosecutorial action against them, and that they had no adequate remedy at law. Appellees also asked the court to declare that:

> A. [Appellees'] amusement machines are not "gambling devices" as defined [in] Ark. Code Ann. Sections 5-66-101 et seq. or by the Arkansas Constitution Article 19, Section 14, but, in fact, are specifically authorized by Ark. Code Ann. Sections 26-57-401 et seq.

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[1] Steve Dalrymple has succeeded Ms. Dickey as Jefferson County Prosecuting Attorney.

[2] The petition included the following description of the amusement machines:

> [Appellees'] amusement machines are the type that display a video amusement game on a 3X3 matrix or other matrix, similar to a tic-tac-toe board. During the play of this amusement machine, various symbols appear on the board. These machines were developed with several important features such as "skill stop" and a mandatory "freeze point" which allows a player to use skill to affect the outcome of the game. Further, the machines only give coupons to winning players which may be redeemed for merchandise.

B. [Appellees] have followed the guidelines of Ark. Code Ann. 26-57-401 et seq., in that the [appellees] have not allowed any player of machine to exceed the Single Play Maximum Limits.

C. That the internal policies of the [respondents] used to interpret and enforce Ark. Code Ann. Sections 5-66-101 et seq., are arbitrary, discriminatory and selective, and have caused the [appellees] to suffer, and continue to suffer, irreparable injury to vested property rights with no adequate remedy at law.

D. That amusement machines do not constitute "lotteries" as defined in Arkansas Constitution Article 19, Section 14 and are thus not prohibited by the Arkansas Constitution.

The Jefferson County Chancery Court held a hearing on October 6, 1998, to consider appellee's petition for injunctive and declaratory relief. At that hearing, the Prosecuting Attorney argued that the chancery court did not have jurisdiction to hear the case. The chancery court granted the injunctive relief requested by appellees and entered a temporary restraining order on October 15, 1998. The chancery court subsequently granted motions to intervene by appellees Charles D. Nixon, Charles and Elizabeth Babcock, Sammy Gray, and Robert J. Susen, who also own and operate amusement machine vending businesses in the City of Pine Bluff, Arkansas. On October 23, 1998, the Prosecuting Attorney filed answers to the petitions filed by appellees, and pled affirmatively that the chancery court lacked subject matter jurisdiction. Pursuant to a request by the chancellor, all parties filed briefs with the chancery court on the issue of its jurisdiction to hear the case. The chancery court concluded that it had jurisdiction to grant an injunction against the prosecuting attorney's office, and that its earlier temporary restraining order should be converted into a preliminary injunction. The preliminary injunction order was filed on December 15, 1998. The Prosecuting Attorney now brings an interlocutory appeal to this court and argues that the trial court lacked subject matter jurisdiction because courts of equity may not enjoin anticipated criminal prosecutions and because appellees have an adequate remedy at law. We reverse and dismiss.

The appellant first argues that the chancery court lacked subject matter jurisdiction because courts of equity do not have jurisdiction to enjoin potential criminal prosecutions. As we stated in *Deaderick v. Parker*, 211 Ark. 394, 396, 200 S.W.2d 787, 788

(1947), "[i]t is a familiar rule in this state that courts of equity will not interfere by injunctions to prevent anticipated criminal prosecution." We reaffirmed that general rule recently in *Billy/Dot, Inc. v. Fields*, 322 Ark. 272, 908 S.W.2d 335 (1995). In that case, the operator of a bingo establishment asked the chancery court to enjoin the Prosecuting Attorney from closing its bingo operation and from imposing penalties. *Id.* The chancery court concluded that it had no authority to issue such an injunction and dismissed the complaint. *Id.* We affirmed and restated the general principle: "[o]ur cases are legion that chancery courts will not interfere to enjoin anticipated criminal prosecutions." 322 Ark. at 275, 908 S.W.2d at 337. We also acknowledged in *Billy/Dot, Inc. v. Fields* that there is a narrow exception to the rule that chancery court will refrain from interfering with prosecutorial functions, but "that exception is limited to the chancery court's protection of property rights in the form of lawful businesses." 322 Ark. at 275, 908 S.W.2d at 337. The exception, however, did not apply in *Billy/Dot, Inc. v. Fields* because the operation of a bingo establishment was not a lawful business. *Id.*

The chancery court found in this case that the appellees established on a *prima facie* basis that certain amusement machines complied with the licensing and taxation provisions for coin-operated amusement devices in Ark. Code Ann. §§ 26-57-401 et seq. (Repl. 1997 and Supp. 1999). Based on that finding, the chancery court concluded that this case fell within the limited exception to the general rule noted in *Billy/Dot, Inc. v. Fields*. We disagree. The notice provided by the Prosecuting Attorney stated that any operation that constitutes gambling under Article 19, section 14, of the Arkansas Constitution and the Arkansas Criminal Code would be subject to prosecution. Thus, the notice by the Prosecuting Attorney limited the threat of prosecution to illegal gambling operations, which is clearly a prosecutorial function. In contrast, when a city council proceeded summarily to close a hotel, we held that the hotel's owner was entitled to a hearing in a court of competent jurisdiction before her property right to carry on a lawful business could be taken from her. *Texarkana v. Brachfield*, 207 Ark. 774, 183 S.W.2d 304 (1944). Similarly, we held that a court of equity could not deprive a diamond appraiser of his right to carry on his lawful business of conducting diamond appraisals by means of an injunction. *Esskay Art Galleries v. Gibbs*, 205 Ark. 1157, 172 S.W.2d 924

(1943). Here, the notice by the Prosecuting Attorney was aimed exclusively at illegal gambling operations, not lawful business operations.

Under these circumstances, we hold that the general rule prohibiting chancery courts from interfering with prosecutorial functions applies in this case. Accordingly, the chancery court had no jurisdiction to enjoin the Prosecuting Attorney from prosecuting any operation that "constitutes gambling as described in the Arkansas Constitution, Article 19, [s]ection 14, and more specifically defined in Arkansas Code Annotated 5-66-101, et [seq]...." In light of this holding, we need not address appellant's corollary argument that the chancery court lacked subject matter jurisdiction because appellees have an adequate remedy at law.

Reversed and dismissed.

Pamela WEBB *v.* Gayle FORD, Judge,
Montgomery County Circuit Court

CR 99-1026 9 S.W.3d 504

Supreme Court of Arkansas
Opinion delivered February 3, 2000

Darrel Blount, for petitioner.

Mark Pryor, Att'y Gen., by: *Sandy Moll*, Ass't Att'y Gen., for respondent.

RAY THORNTON, Justice. Petitioner, Pamela Webb, seeks a writ of prohibition directed to the Montgomery County Circuit Court to prevent her trial on several drug-related charges. The circuit court denied petitioner's motion to dismiss the charges on speedy-trial grounds, and she now presents this motion to this court pursuant to A.R.Cr.P. 28.1. Because Petitioner was not brought to trial within twelve months of her arrest, exclusive of periods of justifiable delay, we hold that the writ of prohibition will lie and dismiss the charges against her.

Petitioner was arrested on April 3, 1998, by the Montgomery County Sheriff's Office. Probable cause was found to support her arrest, and she was detained pending satisfaction of a $15,000.00 bond. She bonded out of jail and was arraigned on April 10, 1998, on charges of possession of marijuana with intent to deliver, possession of drug paraphernalia, and possession of methamphetamine. A pretrial hearing was set by the court for July 10, 1998, and then continued to September 4, 1998. The case was then reset for October 2, 1998, but it appears that no hearing was held at that time. No further action was taken on the matter until July 30, 1999, when the parties returned to court to address petitioner's motion to dismiss for failure to comply with speedy-trial requirements.

Because petitioner established that 483 days had passed since her arrest, she presented a *prima facie* case of violation of her right to a speedy trial. Arkansas Rule of Criminal Procedure 28.1 (1999) requires that any defendant charged with an offense in circuit court and held to bail shall be entitled to have the charge dismissed with an absolute bar to prosecution if not brought to trial within twelve months of the date of the arrest. *Id.* Once a petitioner presents a *prima facie* case of violation of speedy-trial rules, the burden shifts to the State to show that the delay is the result of the petitioner's conduct or otherwise legally justified. *Jones v. State*, 329 Ark. 603, 951 S.W.2d 308 (1997). *See also Eubanks v. Humphrey*, 334 Ark. 21, 972 S.W.2d 234 (1998). Because the State did not meet its burden of establishing legally justified excludable periods of time in excess of 118 days, petitioner is entitled to have her charges dismissed.

The State contends that the periods of time from July 10 through October 2, 1998, should be excluded pursuant to Rule 28.3(d), as a continuance granted at the request of the defendant, based on its assertion that the requests for continuances made on July 10, 1998, and September 4, 1998, were made as joint motions by the prosecution and the defense. Neither the court's docket sheet nor a written order reflects that the trial court made a finding as to whom the time would be charged, as required by Rule 28.3. Notwithstanding, even if we accept the State's assertion that those eighty-four days should be excluded, this still leaves 399 days accumulated, well beyond the twelve-month limitation.

The State argued below that the filing of a Motion to Suppress in another case on June 16, 1998, further tolled the time. The motion in question was filed by another defendant, one James Gwin, who was also charged with certain drug-related offenses arising out of the execution of the same search warrant. Petitioner here did not file a motion to suppress nor did she join in Gwin's motion; indeed, there was no showing below that the evidence sought to be suppressed was applicable to Webb's charges. Contrary to the State's assertion, while Rule 28.3(a) does provide that the "period of delay resulting from . . . hearings on pretrial motions..." are excluded in computing the time for trial, Arkansas speedy-trial rules do not contemplate that the filing of a suppression motion by one defendant should toll the time as to another defendant who is facing different charges filed in a distinct case.[1] Just as an appellant cannot benefit from objections made on behalf of another defendant or personal exchanges between counsel for the other defendant and the court, *Smith v. State*, 308 Ark. 603, 826 S.W.2d 256 (1992), petitioner here should not be charged with the consequences of the filing of a motion in another defendant's case.

We cannot agree with the State's assertion that the time for trying petitioner was suspended indefinitely pending resolution of a motion filed in another's case and, therefore, hold that 399 days had elapsed since petitioner's arrest, well beyond the limitations established by the speedy-trial rules. It is generally recognized that a defendant does not have to bring himself to trial and is not required

[1] We note that under federal law, a time exclusion occasioned by the filing of a pretrial motion applicable to one defendant applies to all co-defendants, as provided by the Speedy Trial Act, 18 U.S.C. §§ 3161-3174 (1999).

to bang on the courthouse door in order to preserve his right to a speedy trial. The burden is on the courts and the prosecutors to see that trials are held in a timely fashion. *Jones, supra.* Under Rule 28.2, the speedy-trial period commences to run "without demand by the defendant." *Id.* Accordingly, we hold that the charges against Petitioner must be dismissed, and that such dismissal constitutes an absolute bar to further prosecution for the same offenses.

Writ granted.

GLAZE and CORBIN, JJ., dissenting.

TOM GLAZE, Justice, dissenting. I dissent, and would deny Pamela Webb's motion to dismiss her request for writ of prohibition on speedy-trial grounds. I do so for most of the same reasons set forth in our companion case of *Gwin v. State*, 340 Ark. 302, 9 S.W.3d 501 (2000), where this court *denied* Gwin's identical request for dismissal.

Pamela Webb was James Gwin's girlfriend. After law enforcement authorities *searched Gwin's house* and found drugs and drug paraphernalia, they arrested both Gwin and Webb. Gwin and Webb retained the same counsel, Darrell Blount, to represent them at separate trials. Consolidated pretrial hearings were set where Blount appeared, representing both Gwin and Webb. As pointed out in our *Gwin* decision, the trial court looked to Blount and asked, "Mr. Blount, do you have the matter of Webb and Gwin...?" Blount responded, "Yes, Your Honor. There's going to be a fairly lengthy pretrial." At an earlier hearing, the prosecutor appeared with Blount where they announced, "There's a joint motion to continue this matter for pretrial..., and we anticipate the pretrial hearing to be approximately four to five hours."

In sum, the prosecutor and Mr. Blount made pretrial appearances where they had requested continuances, but failed to obtain sufficient time to resolve all preliminary motions. Both Webb and Gwin had filed identical discovery motions, and Webb, Gwin, and the prosecutor jointly sought additional time which proved to be inadequate to present and resolve their pretrial matters. Under Ark. R. Crim. P. 28.3 (1999), those periods of delay or continuance requests were excludable. As a consequence, after deducting the periods of continuance, both Webb's and Gwin's trials were set well within Arkansas's speedy-trial time of twelve months.

Here, while Blount sought discovery motions for Webb and Gwin, seeking pretrial information for which continuances were obtained, the majority posits such continuances should not be charged against Webb because she never filed a motion to suppress evidence like Gwin did. The majority court's reasoning escapes me.

First, there is nothing in the record that it was the delay resulting from Gwin's motion to suppress that spurred the prosecutor and Blount to ask for continuances. Second, even if Gwin's suppression motion, alone, caused a period of delay, Blount knew both of his clients would benefit from the suppression motion if Blount succeeded on his motion.[1] After all, Webb's and Gwin's charges arose from the same events and cache of drugs. Gwin was owner of the house, so it was he who had the standing to file the suppression motion. Nonetheless, Blount was well aware that Webb would benefit if Gwin prevailed on his suppression motion, and it would enure to Webb's benefit to join Gwin in any continuances needed to present evidence in support of the motion.

Webb's and Gwin's pretrial records are identical except for the suppression motion filed on Gwin's behalf. Blount appeared at each pretrial motion hearing representing both Gwin and Webb. As hard as I try, I simply fail to understand how this court can hold Gwin's speedy-trial right was not violated, but Webb's was. As in *Gwin*, it only makes sense to conclude Webb's right for speedy trial was not violated.

CORBIN, J., joins this dissent.

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[1] The majority opinion cites the case of *Smith v. State*, 308 Ark. 603, 826 S.W.2d 256 (1992), for the proposition that an appellant cannot benefit from objections made on behalf of another defendant. The *Smith* case is simply inapplicable. Here, as already stated, the record shows Gwin's and Webb's attorney, Blount, appeared for both defendants at the same pretrial hearings, where they joined in requests for continuances.

Gary BEAN *v.* OFFICE of
CHILD SUPPORT ENFORCEMENT

99-131 9 S.W.3d 520

Supreme Court of Arkansas
Opinion delivered February 3, 2000

LAVENSKI R. SMITH, Justice. Appellant Gary Bean appeals a Nevada County Chancery Court decision which found Bean to be the father of M.N. Bean contends that the trial court erred because another man had acknowledged paternity two days after the child was born some six years prior to this action. The Arkansas Court of Appeals certified this matter to us as a case presenting an issue of significant public interest and involving a legal principle of major importance. We, therefore, have jurisdiction under Ark. Sup. Ct. R. 1-2(d)(2) and 1-2(b)(4), (5) and (6).

Facts

Donna Kay Hale, M.N.'s mother, married Jeffery Bryant Smith on November 21, 1988, in San Jose, California. Hale soon separated from Smith because of alleged abuse in the marriage. Hale moved from California to Arkansas in June 1989 after which she began working at Delta Express in Russellville, Arkansas. Within a week of starting her new job, Hale met Bean at work, and the two began dating sometime in early July 1989. According to Hale, their relationship became intimate within a week of their initial meeting, and the couple were sexually involved until mid-November 1989. Bean, however, testified at trial that he met Hale in 1988, and last saw her in June 1989. Hale found out she was pregnant in December 1989, and she apparently called Bean at his place of work to

inform him of the news. According to Hale, Bean did not want to have anything to do with the child.

While pregnant with Bean's child, Hale met Stanley Ross Nichols. Hale testified that the two became friends in January 1990 but admitted on cross-examination that they actually met in November 1989. Within two months, Hale moved in with Nichols. Hale and Nichols became sexually intimate. On May 3, 1990, Hale secured a divorce from Smith. Two days after M.N.'s birth, on June 28, 1990, Hale and Nichols executed an "Affidavit of Birth Out of Wedlock" stating that they were M.N.'s natural parents. In particular, the Department of Health form provided that the child would bear Nichols's surname and that Nichols was "acknowledging possible financial and legal responsibilities to the child herein." Nichols agreed to assume the obligations of being M.N.'s father. Nichols's name appears on the birth certificate as M.N.'s father.

According to Hale, she and Nichols continued to cohabit until late July 1990 when Hale went to a rodeo with Bean causing Nichols to end the relationship with Hale. Soon thereafter, Hale moved to Gloucester, New Jersey. There, she filed a paternity action against Nichols in December 1990. In April 1991, Hale married David Dibartolo in New Jersey. The couple divorced in October 1995. During this time, Hale indicated at trial that she contacted Bean about twice between 1993 and 1995. Bean acknowledged that he first learned about M.N. in 1993 when Hale called him.

Hale subsequently returned to Arkansas and filed for and received Medicaid benefits for M.N. Appellee, Arkansas Child Support Enforcement Unit ("CSEU"), brought a paternity action against Bean based upon Hale's allegations on April 22, 1996, alleging paternity and seeking past child support for M.N.'s birth, lying-in expenses from the birth, health insurance, future child support, and attorney's fees and costs. Bean answered this complaint on May 29, 1996, denying that he was M.N.'s father and moving to dismiss the action against him. In an order entered October 8, 1996, the chancery court denied Bean's motion to dismiss and ordered DNA testing of Hale, M.N., and Bean pursuant to Ark. Code Ann. § 9-10-108 (Repl. 1995).

On December 23, 1996, Bean filed a motion for summary judgment arguing that Nichols is M.N.'s father by operation of law because Nichols signed the Affidavit of Birth Out of Wedlock or, in the alternative, Smith, Hale's first husband, is M.N.'s presumed father. Bean argued that he was entitled to judgment as a matter of law pursuant to Ark. Code Ann. § 9-10-120 (1995). CSEU answered, and the court held a hearing on this motion on January 28, 1997. There, Bean argued that Ark. Code Ann. §§ 9-10-115 (Repl. 1995) and 9-10-120 control to require as a matter of law that Nichols be determined the father because he executed an acknowledgment to that fact, and more than five years had passed since that acknowledgment was signed. In response, CSEU argued that these statutes did not go into effect until 1995 and could not be applied retroactively. Additionally, CSEU contended that such evidence only shifted the burden to Nichols to rebut a presumption that he is M.N.'s father. CSEU then submitted evidence of a DNA test which excluded Nichols as M.N.'s father. Bean's attorney objected to the admission of the test results, arguing that the test is hearsay and that Bean would be challenging that test at the paternity hearing. The court allowed the test results to be admitted for purposes of that hearing only. The court denied Bean's motion for summary judgment.

The court held the paternity hearing on March 4, 1998. At the hearing Bean renewed his argument that Nichols's affidavit established Nichols as M.N.'s father by operation of law. CSEU, consistent with its pleadings, argued that the governing statutes could not be applied retroactively to cause such an outcome. CSEU presented witnesses including Bean, Hale, Hale's mother Mary Ray, and CSEU Investigator Phyllis Beaty, who all testified to the facts noted above. At the close of CSEU's case, Bean's attorney moved for a directed verdict arguing that two necessary parties, Smith and Nichols, were not parties in the case and that a paternity action could still be pending against Nichols in New Jersey. Furthermore, there was no evidence presented at this trial that Nichols was not M.N.'s father, and the statute of limitations to modify an acknowledgment of paternity had already run by the time Hale filed this action. CSEU replied that Smith and Nichols were not necessary parties because Hale's and Smith's divorce decree indicated that no children were born of the marriage, and Ark. Code Ann. §§ 9-10-115 and 9-10-120 cannot be applied retroactively to make Nichols

the father by operation of law. The court overruled Bean's motion for directed verdict.

Bean presented several witnesses, including Robert E. McGhee, Jr., Ph.D., who analyzed the DNA test results establishing Bean's paternity of M.N.. McGhee testified that the lab's test results only indicated that Bean is M.N.'s father by a 926-to-one margin, which indicates that the test was "not even close to clear and convincing." Furthermore, McGhee testified that the "gel" tests were unreliable because the "gels" migrated, making them inaccurate to compare. McGhee testified that the tests could have been rerun, but they were not, which calls into question the test procedures used. On cross-examination, McGhee indicated that the State's 95% match requirement means that there is only a nineteen-to-one requirement to prove paternity.

At the close of the hearing, Bean again moved for directed verdict, which the trial court denied. However, based on McGhee's testimony at trial, the court provided Bean the opportunity to have additional DNA testing performed by McGhee at Bean's expense. Bean agreed to this testing, and the trial court entered an order on March 27, 1998, ordering additional DNA testing. The additional testing indicated that there was a 99.99% probability of paternity, as noted in the report dated May 4, 1998. With the results of the additional testing in hand combined with the testimony at the hearing, the trial court entered its order on September 21, 1998, finding Bean to be M.N.'s father. The chancery court ordered Bean to carry insurance on the child, as well as pay $85.00 a week in child support beginning with the date of the filing of the action against him. This resulted in a judgment of $10,030.00 with 10% interest thereon to be paid at a rate of $8.50 per week in addition to his regular support payments. Bean filed his Notice of Appeal on October 9, 1998.

On appeal, Bean argues that the trial court erred in determining that he is M.N.'s father because Nichols acknowledged paternity in writing two days after M.N. was born. Bean divides his argument into three parts. First, he argues that the court erred in failing to follow the statutory procedure for modification of a paternity acknowledgment. Second, he argues that the statute of limitations for modification of a paternity acknowledgment has run. Third, he argues that even if paternity was correctly established in Bean, the

chancery court erred in awarding child support from the date the complaint was filed instead of the date judgment was entered.

We review chancery cases *de novo* on the record, but do not reverse a finding of fact by the chancellor unless it is clearly erroneous. *Moon v. Marquez*, 338 Ark. 636, 999 S.W.2d 678 (1999); *Office of Child Support Enf. v. Eagle*, 336 Ark. 51, 983 S.W.2d 429 (1999). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed. *Huffman v. Fisher*, 337 Ark. 58, 987 S.W.2d 269 (1999).

Bean's first two arguments center on the "Affidavit of Birth Out of Wedlock," which Nichols signed two days after M.N. was born, and the birth certificate, which lists Nichols as M.N.'s father. Bean offered these as conclusive evidence that Nichols is M.N.'s father by operation of law under Ark. Code Ann. § 9-10-120. As he did below, Bean argues that Nichols's signature and name on these documents, as well as the fact that more than five years have passed since these documents were executed, precludes the court from considering the matter and establishing paternity in Bean. In rebuttal, CSEU argues that the affidavit Nichols signed is not an acknowledgment of paternity. Furthermore, CSEU argues that the law which establishes paternity by operation of law upon signing an acknowledgment of paternity was not in effect at the time that Nichols signed the affidavit; therefore, the statute on which Bean relies, which went into effect in 1995, does not retroactively establish Nichols as M.N.'s father by operation of law. In addition, the five-year statute of limitations cannot apply, as well, because the affidavit created no obligation on Nichols's part as M.N.'s father because no statute was in effect to create a voluntary acknowledgment of paternity to be a binding, conclusive obligation under law. We hold that A.C.A. § 9-1-120 does not apply retroactively and, therefore, affirm.

I. The Applicable Statutes and the Form Acknowledging Paternity and 9-10-120.

At the time of M.N.'s birth in 1990, the applicable paternity statute, Ark. Code Ann. § 9-10-115, provided:

> The court may, at any time, enlarge, diminish, or vacate any such order or judgment in the proceedings under this section and §§ 9-10-101 — 9-10-103, 9-10-105, 9-10-110, 9-10-111, and 9-10-117 — 9-10-119 as justice may require and on such notice to the defendant as the court may prescribe.

Act 1091 of 1995 modified this statute substantially. This revised version, which was in effect when Hale filed this paternity action against Bean in 1996, stated[1]:

> 9-10-115. Modification of orders or judgments.
>
> (a) The chancery court may, at any time, enlarge, diminish, or vacate any such order or judgment in the proceedings under this section, except in regard to the issue of paternity, as justice may require and on such notice to the defendant as the court may prescribe.
>
> (b) The court shall not set aside, alter, or modify any final decree, order, or judgment of paternity where paternity blood testing, genetic testing, or other scientific evidence was used to determine the adjudicated father as the biological father.
>
> (c)(1) Upon request for modification of a judicial finding of paternity or a support order issued pursuant to § 9-10-120, if the court determines that the original finding of paternity or support order did not include results of scientific paternity testing, consent of the parents, or was not entered upon a party's failure to comply with scientific paternity testing ordered by the court, the court shall, upon request when paternity is disputed, direct the biological mother, the child, and the adjudicated or presumed father to submit to scientific testing for paternity, which may include deoxyribonucleic acid testing or other tests as provided by § 9-10-108.
>
> (2) In no event shall the adjudication or acknowledgment of paternity be modified later than five (5) years after such adjudication or execution of such acknowledgment.
>
> (d) If the court determines, based upon the results of scientific testing, that the adjudicated or presumed father is not the biological father, the court shall, upon request of an adjudicated or presumed father, set aside a previous finding of paternity and relieve

[1] This statute was again amended in 1997 and 1999. These versions, however, do not apply to this case because they were not in effect when the action was filed or when Nichols signed the affidavit.

the adjudicated or presumed father of any future obligation of support or any back child support as authorized under § 9-14-234 as of the date of entry of the order of modification.

(e) If the court determines, based upon the results of scientific testing, that the presumed father is the biological father, the court shall enter an order adjudicating paternity and setting child support in accordance with § 9-10-109, the guidelines for child support, and the family support chart.

In addition, Act 1091 of 1995 created Ark. Code Ann. § 9-10-120, which stated [2]:

9-10-120. Effect of acknowledgment of paternity.

(a) A man is presumed to be the father of a child for all intents and purposes if he and the mother execute an acknowledgment of paternity of the child pursuant to § 20-18-408 or § 20-18-409, or a similar acknowledgment executed during the child's minority.

(b)(1) Acknowledgments of paternity shall by operation of law constitute a conclusive finding of paternity, subject to the modification of orders or judgments under § 9-10-115, and shall be recognized by the chancery courts and juvenile divisions thereof as creating a parent and child relationship between father and child.

(2) Such acknowledgments of paternity shall also be recognized as forming the basis for establishment and enforcement of a child support order without a further proceeding to establish paternity.

(c) Upon submission of the acknowledgment of paternity to the Division of Vital Records of the Department of Health, the State Registrar of Vital Records shall accordingly establish a new certificate of birth reflecting the name of the father as recited in the acknowledgment of paternity.

Based on the 1995 revised statutes, Bean argues that Nichols's execution of the "Affidavit of Birth Out of Wedlock" constitutes an "acknowledgment of paternity" sufficient to qualify by operation of law as a conclusive finding of paternity under Ark. Code Ann. § 9-10-120(a) and (b)(1) and, because more than five years had passed

[2] This statute was amended in 1997. This version, however, does not apply to this case because it was not in effect when the paternity action was filed or when Nichols signed the affidavit.

since Stanley signed the affidavit, this conclusion could not be modified by the chancery court pursuant to Ark. Code Ann. § 9-10-115(c)(2). CSEU, on the other hand, argues that not only was this affidavit not the type of form contemplated by the Act but also that Act 1091 of 1995 cannot be retroactively applied to this affidavit which was signed in 1990 to bring it under the statute and make it binding on Nichols.

We first consider whether the "Affidavit of Birth Out of Wedlock" is the type of acknowledgment of paternity contemplated by the statutes. Ark. Code Ann. § 9-10-120(a) notes that the court may consider "an acknowledgment of paternity of the child pursuant to § 20-18-408 or § 20-18-409, or a similar acknowledgment executed during the child's minority" when it makes a determination of paternity. Ark. Code Ann. §§ 20-18-408 and 20-18-409, created by Act 928 of 1993 and partially amended in 1995, established an actual form to be used as an affidavit of paternity so that parents could establish paternity. As noted at the paternity hearing, CSEU Investigator Phyllis Beaty offered a sample of a form used for such a purpose, and the form was titled "Affidavit Acknowledging Paternity."

Clearly, these statutes were not in effect in 1990 when Nichols signed the "Affidavit of Birth Out of Wedlock" to allow that acknowledgment to comply with Ark. Code Ann. § 20-18-408 or § 20-18-409. However, Ark. Code Ann. § 9-10-120(a) also allows a "similar acknowledgment" to suffice if it is executed during the child's minority. The pertinent language of that affidavit states:

> The following affidavit must be signed in the presence of a notary public by both parents of a child born out of wedlock if there is mutual consent for the child to carry the surname of the father or the legal surname of the mother, and for the birth certificate to show information on the father.

The form goes on to state:

> We, the natural parents of M.N. Ross Nichols born in Russellville, Pope County, Arkansas, on 06-26-90, wish to have our child carry the surname as indicated in the box checked below and for the birth certificate to show all requested information on the father. We understand that by signing this affidavit, the natural father is acknowledging possible financial and legal responsibilities to the child named herein.

Both Nichols's and Hale's notarized signatures appear on the form. The form notes that M.N. is to carry the surname of Nichols, and that is the surname that appears on M.N.'s birth certificate. In reading the "Affidavit of Birth Out of Wedlock" signed by Nichols, we hold that it would comply with the intent of § 9-10-120(a) as "a similar acknowledgment."

II. Retroactive Effect of the Applicable Statutes

However, whether the "Affidavit of Birth Out of Wedlock" suffices as "a similar acknowledgment" under the statutes, does not resolve whether the statutes, enacted five years after Nichols signed this form, apply retroactively to such acknowledgment. Bean argues that the statutes do have a retroactive effect because it is a civil act that affects eligibility for welfare and is "remedial in nature." Furthermore, Bean argues that because this act affected the State's eligibility for federal aid, the act can be applied retroactively. Bean also cites *Littles v. Fleming*, 333 Ark. 476, 970 S.W.2d 259 (1998) ("*Littles II*"), for the proposition that this court has already applied Act 1091 of 1995 retroactively. To the contrary, CSEU argues that all legislation is intended to act prospectively unless the purpose and intent of the legislature is to give the statutes retroactive effect which is expressly declared or necessarily implied from the language used. In that Act 1091 contained no express retroactivity, the language of that Act could only intend a prospective application. CSEU is correct.

Our rule on this point could not be more clear. Retroactivity is a matter of legislative intent. Unless it expressly states otherwise, we presume the legislature intends for its laws to apply only prospectively. *Estate of Wood v. Arkansas Dep't of Human Servs.*, 319 Ark. 697, 894 S.W.2d 573 (1995) (citing *Chism v. Phelps*, 228 Ark. 936, 311 S.W.2d 297 (1958)). Any interpretation of an act must be aimed at determining whether retroactive effect is stated or implied so clearly and unequivocally as to eliminate any doubt. In determining legislative intent, we have observed a strict rule of construction against retroactive operation and indulge in the presumption that the legislature intended statutes, or amendments thereof, enacted by it, to operate prospectively only and not retroactively. *See Arkansas Rural Med. Practice Student Loan & Scholarship Bd. v. Luter*, 292 Ark. 259, 729 S.W.2d 402 (1987); *Chism, supra*;

Arkansas State Highway Comm'n v. Hightower, 238 Ark. 569, 383 S.W.2d 279 (1964).

However, this rule does not ordinarily apply to procedural or remedial legislation. *Gannett Rover States Publ'g Co. v. Arkansas Industrial Dev. Comm'n*, 303 Ark. 684, 799 S.W.2d 543 (1990); *Forrest City Mach. Works v. Aderhold*, 273 Ark. 33, 616 S.W.2d 720 (1981). The strict rule of construction does not apply to remedial statutes which do not disturb vested rights, or create new obligations, but only supply a new or more appropriate remedy to enforce an existing right or obligation. *Harrison v. Matthews*, 235 Ark. 915, 362 S.W.2d 704 (1962). Procedural legislation is more often given retroactive application. *Barnett v. Arkansas Transp. Co.*, 303 Ark. 491, 798 S.W.2d 79 (1990). The cardinal principle for construing remedial legislation is for the courts to give appropriate regard to the spirit which promoted its enactment, the mischief sought to be abolished, and the remedy proposed. *Arkansas Dep't of Human Servs. v. Walters*, 315 Ark. 204, 866 S.W.2d 823 (1993); *Skelton v. B.C. Land Co.*, 260 Ark. 122, 539 S.W.2d 411 (1976) (citing *United States v. Colorado Anthracite Co.*, 225 U.S. 219 (1912)). In addition, we have approved retroactive application of civil statutes, especially those concerning the fiscal affairs of government. For example, we held that the State can retroactively impose taxes. *DuLaney v. Continental Life Ins. Co.*, 185 Ark. 517, 47 S.W.2d 1082 (1932). The United States Supreme Court has also said taxes can be retroactively applied. *Reinecke v. Smith*, 289 U.S. 172 (1933).

As noted above, Bean argues that not only does Act 1091 of 1995 affect the fiscal affairs of the State but that it is remedial in nature. Bean notes that Act 1091 was enacted to "conform with federal requirements set forth in title IV-D of the Social Security Act relative to voluntary paternity acknowledgments." The relevant portion of Title IV-D of the Social Security Act, codified at 42 U.S.C.S. §§ 651—676, includes § 668 entitled "Encouragement of States to adopt simple civil process for voluntarily acknowledging paternity and a civil procedure for establishing paternity in contested cases." This section states:

> In the administration of the child support enforcement program under this part, each State is encouraged to establish and implement a simple civil process for voluntarily acknowledging paternity and a civil procedure for establishing paternity in contested cases.

This section was enacted in 1988 and amended in 1996. As the language indicates, there is nothing in this particular section which required immediate adoption of a specific procedure, but instead "encouraged" the establishment of a procedure of voluntary acknowledgment. In fact, the 1996 amendment of § 668 struck "a simple civil process for voluntarily acknowledging paternity" as part of that statutory section. Compliance with the federal statutes is required in order for the states to continue to receive certain federal benefits[3]; however, § 668 does not appear to be mandatory as far as voluntary acknowledgments are concerned, but instead actually focuses on the establishment of a civil procedure for establishing paternity.

Using that history, determining whether the legislature intended Act 1091 of 1995 to be retroactive becomes clearer. As noted, in the absence of an express declaration, in order for a statute to be applied retroactively, it either must affect the fiscal viability of the State or qualify as remedial. To be remedial, the courts must "give appropriate regard to the spirit which promoted its enactment, the mischief sought to be abolished, and the remedy proposed," but cannot "disturb vested rights, or create new obligations, but only supply a new or more appropriate remedy to enforce an existing right or obligation." *Harrison, supra.*

Whether the State would be fiscally harmed by failure to include the "voluntary acknowledgment of paternity" language was a prospective concern, as there is no indication that funds had been cut off or were likely to be. The federal statute did not require, but only "encouraged," compliance with the provision and, in fact, such language was removed from § 668 a year after the passage of Act 1091. Bean notes that the Emergency Clause of Act 1091 stated that there was a problem with the voluntary acknowledgment of paternity, and failure to remedy that provision could affect the State's right to federal benefits. Bean fails to note, however, that the Emergency Clause also states that "an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health and safety *shall be in full force and effect from and after its passage and approval.*" (Emphasis added.) This is not a definite statement that the Act will apply retroactively. Finally,

[3] 42 U.S.C.S. §§ 651-676.

retroactive application of Act 1091 for remedial purposes would only be appropriate if it did "not disturb vested rights, or create new obligations, but only supply a new or more appropriate remedy to enforce an existing right or obligation." If Act 1091 were applied to any type of "acknowledgment" signed before the Act's effective date a new obligation would be created. The man signing the form, *by operation of law* (see Ark. Code Ann. § 9-10-120), would become the father conclusively when, before Act 1091 was passed, such evidence could only be used as persuasive, presumptive evidence of paternity.

Bean also argues that we have already applied Act 1091 retroactively in *Littles v. Flemings*, 333 Ark. 476, 970 S.W.2d 259 (1998)("*Flemings II*"). We disagree with Bean's analysis of *Flemings*. It simply is inapposite to the instant facts. In that case, the issue was whether "one who has been adjudicated to be the father of a child is entitled to relief from future child-support obligations if scientific testing proves that he is not the child's biological father." There, Littles was adjudicated to be the father of a child in 1982 when he failed to pay for the DNA testing to establish paternity. He did not appeal from the judgment. In 1994, Littles moved the chancellor to order a paternity test, and that motion was granted. The test proved that he was not the biological father, and Littles moved the chancery court in July 1995 to set aside the 1982 paternity judgment, which the court did. We reversed the chancellor's decision in *Flemings v. Littles*, 325 Ark. 367, 926 S.W.2d 445 (1996) ("*Flemings I*"). In the reversal decision, we held that the chancellor had no authority under Ark. Code Ann. § 9-10-115(c)(1) to modify the original judicial finding of paternity because Littles had not met all statutory conditions for the granting of relief. However, in *Flemings II*, after Littles returned to the chancery court to have the child-support order *modified* pursuant to changed circumstances, we allowed a modification of future support pursuant to Ark. Code Ann. § 9-10-115(d) after a showing of scientific evidence that the adjudicated father was not the natural father. The *Flemings* cases involved substantially different facts and none of the same issues as the present case. Moreover, the *Flemings* cases contain no holding respecting retroactive application of Act 1091 for any purpose.

Because we hold that Ark. Code Ann. § 9-10-115 should not be applied retroactively, Bean's second argument therefore also fails. The five-year statute of limitations found in the then existing

version of § 9-10-115(c)(2) cannot apply to the Nichols affidavit. If the voluntary acknowledgment of paternity is not conclusive by operation of law under the law as it existed in 1990, which it is not, then paternity has not been established in Nichols to trigger the running of the statute of limitations.

III. Award of Child Support

In his final point on appeal, Bean argues that if this court determines that the chancellor did not err in finding that he is M.N.'s father, the chancellor did err in awarding child support from the date of the filing of the complaint. Again, Bean argues this point using Ark. Code Ann. § 9-10-115(d) which provides, in part, that:

> If the court determines, based upon the results of scientific testing, that the adjudicated or presumed father is not the biological father, the court shall, upon request of an adjudicated or presumed father, set aside a previous finding of paternity and relieve the adjudicated or presumed father of any future obligation of support or any back child support as authorized under § 9-14-234 as of the date of the entry of the judgment.

Bean argues first that the chancery court erred in failing to set aside the acknowledgment of paternity signed by Nichols and, therefore, there was no statutory compliance because Nichols did not request to have that acknowledgment set aside. Second, Bean argues that the 1995 version of this statute (above) states that the change in child-support responsibility will not go into effect until the entry of the order by the chancellor setting aside the original acknowledgment of paternity.

Bean relies upon the modification provisions of Ark. Code Ann. § 9-10-115. However, those provisions are not relevant to Bean's child-support obligation because the action filed against him is an original action rather than a modification. Given the possibility of an award from the date of the child's birth, the chancellor's decision to award support from the date of the complaint was not clearly erroneous. In response, CSEU argues that because paternity was never established in Nichols, either by adjudication or by his signing the Affidavit of Birth Out of Wedlock (since Act 1091 of 1995 cannot be applied retroactively), there has never been a finding of paternity for the court to set aside under Ark. Code Ann. §

9-10-115. Therefore, Ark. Code Ann. § 9-10-111 (Supp. 1995), which allows the chancery court to award support from as early as the date of the birth of the child, applies. The statute states:

> (a) If it is found by the chancery court that the accused is the father of the child and, if claimed by the mother, the chancery court or chancellor shall give judgment for a monthly sum of not less than ten dollars ($10.00) per month for every month from the birth of the child until the child attains the age of eighteen (18) years.

Here, the trial court had the option to award past support from M.N.'s birth forward, but chose instead to award past support from the date of the filing of the complaint against Bean to the time the judgment was entered. This decision was made contrary to both parties' requests, as Bean, of course, argued that support should begin with the entry of the judgment, and CSEU argued that support should begin from M.N.'s date of birth forward. Because the chancellor could have awarded support from M.N.'s date of birth, his decision to award support from the date of the filing of the complaint was not clearly erroneous.

[redacted] In conclusion, because CSEU's claim against Bean is actually an original action to establish paternity, as opposed to an action to modify a paternity order under Ark. Code Ann. § 9-10-115, the judge correctly found that Bean is M.N.'s father pursuant to Ark. Code Ann. § 9-10-108(a)(6)(B). This section of the statute states:

> If the results of the paternity tests conducted pursuant to subdivision (a)(2) of this section establish a ninety-five percent (95%) or more probability of inclusion that the putative father is the biological father of the child, after corroborating testimony concerning the conception, birth, and history of the child, such shall constitute a prima facie case of establishment of paternity, and the burden of proof shall shift to the putative father to rebut such proof.

Here, two paternity tests established that Bean is M.N.'s father. Those tests, along with the corroborating evidence offered by Hale and the other witnesses at trial, constituted a prima facie case of the establishment of paternity. As such, the burden shifted to Bean to rebut that evidence, which he attempted to do by offering the Affidavit of Birth Out of Wedlock and birth certificate as evidence of Nichols's parentage of M.N. However, under the law applicable when Nichols executed those documents, they constituted pre-

sumptive evidence of paternity only, not conclusive evidence. Taking all of the evidence into account, the chancellor determined that Bean did not rebut the presumption that he is M.N.'s father. The chancellor's decision was not clearly erroneous.

Affirmed.

James GWIN *v.* STATE of Arkansas

CR 99-1027 9 S.W.3d 501

Supreme Court of Arkansas
Opinion delivered February 3, 2000

Darrel Blount, for appellant.

Mark Pryor, Att'y Gen., by: *Sandy Moll*, Ass't Att'y Gen., for appellee.

LAVENSKI R. SMITH, Justice. Petitioner James Gwin, seeks a writ of prohibition to end criminal proceedings filed against him in Montgomery County Circuit Court. Montgomery County Sheriff's deputies arrested Gwin on April 3, 1998. The State charged Gwin by information with two counts of delivery of a controlled substance, one count of possession with intent to deliver, one count of possession, and one count of possession of paraphernalia. Gwin contends that all charges against him must be dismissed because the State failed to bring him to trial within one year of his arrest pursuant to Ark. R. Crim. P. 28.2(c). We disagree and deny his Petition.

Facts

Following Gwin's arrest, the criminal docket sheet reflects some activity in the file up to October 2, 1998, and then none until May 1999. On April 10, 1998, Gwin waived arraignment, pleaded not guilty, and the court set the matter for pretrial on July 10, 1998. On April 16, 1998, Gwin filed a motion for discovery. The State responded to the discovery motion on June 1, 1998. On June 16, 1998, Gwin filed a motion to suppress. The State filed a First Supplemental Response to the discovery motion on July 1, 1998. On July 10, 1998, the trial judge postponed the pretrial hearing

until September 4, 1998. On September 4, 1998, the court again postponed the pretrial hearing moving it to October 2, 1998. The next docket entry records Gwin's motion to dismiss.

The transcript from the proceedings on these dates offers some aid in gathering the facts. On July 10, 1998, the court called Gwin's pretrial hearing to order. The prosecutor, Tim Williamson, in the presence of Gwin and his counsel, Darrell Blount, stated to the court that he anticipated additional motions from the defendant and that a minimum of three hours would be needed to address lab results, the search warrant, and other issues. Mr. Blount acknowledged that more motions would likely be forthcoming. Circuit Judge Gayle Ford directed counsel to get a date from his case coordinator. On September 4, 1998, the court again took up the pretrial hearing whereupon the prosecutor announced, "There's a joint motion to continue this matter for pretrial. Mr. Blount and I still have some unresolved issues prior to pretrial in this case and we anticipate the pretrial hearing to be approximately four to five hours." On the prosecutor's suggestion, Judge Ford reset the hearing on the motions for October 2, 1998. However, at the October 2, 1998, hearing, the following conversation occurred:

> BY THE COURT: Mr. Blount, do you have this matter of Webb and Gwin and that matter needs to be set, is that right?
>
> BY MR. BLOUNT: Yes, Your Honor. There's going to be a fairly lengthy pretrial.
>
> BY THE COURT: I may have to give you a special setting, I don't know, we'll see.

Neither the docket sheet nor the record reflect any other activity until May 19, 1999, when Gwin moved to dismiss for violation of Ark. R. Crim. P. 28.3(c). Judge Ford heard arguments of counsel on the dismissal motion on July 30, 1999. Gwin argued that even excluding the delays from July 10, 1998, to October 2, 1998, twelve months elapsed before he was brought to trial. Gwin also argued that the trial judge's docket contained no notation excluding time for speedy-trial purposes. In response, the State argued that Ark. R. Crim. P. 28.3 excluded the period of time beginning with Gwin's suppression motion until thirty days after the trial court takes that motion under advisement. Judge Ford denied the dismissal motion. Judge Ford made no specific findings

of excluded periods. Consistent with our rules and precedent, Gwin petitioned this court for a writ of prohibition. *Richards v. State*, 338 Ark. 801, 2 S.W.3d 766 (1999).

Speedy Trial

Under Ark. R. Crim. P. 28.1 an accused must be brought to trial within twelve months unless necessary delay occurs as authorized in Ark. R. Crim. P. 28.3. Once the defendant presents a prima facie case of a speedy-trial violation, *i.e.*, that the trial is or will be held outside the applicable speedy-trial period, the State has the burden of showing that the delay was the result of the defendant's conduct or was otherwise justified. *Eubanks v. Humphrey*, 334 Ark. 21, 972 S.W.2d 234 (1998); *Strickland v. State*, 331 Ark. 402, 962 S.W.2d 769 (1998); *Dean v. State*, 339 Ark. 105, 3 S.W.3d 328 (1999). In Arkansas, the speedy-trial period commences to run "without demand by the defendant." Ark. R. Crim. P. 28.2. Additionally, the defendant can assert the speedy-trial right unless he fails to move for dismissal prior to a plea of guilty or a trial. Ark. R. Crim. P. 28.1(f). *Tanner v. State*, 324 Ark. 37, 42, 918 S.W.2d 166 (1996). In the instant case, Gwin unquestionably established a prima facie case in that 483 days had elapsed since his arrest by the time the court heard his motion to dismiss for speedy-trial violation. The only issue in this case is a determination of the appropriate exclusion periods, if any, within that span.

Permissible periods of exclusion are outlined in Ark. R. Crim.P. 28.3. The State points out that Rule 28.3(a) specifically excludes time for "hearings on pretrial motions." The State then contends that the period of time excluded by "hearings on pretrial motions" extends from the filing of the motion until the motion is heard by the court and no more than thirty days after the court takes the motion under advisement. Rule 28.3(a) provides:

> (a) The period of delay resulting from other proceedings concerning the defendant, including but not limited to an examination and hearing on the competency of the defendant and the period during which he is incompetent to stand trial, *hearings on pretrial motions*, interlocutory appeals by the defendant or the state, and trials of other charges against the defendant. No pretrial motion shall be held under advisement for more than thirty (30) days, and the period of time in excess of thirty (30) days during

> which any such motion is held under advisement shall not be considered an excluded period. [Emphasis added.]

We have not previously addressed the specific meaning of the phrase "hearings on pretrial motions." We agree with the State's interpretation that the excluded period contemplated by the rule begins at the time the pretrial motion is made and includes those periods of delay attributable to the defendant until the motion is heard by the court and not more than thirty days thereafter. This construction is consistent with our cases on defendant competency hearings also found in Rule 28.3. *Brawley v. State*, 306 Ark. 609, 816 S.W.2d 598 (1991). We note this is also consistent with the federal speedy-trial rule.[1] Applying this interpretation to the instant case, we conclude that Gwin's motion to suppress began an excluded period that included the continuances that the record reflects to have been jointly requested. When the trial court granted the final continuance found in the record on October 2, 1998, it too appeared to be a joint request. A joint continuance is presumably desired by both parties, which would include the defendant. Gwin obtained the desired benefit of more preparation time and cannot now be heard to complain that it was too much. Certainly, this case would have been aided immensely by contemporaneous docket notes by the trial court and more explicit statements by counsel. However, the record as we find it does not show the trial court erred in denying Gwin's motion to dismiss for speedy-trial violation. It is certainly true that the defendant is not required to bring himself to trial or to

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[1] The federal rule on excluded periods found at 18 U.S.C.S. § 3161(h) contains the following:

> (1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to—
>
> (A) delay resulting from any proceeding, including any examinations to determine the mental competency or physical capacity of the defendant;
>
> (B) delay resulting from any proceeding, including any examination of the defendant, pursuant to section 2902 of title 28, United Sates Code;
>
> (C) delay resulting from deferral of prosecution pursuant to section 2902 of title 28, United Sates Code;
>
> (D) delay resulting from trial with respect to other charges against the defendant;
>
> (E) delay resulting from any interlocutory appeal;
>
> (F) *delay resulting from any pretrial motion, from the filing of the motion through the conclusions of the hearing on, or other prompt disposition of, such motion*; [Emphasis added.]

bang at the courthouse door. However, once a pretrial motion is made on his behalf and continuances granted at his request, he must do more than mark his calendar for some time beyond one year of his arrest.

Writ of prohibition denied.

ST. PAUL FIRE & MARINE INSURANCE CO. *v.* MURRAY GUARD, INC.

99-515 9 S.W.3d 501

Supreme Court of Arkansas
Opinion delivered February 3, 2000

Barrett & Deacon, A Professional Association, by: *D.P. Marshall Jr.* and *James F. Gramling*, for appellant.

No response.

PER CURIAM. In response to appellant's motion to lift the stay in the above-styled case, now docketed in the court of appeals, and to consolidate with *NationsBank v. Murray Guard*, case no. 99-891, filed with this court, we deny the motion without prejudice. We recognize that the similarity of the two cases, each arising from substantially the same set of facts, presents a potential for inconsistent decisions, and for that reason, we are reassigning case no. 99-515 to this court, without consolidating the two cases at this time.

Motion denied.

GLAZE, and IMBER, JJ., not participating.

Steven F. TAYLOR v. STATE of Arkansas

CR 98-15 9 S.W.3d 515

Supreme Court of Arkansas
Opinion delivered February 3, 2000

Stuart Vess, for appellant.

Winston Bryant, Att'y Gen., by: *C. Joseph Cordi, Jr.*, Ass't Att'y Gen., for appellee.

PER CURIAM. In 1995 and 1996, the State filed three informations that charged Steven Taylor with a variety of drug-related offenses. In CR 95-648, Taylor was charged with delivery of a controlled substance. In CR 96-113, he was charged with simultaneous possession of drugs and firearms. In CR 96-190, Taylor was charged with two counts of possession of a controlled substance with intent to deliver and one count of possession of a firearm. In exchange for Taylor's guilty plea, the charge in CR 95-648 was nolle prossed, and he received 432 months' imprisonment in cases CR 96-190 and CR 96-113. Following his guilty plea, Taylor filed a timely petition for postconviction relief pursuant to Arkansas Criminal Procedure Rule 37. In the petition, he alleged he did not receive effective assistance of counsel as guaranteed by the Sixth Amendment. After a hearing, the circuit court entered an order denying relief. We conclude that the circuit court's order does not comply with the requirements of Rule 37.3, and, therefore, we must reverse and remand the case for written findings of fact and conclusions of law.

During the postconviction hearing, evidence was introduced concerning a possible conflict of interest that existed in CR 96-113. Shortly after the charges were filed, Phyllis Worley was appointed to represent Taylor in all three cases. After reviewing the prosecutor's file, she discovered that she, at one time, had represented the confidential informant that was used in cases CR 95-648 and CR 96-113. Consequently, the trial court granted her motion to be relieved in both cases.

For reasons that were never made clear, Ms. Worley was again appointed to represent Taylor in CR 96-113. Another attorney was also appointed to assist her. During the hearing, she testified that once she was reappointed to the case, she alerted the prosecutor to the possible conflict that she had with the confidential informant. She remained on the case, however, because the prosecutor assured her that in the event of a trial, the confidential informant would not testify.

Taylor now argues that the circuit court erred when it denied relief on his claim that he did not receive effective assistance of counsel. First, Taylor asserts that he was prejudiced by Ms. Worley's conflict of interest in CR 96-113. Taylor contends that the charges in that case were the result of the execution of a nighttime search

warrant at his residence. He states that although he desired to challenge the validity of the warrant, Ms. Worley could not act on his request because the affidavit that supported the warrant contained information that was received from the confidential informant.

Taylor also raises other claims of ineffective assistance of counsel. Taylor argues that the attorneys that represented him failed to adequately investigate the case and failed to fully inform him of the charges against him. According to Taylor, his attorneys' failure to conduct an adequate investigation played a role in their failure to discover grounds to challenge the nighttime search.

Taylor also asserts that his attorneys allowed him to plead guilty while under the influence of alcohol and drugs. He contends that their failure to recognize his intoxication caused him to unknowingly waive his right to a jury trial. He further suggests that his intoxicated state at the plea hearing led to a denial of due process.

[redacted] We cannot reach the merits of Taylor's arguments because the circuit court did not enter written findings of fact and conclusions of law as required by Ark. R. Cr. P. Rule 37.3. In pertinent part, Rule 37.3(c) provides that after a hearing, "[t]he court *shall* determine the issues and make written findings of fact and conclusions of law with respect thereto." (Emphasis added.) In *Williams v. State*, 272 Ark. 98, 612 S.W.2d 115 (1981), we noted that "[w]e have held without exception that this rule is mandatory and requires written findings." In *Baumgarner v. State*, 288 Ark. 315, 705 S.W.2d 10 (1986), we made it clear that the requirement of written findings of fact applies to any issue upon which a Rule 37 hearing is held.

[redacted] In this case, the circuit court's order is conclusory. The order does not reflect how the circuit court applied the standard for ineffective-assistance-of-counsel claims, as set forth in *Strickland v. Washington,* 466 U.S. 668 (1984), to the allegations that were the subject of the postconviction hearing. There is also no indication that the circuit court applied the standards of *Cuyler v. Sullivan*, 446 U.S. 335 (1980), for ineffective-assistance-of-counsel claim based on a conflict of interest.

Accordingly, we must reverse and remand the case for findings that comply with the rule. If Taylor desires to appeal those findings, he must renew the appeal process in this court with the filing of another notice of appeal.

Reversed and remanded.

Eric Scott PIKE *v.* BENTON CIRCUIT COURT,
The Hon. Tommy J. Keith, Judge

CR 99-982 10 S.W.3d 447

Supreme Court of Arkansas
Opinion delivered February 10, 2000

Doug Norwood, for appellant.

Mark Pryor, Att'y Gen., by: *James R. Gowen, Jr.*, Ass't Att'y Gen., for appellee.

WH. "DUB" ARNOLD, Chief Justice. Petitioner Eric Scott Pike petitions this court to issue a writ of prohibition to the circuit court on the grounds that that court lacks personal jurisdiction over him due to the fact that his probationary period has ended. We hold that a writ of prohibition is not an appropriate remedy in this case and deny the petition.

On November 10, 1993, petitioner pleaded guilty to four counts of forgery, a Class C felony. The trial court initially deferred acceptance of the petitioner's guilty plea and gave him three years of supervised probation, pursuant to Act 346 of 1975, codified as Ark. Code Ann. § 16-93-303 (Supp. 1997). On January 17, 1995, the State filed a petition to revoke petitioner's probation. At the probation revocation hearing, petitioner admitted that he had violated the terms of his probation; however, the trial court extended his probationary period for two more years, without accepting his initial guilty plea or revoking his Act 346 status.

On October 8, 1996, the State again filed a petition to revoke petitioner's probation. At the second probation revocation hearing, on September 4, 1997, the petitioner again admitted to committing the violations contained in the State's petition. Based on that admission, the court then accepted petitioner's initial guilty plea on the forgery charges, revoked his Act 346 status, sentenced him to 120 days in the Arkansas Department of Community Punishment Regional Facility, with drug treatment and Therapeutic Community directed, and extended his probation for twenty-four additional months. Further, the court ordered petitioner to pay the balance of his fines, costs, and restitution at the rate of $50 per month plus a $5 monthly processing fee, beginning sixty days after his release. The court's order filed on September 26, 1997, reflects the same judgment and disposition.

Subsequently, the State filed a third petition to revoke petitioner's probation on June 5, 1998, amending said petition on March 17, 1999. In response, petitioner filed a motion to dismiss

the State's petition, alleging that the trial court had lost jurisdiction over him, pursuant to *McGhee v. State*, 334 Ark. 543, 975 S.W.2d 834 (1998), when it had accepted his initial plea of guilty to the forgery charges at the preceding probation revocation hearing on September 4, 1997. Petitioner's motion was denied.

In an April 19, 1999, probation revocation hearing, petitioner renewed his motion to dismiss, which was again denied. He then admitted that he had violated the terms of his probation. The trial court denied the State's petition to revoke, but found that petitioner had violated the conditions of his probation and sentenced him to 150 days in the Benton County Jail for contempt of court. The court entered judgment to that effect on May 26, 1999. The trial court subsequently stayed entry of the judgment pending the outcome of this action seeking a writ of prohibition against the circuit court.

Petitioner contends in this petition for writ of prohibition that by the time of the third revocation hearing, the trial court had lost jurisdiction over him and that he should no longer be on probation. For his petition for writ of prohibition, the petitioner asserts two points:

1) The trial court erred in finding the petitioner in contempt of court after his probation period had expired;

2) The trial court erred in ordering the defendant to jail in excess of the statutory maximum sentence.

Propriety of Prohibition

It is essential, initially, for this court to examine whether prohibition is the appropriate remedy. We first observe that Eric Scott Pike has named the individual judge as respondent to his petition. That is incorrect. Prohibition lies to the circuit court and not to the individual judge. *See Green v. Mills*, 339 Ark. 200, 4 S.W.2d 493 (1999); *Travelers Insur. Co. v. Smith*, 329 Ark. 336, 947 S.W.2d 382 (1997); *Ford v. Wilson*, 327 Ark. 243, 939 S.W.2d 258 (1997); *Lee v. McNeil*, 308 Ark. 114, 823 S.W.2d 837 (1992). Accordingly, we will treat the petition as one against the circuit court. *See Ford v. Wilson, supra.*

We recently set out the requirements for a writ of prohibition:

> A writ of prohibition is extraordinary relief which is appropriate only when the trial court is wholly without jurisdiction. *Henderson Specialties, Inc. v. Boone County Circuit Court*, 334 Ark. 111, 971 S.W.2d 234 (1998); *Nucor Holding Co. v. Rinkines*, 326 Ark. 217, 931 S.W.2d 426 (1996). The writ is appropriate only when there is no other remedy, such as an appeal, available. *Henderson Specialties, Inc. v. Boone County Circuit Court, supra; West Memphis Sch. Dist. No. 4 v. Circuit Court*, 316 Ark. 290, 871 S.W.2d 368 (1994)(quoting *National Sec. Fire & Cas. Co. v. Poskey*, 309 Ark. 206, 828 S.W.2d 836 (1992)). When deciding whether prohibition will lie, we confine our review to the pleadings in the case. *The Wise Company, Inc. v. Clay Circuit*, 315 Ark. 333, 869 S.W.2d 6 (1993).

State v. Circuit Court of Lincoln County, 336 Ark. 122, 125, 984 S.W.2d 412, 414 (1999). We have further held that we do not issue a writ of prohibition for something that has already been done. *Holmes v. Lessenberry*, 297 Ark. 23, 759 S.W.2d 37 (1988) (per curiam).

Given the order of events in the instant case, we must hold that because the court denied petitioner's motion to dismiss and further entered judgment at the third revocation hearing *before* staying the proceedings pending the filing of this petition for writ of prohibition, a petition for writ of prohibition would not be the proper remedy. Instead, an appeal of the trial court's final order would have been the correct remedy at law. As stated above, the writ is appropriate only when there is no other remedy, such as an appeal, available. *State v. Circuit Court of Lincoln County, supra; Henderson Specialties, Inc. v. Boone County Circuit Court, supra; West Memphis Sch. Dist. No. 4 v. Circuit Court, supra.*

Once the trial court acted by entering the judgment at the third revocation hearing, the remedy became an appeal, not a petition for writ of prohibition. As such, we must deny petitioner's petition for writ of prohibition.

Denied without prejudice to raise on appeal.

STATE of Arkansas *v.* Kenneth Andrew SULLIVAN

CR 99-1140 11 S.W.3d 526

Supreme Court of Arkansas
Opinion delivered February 10, 2000
[Supplemental opinion on denial of rehearing issued May 18, 2000.*]

* GLAZE, IMBER, and SMITH, JJ., would grant.

Mark Pryor, Att'y Gen., by: *Brad Newman*, Ass't Att'y Gen., for appellant.

F.N. "Buddy" Troxell, for appellee.

W.H. "DUB" ARNOLD, Chief Justice. The State brings this interlocutory appeal from the trial court's granting of appellee's motion to suppress evidence found in his vehicle after an officer observed him speeding. Appellee was approached by a Conway police officer, Joe Taylor, for allegedly traveling forty miles per hour in a thirty-five mile-per-hour zone on Highway 65 in Conway. Although Officer Taylor did not use his "blue lights" to require appellee to stop, appellee pulled into a service station and was then informed by Officer Taylor of the reason for the contact.

Appellee was requested by Officer Taylor to produce registration and proof of insurance. When appellee, a now-disabled, previously self-employed roofer, opened his vehicle door to locate the documents requested, Officer Taylor noticed a rusted roofing hatchet that was corroding into the carpet of the vehicle. Appellee was unable to locate his vehicle registration and proof of insurance. He was then arrested for speeding, having no vehicle registration and no proof of insurance, and carrying a weapon (the roofing hatchet), as well as having an improper tint on his windshield. Officer Taylor further deemed appellee's vehicle to be unsafe because his speedometer was not working properly.

After another officer arrived and placed appellee in the back of his police unit, Officer Taylor began an inventory search of appellee's automobile. Officer Taylor testified that under the armrest, he found a black bag with what appeared to be methamphetamine inside it. The bag, he claims, contained a Ziploc-type bag with ten individually-wrapped bags of the substance, twenty-seven corners of plastic bags, a small plastic container with suspected marijuana, another Ziploc-type bag with bag corners inside of it, and a plastic container with two bags of suspected methamphetamine. Officer Taylor also stated that a zippered pocket of the same black tote bag contained two bags of suspected methamphetamine, a plastic tube with white powdery residue in it, a wood-handled knife with white powdery residue on the ends, and a red metal plate and a purple plastic straw. Appellee was then charged with the following offenses: possession of methamphetamine with intent to deliver; attempt to manufacture methamphetamine; possession of drug paraphernalia; unlawful possession of a weapon, the roofing hatchet; and speeding.

He was not charged with having no proof of insurance or vehicle registration.

Appellee moved to suppress evidence seized from his vehicle on the basis that the stop was a pretext to conduct a search. Upon the testimony of the sole witness at the suppression hearing, who was Officer Joe Taylor, as well as arguments of counsel, the trial court deliberated overnight and then granted appellee's motion to suppress, from which the State now brings this appeal. For its only point on appeal, the State asserts that the trial court erred in granting appellee's motion to suppress evidence found in his vehicle. We disagree with the State and affirm the trial court.

This Court, upon review of a trial court's ruling on a motion to suppress, makes an independent determination based on the totality of the circumstances and reverses only if the trial court's ruling is against the preponderance of the evidence. *Thompson v. State*, 333 Ark. 92, 966 S.W.2d 901 (1998). The issue before this Court is whether the search of appellee's vehicle was justified, either as an inventory search or as a search incident to arrest. We hold that it was not.

In the instant case, Officer Taylor was the sole witness who testified at the hearing on appellee's motion to suppress. Although he testified on direct examination that what he conducted was merely an inventory search as dictated by policy and not a search conducted after a traffic stop predicated on suspicions he had of the appellee's involvement in drug activity, he did admit on cross-examination that he had been assigned to the narcotics section and that said section had intelligence on the appellee of which Officer Taylor was aware. Appellee contends that the very facts and circumstances surrounding the arrest itself proves that it was pretextual in nature, in that it was made solely for the purpose of searching the appellee's vehicle for controlled substances, and that, as a result, he is entitled to an order suppressing any and all evidence seized from his vehicle. Appellee asserts that the arresting officer had no reasonable basis to believe that the roofing hatchet was to be used as a weapon.

We have held that "pretext" is a matter of the arresting officer's intent, which must be determined by the circumstances of the arrest. *Brenk v. State*, 311 Ark. 570, 847 S.W.2d 1 (1993). We held in *Hines v. State*, 289 Ark. 50, 709 S.W.2d 65 (1986), and the Court of Appeals followed in *Miller v. State*, 44 Ark. App. 112, 114, 868 S.W.2d 510 (1993):

> The Supreme Court has specifically held that "an arrest may not be used as a pretext to search for evidence." *United States v. Lefkowitz*, 285 U.S. 452 (1932). ...
>
> ....
>
> Claims of pretextual arrest raise a unique problem in law — deciding whether an ulterior motive prompted an arrest which otherwise would not have occurred. Confusion can be avoided by applying a "but for" approach, that is, would the arrest not have occurred but for the other, typically, the more serious crime. Where the police have a dual motive in making an arrest, what might be termed the covert motive may be dominant, so long as the arrest would have been carried out had the covert motive been absent. ...

The question then becomes whether appellee would have been *arrested* simply for traveling forty miles per hour in a thirty-five mile-per-hour zone and possessing a roofing hatchet that had clearly been in his vehicle for quite a long time, given that it was corroding into the carpet. We find that to be doubtful. His vehicle may have been impounded due to his failure to provide proof of insurance and registration. However, appellee was never *charged* with having no proof of insurance or vehicle registration. Further, the trial court, when assessing the credibility of Officer Taylor (the sole witness at the hearing), the totality of the circumstances, and the applicable law, agreed with appellee that the search and seizure was pretextual and should be suppressed. Clearly, a review of the applicable law illustrates that the issue of pretext necessarily turns on the facts in a given case, and given our standard of review in these cases, we cannot say that the trial court's ruling was against the preponderance of the evidence.

Affirmed.

SUPPLEMENTAL OPINION ON DENIAL OF REHEARING MAY 18, 2000

Mark Pryor, Att'y Gen., by: *Brad Newman*, Ass't Att'y Gen., for appellant.

No response.

WH. "DUB" ARNOLD, Chief Justice. The State has petitioned for rehearing in this case, contending that this court's opinion delivered on February 10, 2000, *State v. Sullivan*, 340 Ark. 315, 11 S.W.3d 526 (2000), contained a significant error of law. The State argues that this court's analysis of the present case using the concept of "pretext" is contrary to the United States Supreme Court's opinion in *Whren v. United States*, 517 U.S. 806 (1996). The State presents us with the *Whren* case for the first time on rehearing and argues that under *Whren*, a police officer may arrest someone for a minor traffic violation, knowing full well that the real reason for the arrest is to enable a search of the vehicle for a suspected crime.

We do not read *Whren* as going as far as the State would have it. In *Whren*, the police officers observed youthful occupants at night in a vehicle with temporary license plates. The youths were acting suspiciously in a high crime area. When the vehicle did a U-turn and sped off at an unreasonable speed, the police officers gave chase and stopped the vehicle. One of the police officers

approached the vehicle and saw two bags of crack cocaine in the driver's hands.

These facts are very different from those in the case before us. Here, the police officer stopped Sullivan for speeding, arrested him primarily because he had a roofing hatchet on the floor of his vehicle which had rusted into the carpet, and then conducted an inventory search following the arrest. As the trial court found in its ruling:

> [F]ollowing our hearing yesterday, I have gone over the testimony and looked at what I believe to be the law in that case, and it's going to be my decision in this particular instance that based on the testimony, specifically that the officer testified that he stopped the car based on a charge of suspicion of speeding -- which I have no problem with the stop. I think that was ... there was radar. I don't have any problem with that.
>
> He testified that once he got him stopped, he recognized him as someone that he had seen intelligence on regarding narcotics, and he -- rather than write citations, he physically arrested him. And the weapons charge, I think, was added to that. And I don't believe that in this particular instance that the -- that that was appropriate, and I'm going to grant the defendant's motion to suppress the evidence seized as a result of that search.

The State argues that under *Whren*, the Supreme Court has determined that the ulterior motives of police officers are irrelevant so long as there is probable cause for the traffic stop. Admittedly, the decision in *Whren* is broadly written, but much of it is *dicta*. Nevertheless, we do not interpret *Whren* as blanket authority for pretextual arrests for purposes of a search in all cases. Rather, the reasonableness of the arrest and search must be governed by the facts of each case. For example, we do not believe that *Whren* goes so far as to sanction conduct where a police officer can trail a targeted vehicle with a driver merely suspected of criminal activity, wait for the driver to exceed the speed limit by one mile per hour, arrest the driver for speeding, and conduct a full-blown inventory search of the vehicle with impunity.

Several jurisdictions, after the *Whren* decision, have refused to give total authority to law enforcement for pretextual arrests and the resulting searches, either because of state constitutions or

because the search and seizure was unreasonable. *See, e.g., State v. Ladson*, 979 P.2d 833 (Wash. 1999); *State v. Varnado* , 582 N.W.2d 886 (Minn. 1998); *People v. Dickson* , 690 N.Y. Sup. Ct. 2d 390, 180 Misc. 2d 113 (1998); *State v. Gonzalez-Gutierrez*, 927 P. 2d 776 (Ariz. 1996). Further, one jurisdiction has questioned the ultimate absurdity of whether *Whren* was meant to sanction arrests and searches incident to a parking violation. *See State v. Holmes,* 569 N.W.2d 181 (Minn. 1997).

This court has cited *Whren* in two cases. *See Travis v. State*, 331 Ark. 7, 959 S.W.2d 32 (1998); *Burris v. State* 330 Ark. 66, 954 S.W.2d 209 (1997). Neither case dealt with the issue of pretextual arrests but rather cited *Whren* for the proposition that probable cause of a traffic violation is all that is required for a police officer to make a stop. In fact, in *Travis*, we specifically noted that the argument of a pretextual arrest had not been made.

Here, the trial court found that the arrest was pretextual and made for the purpose of searching Sullivan's vehicle for evidence of a crime. Again, we do not believe that *Whren* disallows this. Moreover, even if we were to interpret *Whren* to give full rein to law enforcement to effect pretextual arrests for traffic violations, there is nothing that prevents this court from interpreting the U.S. Constitution more broadly than the United States Supreme Court, which has the effect of providing more rights. We arguably have done so with our Criminal Rules that provide more stringent requirements for nighttime searches than Court decisions. *See* Ark. R. Crim. P. 13.2(c); *Garner v. State*, 307 Ark. 353, 820 S.W.2d 446 (1991).

In sum, we will not give *carte blanche* approval for all pretextual arrests for traffic violations, as the State would have us do. We draw a clear distinction between arresting a person with crack cocaine in his hands as was the case in *Whren* and effecting a pretextual arrest for purposes of a search, such as we have in the instant case. Surely that flies in the face of reasonableness, which is the essence of the Fourth Amendment. *See State v. Holmes, supra.* We will decide the reasonableness of the arrest and search on a case-by-case basis, as the *Whren* decision makes clear. For these reasons, we deny the State's petition for rehearing.

Denied.

CORBIN, BROWN, and THORNTON, JJ., join.

GLAZE, IMBER, and SMITH, JJ., would grant rehearing.

TOM GLAZE, Justice, dissenting. The State petitioned for rehearing in this case, arguing that our decision rendered on February 10, 2000, *State v. Sullivan*, 340 Ark. 315, 11 S.W.3d 526 (2000), contained a significant error of law in failing to mention *Whren v. United States*, 517 U.S. 806 (1996). It is true that our opinion did not discuss *Whren*, but only because that case was neither cited nor argued to this court. I agree with the majority court that the *Whren* decision is significant to our reaching a correct holding in the present case; thus, our court considers it now.[1]

As our court set out in its original opinion, the evidence was indisputable that police officer Joe Taylor made a proper stop of Kenneth Sullivan's car because Sullivan was speeding. Sullivan also had no insurance, vehicle registration, or functional speedometer, and his car windows were improperly tinted. The officer additionally observed a hatchet on the driver's floorboard. The officer advised Sullivan that he was being placed under arrest for these infractions and for driving an unsafe car. He put Sullivan in the back of another officer's car and began inventorying Sullivan's vehicle. In the search, the officer found methamphetamine and marijuana. In making the inventory search, Taylor testified that he followed his department's policy and procedural manual. In these circumstances, Officer Taylor had probable cause to believe Sullivan committed a traffic offense at the time of the stop. That valid stop resulted in the discovery of other violations of the law that permitted Taylor to arrest Sullivan and inventory his car, where the officer found illegal drugs.

Recently, in *Travis v. State*, 331 Ark. 7, 959 S.W.2d 32 (1998), our court upheld the stop of a defendant's truck for committing a traffic offense -- failing to display expiration-date stickers. After the stop, the officer discovered that the driver of the truck had a suspended driver's license, and the passenger, defendant, was a felon who also had no valid license. The officer had the truck towed.

[1] The State also failed to cite or argue Arkansas cases *Travis v. State*, 331 Ark. 7, 959 S.W.2d 32 (1998), or *Burris v. State*, 330 Ark. 66, 954 S.W.2d 209 (1997). However, the *Travis*, *Burris*, and *Whren* cases are relevant to the search, seizure, and arrest issues raised at trial and on appeal and require this court to consider them

When the officer later opened the door of the truck, he found a rifle which led to the defendant's arrest for being a felon in possession of a firearm. At trial, the defendant argued that no probable cause existed for the officer to stop his truck because the officer wrongly believed the Texas license plate was required to display an expiration sticker. Citing *Burris v. State*, 330 Ark. 66, 954 S.W.2d 209 (1997), and *Whren v. United States*, 517 U.S. 806 (1996), the *Travis* court rejected the defendant's argument and upheld the search of defendant's truck, holding that it is well settled that an officer may stop and detain a motorist where the officer has probable cause to believe a traffic violation had occurred. Furthermore, in reaching its decision, the *Travis* court repeated the rule in *Brunson v. State*, 327 Ark. 567, 940 S.W.2d 440 (1997), that, *in assessing the existence of probable cause, our review is liberal rather than strict.* To the same effect, *see Burris v. State*, 330 Ark. 66, 954 S.W.2d 209 (1997). In the present case, once the officer made a valid stop and arrested Sullivan for the numerous traffic violations, including driving an unsafe vehicle, the officer had the authority to perform an inventory of Sullivan's vehicle.

It has been suggested that the State's argument on rehearing is that a police officer may arrest someone for a minor traffic violation, knowing full well that the real reason for the arrest is to enable a search of the vehicle for a suspected crime. To the contrary, the State set out its contention as follows:

> The relevant inquiry, thus, is not whether the officer had an ulterior motive for stopping the vehicle, but whether the officer had probable cause to believe that the defendant was committing a traffic offense at the time of the initial stop. *Travis, supra*; *Burris, supra. Based on his radar detection of [Sullivan's] speed, the officer here unquestionably had probable cause to stop [Sullivan]. This Court, thus, applied the wrong standard when it decided this case based on its view that the officer stopped appellee based on an ulterior motive. Even if the officer had an ulterior motive, which the State does not admit, it is not to be taken into account by this Court, according to Whren, because the stop was unquestionably proper. The Court should grant rehearing to consider this case in the light of Whren, Travis, and Burris.*

It has been further suggested that Officer Taylor had arrested Sullivan primarily because he had a roofing hatchet in the floor of his vehicle; however, even if the trial court believed this to be true, Taylor still had probable cause to detain and arrest Sullivan for the

numerous traffic offenses he had committed. It appears that the judge got off track by injecting his personal view as to whether a hatchet could be a weapon for which he could be arrested for possession. The judge mused, "I've got a hammer under the seat of my car today. Am I subject to being arrested and taken physically into custody because I have a hammer?" With all due respect to the trial judge, the issue, as stated above, is not whether the hatchet, alone, was cause for an arrest after the stop, but whether Sullivan had committed traffic violations in Officer Taylor's presence. Unquestionably, such violations occurred.

In sum, because Sullivan was speeding, had no insurance or vehicle registration, a non-working speedometer, illegally tinted windows, and an unsafe vehicle, the officer had the right to place (and did place) Sullivan under arrest. Sullivan's arrest was valid under Ark. R. Crim. P. 4.1(a)(iii) (1999), which states that "a law enforcement officer may arrest a person without a warrant if the officer has reasonable cause to believe that such person has committed . . . *any* violation of the law in the officer's presence." (Emphasis added.) Pursuant to this rule, a law enforcement officer is authorized to arrest a person for minor traffic violations witnessed by the officer, such as speeding. *See State v. Earl*, 333 Ark. 489, 970 S.W.2d 789 (1998); *Hazelwood v. State*, 328 Ark. 602, 945 S.W.2d 365 (1997). The officer's arrest of Sullivan was, therefore, valid. These violations being found also allowed Taylor to make an inventory search that quickly led to the discovery of illegal drugs. *See* Ark. R. Crim. P. 12.6(b) (1999) (a vehicle impounded in consequence of any arrest, or retained in official custody for other cause, may be searched at such times and to such extent as is reasonably necessary for safekeeping of the vehicle and its contents). The trial court did not find, nor did Sullivan prove, that the inventory search was conducted in bad faith for the sole purpose of collecting evidence.

The majority opinion on rehearing hypothecates that the Supreme Court's *Whren* case does not go so far as to sanction conduct where a police can trail a targeted vehicle with a driver merely suspected of criminal activity, wait for the driver to exceed the speed limit by one mile per hour, arrest the driver for speeding, and conduct a full-blown inventory search of the vehicle with impunity. Of course, I agree *Whren* does not allow such a stop and search, but those are not the facts before this court. It is uncontro-

verted that, at the time of the stop, Officer Taylor did not know the driver was Sullivan. Once again, even the trial court found no pretextual stop, and ruled the stop valid. Under the circumstances of this case, Sullivan's criminal record simply cannot be utilized to his advantage at the time of his stop and arrest.

The majority court validates the stop in this case, but finds Sullivan's arrest pretextual. Again, Sullivan's violation of numerous traffic offenses justified his arrest, and I am unaware of any rule or law that requires an officer merely to issue citations in a traffic stop where numerous violations occurred. Furthermore, I find nothing in the record that the officer could not arrest the violator. While it is true that Officer Taylor, after the stop, recognized Sullivan as a person who had been involved in illegal drugs, surely this fact should not be employed by our court to hold Sullivan's arrest invalid. Labeling Sullivan's arrest illegal when so many other violations justified it fails to comport with the law.

In fact, Supreme Court jurisprudence dictates a contrary result. In *United States v. Villamonte-Marquez*, 462 U.S. 579 (1983), the court dismissed the argument that an ulterior motive might strip law enforcement officers of their legal justification to undertake a search. The Court likewise held that a traffic-violation arrest would not be rendered invalid by the fact that it was "a mere pretext for a narcotics search." *United States v. Robinson*, 414 U.S. 218 (1973). Summarizing these and other cases in *Whren*, Justice Scalia wrote, "[w]e think these cases foreclose any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved." *Whren*, 517 U.S. at 813.

For the above reasons, I would hold that the trial court erred and would overturn its ruling. The majority court's failure to do so will generate considerable confusion among the rank and file of law enforcement, the bench, and the bar alike. Its decision is unquestionably a departure from search and seizure law as the Supreme Court has heretofore defined it.

IMBER and SMITH, JJ., join this dissenting opinion.

Floyd VILLINES, III, Pulaski County Judge; B.A. McIntosh, Pulaski County Assessor; and Pulaski County Board of Equalization *v.* Nora HARRIS

99-297 11 S.W.3d 516

Supreme Court of Arkansas
Opinion delivered February 10, 2000

Pulaski County Attorney's Office, by: *Karla M. Burnett*, *Amanda Mankin*, and *Keith Chrestman*, for appellants.

Dover & Dixon, P.A., by: *Thomas S. Stone* and *Michael R. Johns*, for appellee.

W.H. "DUB" ARNOLD, Chief Justice. This case presents an appeal from an interlocutory order of the Pulaski County Circuit Court granting appellee, Nora Harris, injunctive relief from appellants' assessment and collection of any real property tax as a result of or based upon the 1996 reappraisal of the real property located within Pulaski County, Arkansas. Significantly, the Court of Appeals certified the case to this court as an issue of substantial public interest, solely to determine whether the circuit

court erred by enjoining appellants' continued tax assessment and collection. Accordingly, our jurisdiction is authorized pursuant to Ark. Sup. Ct. Rule 1-2(d) (1999), and Ark. R. App. P.—Civ. 2(a)(6) (1999).

Notably, the parties urge us to consider related, substantive issues, including (1) whether the circuit court erred in finding that it has subject-matter jurisdiction over this action, and (2) whether Harris stated an illegal-exaction claim. However, we decline to reach issues not properly before us on appeal. Moreover, we reiterate that our appellate jurisdiction in this matter is confined to a review of the circuit court's interlocutory order granting an injunction. *See* Ark. R. App. P.—Civ. 2(a)(6) (1999). In fact, the trial court stated that certain issues remain unresolved in this proceeding, including damages and class certification. Given that the issue before this court is whether the circuit court possessed the jurisdiction to grant an injunction, we hold that the circuit court erred and we reverse.

Background

Pursuant to its obligation to equalize real-property values in the county, the Pulaski County Board of Equalization held a special meeting in 1994 and approved a contract with an outside appraisal firm. The contract was executed by the county judge, the appraisals were performed, and reappraised values were placed on the tax rolls in 1996. Nora Harris, a property owner and taxpayer, appealed her reassessment to the Board of Equalization.

Subsequently, on August 14, 1996, Harris filed a complaint in the Pulaski County Court alleging that Pulaski County Judge Floyd Villines, III, and other county officials violated Arkansas statutory requirements and Pulaski County property owners' federal due-process rights via the county-wide, real-property assessment. As a result, she sought a declaratory judgment and an injunction to prevent appellees from collecting any new taxes based upon the reappraised values. After hearing arguments, Special County Judge Russ Hunt concluded that the county court lacked the power to grant an injunction pursuant to Ark. Code Ann. section 14-14-1002(a), which permits the issuance of an injunction only in the absence of a chancellor from the county. However, he granted

summary judgment in favor of Harris and found that appellants violated her due-process rights under the Fourteenth Amendment because they failed to follow the proper Arkansas statute. Importantly, appellants failed to appeal the county court's March 21, 1997, order. Further, appellants continued to collect taxes based upon the reappraisal.[1]

On April 1, 1997, Harris filed a new action in the Pulaski County Chancery Court and sought an injunction prohibiting the county from issuing tax statements and collecting taxes based on the reappraisals. Pursuant to Ark. Const. art. 7, § 15, and Ark. Code Ann. section 16-113-306, chancery courts have jurisdiction to grant injunctions against illegal or unauthorized taxes or assessments. *Priest v. Polk*, 322 Ark 673, 912 S.W.2d 902 (1995); *Pockrus v. Bella Vista Village Property Owners Assn.*, 316 Ark. 468, 872 S.W.2d 416 (1994). Although the Pulaski County Chancery Court apparently had subject-matter jurisdiction over Harris's claim, the parties transferred the action to circuit court.

At the Pulaski County Circuit Court, Harris again sought injunctive relief. She alleged that appellants' continued tax collection constituted an illegal exaction and violated Pulaski County property owners' constitutional rights. She also sought money damages. In response, appellants filed a motion to dismiss and argued that the circuit court lacked subject-matter jurisdiction over Harris's claim. After reviewing the pleadings and counsels' arguments, Special Circuit Judge John S. Patterson found that the circuit court had jurisdiction over Harris's claim, which it deemed an illegal-exaction claim. Moreover, the circuit court concluded that it had the authority to issue an injunction in light of the county court's final and unappealed order and appellants' subsequent conduct. Reserving the issues of damages and class certification, the circuit court entered an interlocutory order on December 28, 1998, enjoining appellants' assessment and collection of taxes based upon the 1996 reappraisal. From that order, comes the instant interlocutory appeal.

[1] In the absence of a complete evidentiary record, we remain bewildered by appellees' conduct. Their initial failure to comply with the statutory procedures, coupled with their subsequent conduct, (failing to appeal, and then ignoring the final and binding county-court order), creates a disturbing picture. Nevertheless, we are wholly without jurisdiction to instruct the circuit court how it should proceed on the pending damages issue.

I. Interlocutory appeal

First, we consider the scope of the instant appeal. As a general rule, an appeal from an interlocutory decision brings up for review only the decision from which the appeal was taken, here, the granting of an injunction.*See generally*, 5 C.J.S. *Appeal and Error* § 738 (1993 & Supp. 1999). Conversely, an appellate court will not review another interlocutory decision from which no appeal was taken. *Id.* For example, where an appeal was certified to consider an interlocutory appeal from the dismissal of a counterclaim and third-party complaint, the court of appeals concluded that the defendant could not bring up for review unrelated issues pertaining to the primary suit that was still pending in the trial court. *See Coleman's Service Center, Inc. v. Southern Inns Management, Inc.*, 44 Ark. App. 45, 866 S.W.2d 427 (1993); *see also* Ark. R. Civ. P. 54(b). Specifically, the appellate court noted that when a trial court permits an interlocutory appeal on one issue, when other issues remain to be decided, the issues raised in the appeal must be reasonably related to the order appealed from. Significantly, the interlocutory appeal may not be used as a "vehicle to bring up for review matters which are still pending before the trial court." *Coleman's*, 44 Ark. App. at 49, 866 S.W.2d at 429.

The mere fact that a significant issue is involved, standing alone, is an insufficient basis for this court to accept jurisdiction of an interlocutory appeal. *Scheland v. Chilldres*, 313 Ark. 165, 167, 852 S.W.2d 791, 792 (1993). Here, Harris suggests that appellees' conduct rises to the level of an "illegal exaction" in a manner never before considered by the court. She frankly requests that we extend existing law and find that a flaw in the assessment procedure can rise to an illegal exaction. Arguably, this is a significant issue. Nevertheless, we may not reach the merits of her argument. When an appeal reaches a court via an order granting a preliminary injunction, the appellate court will not delve into the merits of the case further than is necessary to determine whether the trial court exceeded its discretion in granting the injunction. *Special Sch. Dist. v. Speer*, 75 F.2d 420 (8th Cir. 1935). The sole question before the appellate court is whether the trial court "departed from the rules and principles of equity in making the order," and not whether the appellate court would have made the order. *Special Sch. Dist.*, 75 F.2d at 421-22.

Moreover, when the trial court's subject-matter jurisdiction is essential to an action, the trial court's ruling that it has proper jurisdiction does not render that order appealable, even if that ruling is erroneous. *Signa Ins. v. Brisson*, 294 Ark. 504, 744 S.W.2d 716 (1988). In such a case, this court retains the independent duty to raise the issue of our own jurisdiction because a *final* order is a jurisdictional requisite for this court to act. *Id.*; *see also Mueller v. Killam*, 295 Ark. 270, 748 S.W.2d 141 (1988). Despite the lack of final order, however, we may exercise our appellate jurisdiction over "an interlocutory order by which an injunction is granted," pursuant to Ark. R. App. P.—Civ. 2(a)(6). The rule providing for appeals from injunctions is an *exception* to the general rule that appeals may be taken only from a "final judgment or decree." *See* Ark. R. App. P.—Civ 2(a)(1).

Here, we have a distinct basis and specific authority to hear the appeal from an injunction, and the extent of our review is dependent on the decision appealed from. Although we may regret our lack of ability to give a trial court sufficient guidance on remand so that it might avoid error, we cannot precipitately prevent such error by preempting the trial court's action. We have long held that our role, for better or worse, is to decline to issue advisory opinions. *See Seeco, Inc. v. Hales*, 330 Ark. 402, 414, 954 S.W.2d 234, 241 (1997). We are limited to a review of the record before us.

In light of our jurisdictional grounds, we decline to reach the following issues: (1) whether the circuit court erred in finding that it has subject-matter jurisdiction over this action, (2) whether Harris stated an illegal-exaction claim, (3) whether the circuit court erred in finding that appellant's attempts to relitigate the merits of the county-court order are barred by *res judicata*, (4) any issues relating to summary judgment, (5) any issues relating to the, as yet, unawarded damages, and (6) any issues concerning the motion for class certification. However, we are aware that at the conclusion of the instant litigation, marked by the entry of a final order, these issues may be ripe for appeal. Accordingly, while these issues are beyond the scope of this interlocutory appeal, nothing in this opinion shall be construed as a bar to a subsequent appeal of any or all of these issues.

II. Injunctive relief

Next, we consider the circuit court's finding that it had the authority to grant appellee injunctive relief. In support of affirming the decision, appellee cites the county court's inability to grant her an injunction. Specifically, appellee posits that the presence of circuit-court authority derives from the absence of county-court authority. This argument amounts to a logical fallacy in reasoning.[2] It also fails to account for the fact that the chancery court had the authority to grant her an injunction.[3] Alternatively, appellee maintains that because jurisdiction over injunctions has not been given exclusively to courts of equity, a circuit court may have the power to issue an injunction in a case properly before it when ancillary to its jurisdiction or as necessary to grant complete relief. *See Arkansas State Medical Bd. v. Leipzig*, 299 Ark.71, 770 S.W.2d 661 (1989); *Daley v. Digby*, 272 Ark. 27, 613 S.W.2d 589 (1981); and *Pinckney v. Mass Merchandisers, Inc.*, 16 Ark. App. 151, 698 S.W.2d 310 (1985).

[redacted] On the other hand, appellants argue that the circuit court was wholly without authority to issue an injunction. We agree. In the early case of *Monette Road Improvement Dist. v. Dudley*, 144 Ark. 169, 222 S.W. 59 (1920), we held that the creation of our chancery courts left no vestige of equity jurisdiction in the circuit courts.[4]

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[2] The structure of appellee's argument takes the form of a "conditional syllogism":

A cannot grant an injunction
B is not *A*;
therefore, *B* can grant an injunction.

Although some forms of conditional syllogisms may yield a valid argument (e.g., the *modus ponens*, and the *modus tollens*), the instant form reaches an invalid conclusion by denying the antecedent. Notably, the fallacy of "denying the antecedent" fails to account for other possibilities, here, that *C* can grant an injunction. For a thorough discussion of this and other logical fallacies in the context of reasoning in the law, see Andrew Jay McClurg, *Logical Fallacies and the Supreme Court: A Critical Examination of Justice Rehnquist's Decisions in Criminal Procedure Cases*, 59 U. COLO. L. REV. 741, 774-75 (1988).

[3] Unfortunately, and inexplicably, the parties agreed to transfer the action from chancery to circuit court. From the limited record before us, it appears that the action could and should have remained in chancery court where that court could have granted an injunction and awarded damages pursuant to the clean-up doctrine.

[4] Since *Monette*, only three Arkansas cases have sanctioned a circuit court granting injunctive relief. *See Arkansas state Medical Bd. v. Leipzig*, 299 Ark. 71, 770 S.W.2d 661 (1989); *Daley v. Digby*, 272 Ark. 267, 613 S.W.2d 589 (1981); and *Pinckney v. Mass Merchandisers, Inc.*, 16 Ark. App. 151, 698 S.W.2d 310 (1985). Notably, the majority opinions is *Leipzig*, *Daley*, and *Pinckney* fail to cite *Monette* or to explain why the longstanding constitutional rationale of *Monette* was inapplicable. Moreover, in his concurring opinion in *Cummings v. Fingers*, 296 Ark. 276, 281-82, 753 S.W.2d 865, 868 (1988), Justice Newbern observed that in *Daley*, the

Injunctions are historically equitable and fall within the exclusive jurisdiction of chancery court. *Id.* Accordingly, we reverse that portion of the circuit court's order enjoining appellants from collecting any tax based on the 1996 county-wide reappraisal.

Special Justice MARTHA MILLER HARRIMAN and Special Justice W. KELVIN WYRICK join.

Special Justice KENNETH R. REEVES and Special Justice HOWARD W. BRILL concur.

Special Justice RICHARD A. LUSBY and Special Justice JAMES E. BAINE concur in part and dissent in part.

HOWARD W. BRILL, Special Justice, concurring. I concur in the opinion that the circuit court should not have issued an injunction. However, as set out below I do so for different reasons than the majority.

Certainly this court does not issue advisory opinions. Therefore since the trial court expressly refused to rule upon issues of damages and class certification, the majority wisely refused to address those issues. However, the Circuit Court in its order of December 28, 1998, did grant summary judgment for the taxpayer, recognizing the validity of the county court judgment and granting the taxpayer relief on the merits. In addition, the parties at the trial court level and in their briefs and arguments have raised and contested the issues of illegal-exaction claims and *res judicata*. When this case is remanded to the circuit court, and perhaps transferred back to chancery, these issues will return. Guidance from this court will help the subsequent judicial process.

I. Subject-matter jurisdiction

This case is properly in the circuit court and should remain there. With the consent of both parties, the action was transferred to Circuit Court in July 1997. While motions were pending, the taxpayer filed an amended petition on August 10, 1998. It alleged

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authority of a circuit court to grant an injunction was not even an issue on appeal. *See Cummings*, 296 Ark. at 281-82, 753 S.W.2d at 868 (Newbern, J., concurring). Therefore, the court's acquiescence to the circuit court's action resulted not from a deliberation on the merits but from the scope of the appeal.

that taxes had been based on the appraisal and had therefore been unlawfully collected, and the taxpayer sought damages.

As the majority states, this action clearly could have remained in chancery court because that court would have had authority under the clean-up doctrine to award damages. However, circuit courts are the repository of all matters, unless the Constitution vests exclusive jurisdiction elsewhere. Ark. Const. art. 7, § 11. Likewise, Ark. Code Ann. section 16-13-201 provides that circuit courts have "orignal jurisdiction of all actions and proceedings for the enforcement of civil rights or redress of civil wrongs, except when exclusive jurisdiction is given to other courts."

The crucial issue when the original action was commenced in 1996 in the county court was the assessment itself. The issue when this action was filed in April 1997 in chancery court was whether an injunction should be granted to stop the collection of taxes. But when this action was transferred to circuit court and the amended complaint filed in August 1998, the primary issue became damages. The taxes had been collected, and any injunction would be of scant, if any, relevance. Further, equity jurisdiction is predicated on the absence of an adequate remedy at law. In this procedural context damages have become an adequate remedy, leaving the case properly in circuit court. Despite the circular fashion in which this action came to circuit court, the circuit judge did have subject-matter jurisdiction when he ruled.

II. Injunctions in circuit court

The parties have contested the authority of a circuit court to issue injunctions. The majority opinion sets forth the five scattered precedents that deal with this issue. However, given the passage of time since the 1996 appraisal, the question of an injunction in this matter has declined in significance and the adequacy of the damages remedy has grown. Accordingly, it is unnecessary to hold, as the majority does, that circuit courts lack power to issue injunctions.

III. Res judicata

The elements of *res judicata* are well established. The doctrine bars relitigation of a claim in a subsequent suit when "(1) the first

suit resulted in a final judgment on the merits; (2) the first suit was based upon proper jurisdiction; (3) the first suit was fully contested in good faith; (4) both suits involve the same claim or cause of action; and (5) both suits involve the same parties or their privies." *Bailey v. Harris Brake Fire Protection District*, 287 Ark. 268, 697 S.W.2d 916 (1985).

While the county court is not a court of general jurisdiction, it is a court of record, Ark. Code Ann. § 14-14-1001, and had subject-matter jurisdiction. The essence of *res judicata* is that the parties had a full and fair opportunity to litigate the issue. The county had such a chance in the original action. In addition, *res judicata* requires that a dissatisfied party have the opportunity to appeal. Here the county had the right, and indeed under Ark. Code Ann. section 16-67-201 had six months to act, and failed to do so.

The parties were not identical in the two actions, for the chancery/circuit court action includes an additional defendant. However, the modern definition of privity is "a person so identified in interest with another that he represents the same legal right." *Bruns Foods of Morrilton, Inc. v. Hawkins*, 328 Ark. 416, 418, 944 S.W.2d 509, 510 (1997). The privity requirement is satisfied.

The claim in the county court action challenged the appraisal; the claim in the chancery/circuit court action went further and challenged the collection of taxes and sought damages. Those issues were premature and could not have been asserted initially. However, "issues and remedies raised in the subsequent suit do not have to be identical to those raised in the initial suit in order for the claim preclusion part of res judicata to apply." *Swofford v. Stafford*, 295 Ark. 433, 435, 748 S.W.2d 660, 662 (1988). The circuit court properly held that the issue of the application of Ark. Code Ann. section 26-26-601 and the county's failure to follow the procedures had been fairly litigated and the finding was thereby conclusive. The county had its day in court and is not entitled to relitigate its failure to adhere to the Arkansas statutes.

IV. Illegal-exaction claims

Article 16, section 13, of the Constitution permits any citizen to sue for himself and all others interested to protect "against the enforcement of any illegal exactions whatever." When properly

asserted, illegal-exaction claims may be brought in either circuit or chancery court, depending in large part on the remedy sought. *Hoyle v. Faucher*, 334 Ark. 529, 975 S.W.2d 843 (1998). The provision encompasses two types of claims: those involving public funds and those involving illegal taxes. *Western Foods, Inc. v. Weiss*, 338 Ark. 140, 992 S.W.2d 100 (1999); *Pledger v. Featherlite Precast Corp.*, 308 Ark. 124, 823 S.W.2d 852 (1992).

Cases involving taxes are divided between those alleging that the tax itself is illegal or void, and those alleging that the assessment or collection of the tax is flawed or erroneous. Allegations that a tax is contrary to a constitutional or statutory provision fall within the scope of illegal exactions, and thus come within the subject-matter jurisdiction of the circuit and chancery courts. *Barclay v. Melton*, 339 Ark. 362, 5 S.W.3d 457 (1999); *Barnhart v. City of Fayetteville*, 321 Ark. 197, 900 S.W.2d 539 (1995). Likewise, allegations that a government has failed to roll back taxes as required by Amendment 59 support an illegal- exaction claim. *See Hoyle v. Faucher*, 334 Ark. 529, 975 S.W.2d 843 (1998); *Barker v. Frank*, 327 Ark. 589, 939 S.W.2d 837 (1997). But the authorities are equally clear that a flaw in the assessment procedure, no matter how serious or grievous to the taxpayer, does not make the exaction itself illegal or void. *Pockrus v. Bella Vista Village Property Owners Assn.*, 316 Ark. 468, 872 S.W.2d 416 (1994); *Scott County v. Frost*, 305 Ark. 358, 807 S.W.2d 469 (1991); *McIntosh v. Southwestern Truck Sales*, 304 Ark. 224, 800 S.W.2d 431 (1990).

The unique posture of this case falls between the two classic situations. The original action alleged a flaw in the assessment and was properly brought in county court; it was not an illegal-exaction claim. Further, neither the county suit nor this suit specifically alleged that the tax itself was illegal or contrary to law. Accordingly, the county contends that a mistake or flaw in the assessment procedure can never rise to the level of an illegal exaction. The taxpayer on the other hand, while admitting that the special circumstances of this case present a form of illegal exaction never before addressed by this Court, contends that the mistake or error in the assessment grew into an illegal exaction because of two subsequent events: first, the determination by the county judge, and second, the county's failure to abide by the judicial determination.

The taxpayer has made an express and frank request to extend existing law. Without deciding whether a flaw in the assessment procedure can ever rise to an illegal exaction, in the unusual setting of this case it did not. At a special session in 1994, the Board of Equalization decided, pursuant to its authority in Ark. Code Ann. section 26-27-311, to employ professional appraisers to conduct the appraisal, rather than have its in-house staff carry out its duties. However, the Board ignored, or overlooked, the provisions of Ark. Code Ann. section 26-26-601 *et seq.* These provisions require (1) a petition signed by the county assessor, a majority of the equalization board, and a majority of the local government governing bodies and school boards; (2) publication of the petition; (3) a public hearing, with the opportunity for property owners to be heard in support or in opposition to the petition; (4) approval by the county court; (5) negotiations by three property owners appointed by the court for the employment of professional appraisers; and (6) approval of the contract by the county judge, a majority of the members of the municipal governing bodies, and a majority of the affected school boards.

Certainly this court should not undermine the significance of this statute or the legislative intent in enacting these safeguards. However, these facts do not rise to this court's prior definition of an illegal or void tax. Taxes collected pursuant to an appraisal conducted by an appraiser hired in violation of this statute do not become illegal or void.

V. Damages

The taxpayer has been wronged. She has been denied the rights given her by the Arkansas statutes. With notice and the chance to participate in a hearing, she might have persuaded the court that no county-wide reappraisal was required or that a different professional appraiser be hired.

The Constitution guarantees her redress. "Every person is entitled to a certain remedy in the laws for all injuries or wrongs he may receive in his person, property or character." Ark. Const. art. 2, § 13. The circuit court has jurisdiction of proceedings "for the enforcement of civil rights or redress of civil wrongs." Ark. Code Ann. § 16-13-201. Governments should not be permitted with

impunity to ignore the orders of courts. Upon remand, the taxpayer should have the opportunity to prove her damages.

KENNETH R. REEVES, Special Justice, concurring. I concur with the majority view that the Circuit Court erred in granting the injunction, but do so on the basis that there is an adequate remedy at law. The Appellee sued in Circuit Court for damages and, if she can prove her case, she can obtain relief with a money judgment. As to the injunction to prohibit the collection of taxes based on the flawed assessment, the horse is already out of the barn. The entry of an injunction at this point affords no relief to the taxpayer.

The issue of whether or not a Circuit Court has the authority to issue an injunction, though addressed by this Court on several occasions, remains unclear. As the majority opinion points out, there is certainly more recent authority that Circuit Courts can issue injunctions, however, the *Monette* decision still hangs out there — inexplicably unaddressed.

Considering the fact that there is an adequate remedy at law, this Court does not have to reach the significant question of whether or not a Circuit Court can *ever* issue an injunction, and should not.

RICHARD LUSBY, Special Justice, concurring in part; dissenting in part. I concur with the majority view that the circuit court lacked authority to issue injunctive relief in this case. It may well be that the court could have concluded that appellee now has an adequate remedy at law in her claim for monetary damages, denying appellee injunctive relief on that basis. Nevertheless, I do agree there is an absence of persuasive precedent granting circuit courts the power to issue injunctions. I disagree with the majority with respect to its refusal to address subject-matter jurisdiction and the related illegal-exaction issue.

I. Interlocutory Appeal

The majority noted that this is an interlocutory appeal permitted by Ark. R. App. P.—Civ. 2(a)(6) (1999) pertaining to injunctions. Citing *Coleman's Service Ctr., Inc. v. Southern Inns Management, Inc.*, 44 Ark. App. 45, 866 S.W.2d 427 (1993), the court concluded

it could not take up any issue other than the circuit court's authority to grant injunctive relief. However, the court of appeals refused to take up other issues in *Coleman's Service Ctr., Inc.* because those issues were "totally unrelated" to the question that was the basis of the interlocutory appeal. *Id.* at 429. That is not true in the matter now before this court.

In the proceedings below, appellant contended that the circuit court lacked subject-matter jurisdiction. Before granting appellee the injunctive relief requested, the circuit court specifically determined that it did have such jurisdiction. On appeal, appellant not only argues that circuit courts lack power to grant injunctive relief, it again contends that this circuit court lacks subject-matter jurisdiction in the circumstances of this case.

The circuit court's granting of relief in inextricably bound up in its decision that it had subject-matter jurisdiction. Both below and on appeal, the question of subject-matter jurisdiction is at the heart of the parties' battle over the appropriateness of the circuit court's grant of injunctive relief. Under the circumstances, it simply cannot be fairly said that the issue of subject-matter jurisdiction is "totally unrelated" to the injunction which provides the basis for this interlocutory appeal.

The majority concluded that the court cannot take up the issue of subject-matter jurisdiction. The court can take up this issue and if it can, it should. A refusal to do so makes a second appeal almost inevitable. Depending upon the outcome of a second appeal that does resolve the subject-matter jurisdiction issue, the parties' effort, time, and expense in prosecuting a damage action may well be for naught. I agree this court should not violate its rules and principles simply for the sake of economy. However, where the court, by acting now within its guidelines, can foreclose the necessity of an additional appeal or other legal action, I believe it should.

II. Subject-Matter Jurisdiction and Illegal Exaction

Appellee contends, and appellant vigorously denies, that the case now before the court involved an illegal exaction. If this is an illegal-exaction case, it is beyond question that the circuit court does have subject-matter jurisdiction. Ark. Const art. 16, § 13; *Barclay v. Melton*, 339 Ark. 362, 5 S.W.3d 457 (1999); *Barnhardt v.*

City of Fayetteville, 321 Ark. 197, 900 S.W.2d 539 (1995). However, appellee concedes that the actions of the county in collecting the tax in this case do not fit within the accepted definition of an illegal exaction. Consequently, appellee frankly asks the court to expand the definition of illegal exaction to apply to the circumstances of this case thereby establishing subject-matter jurisdiction in the circuit court.

As set forth in the background provided in the majority opinion, this case involves the collection of taxes based upon a flawed reappraisal. I agree this court has thus far excluded from the definition of illegal exaction, taxes based upon faulty appraisals and assessments. *Pockrus v. Bella Vista Village Property Owners Assn.*, 316 Ark. 468, 872 S.W.2d 416 (1994); *Scott County v. Frost*, 305 Ark. 358, 807 S.W.2d 469 (1991); *McIntosh v. Southwestern Truck Sales*, 304 Ark. 224, 800 S.W.2d 431 (1990). I would *not* broaden the definition of illegal exaction to include such matters. However, the facts in this case go beyond the simple situation of a tax based upon a flawed assessment. Here, the county was faced with the need for property reappraisal. The county chose between two statutory methods for conducting the reappraisal process. The statutory provisions appropriate for these particular circumstances involved public notice and the opportunity for property owners to participate in the process. Ark. Code Ann. § 26-26-601, *et seq.* The county chose a method that did not involve the public's participation. Ark. Code Ann. § 26-27-311.

As egregious as this decision may have been, it cannot be the basis for an illegal-exaction case, pursuant to the precedents cited above. However, there is more involved here than a taxing authority's determination to exclude taxpayers from the process. The appellant, having been denied relief by the Board of Equalization, filed suit in county court, seeking to prevent the county from collecting taxes based upon the flawed reappraisal process. The county court agreed that the reappraisal was flawed and gave declaratory relief but denied an injunction, based upon its determination that it lacked authority to provide such relief. Appellant immediately filed suit in chancery court, seeking the additional relief which the county court could not give. Despite notice by a court of competent jurisdiction that its reappraisal process violated the statute, and despite notice of ongoing litigation to enforce the county court's order, the county went forward to collect taxes based upon a

reappraisal that was contrary to statutory law. Stated another way, the county knowingly collected taxes based upon an appraisal that had been declared to be illegal. It is this action of the county that I believe renders the tax collected an illegal exaction.

While the facts described herein do not precisely fit under accepted notions of illegal exaction, I believe the definition should be broadened just enough to include such circumstances. The county's wrongful exclusion of property owners from the process was bad enough. The county's inexplicable action, ignoring the court's order, cannot be allowed to stand. As a practical matter, reversing the trial court's decision without addressing subject-matter jurisdiction may well do just that.

I share a reluctance to take any action likely to generate unwarranted litigation or undermine the ability of county government to collect legal taxes. However, I do not believe this narrow expansion of existing law would unduly open the door to a flood of illegal-exaction cases. Hopefully, the action of Pulaski County ignoring a court order will not be repeated in this county or any other.

Undoubtedly, there would have been much consternation in Pulaski County government had the majority determined the county's collection of the tax to be an illegal exaction. I am confident that this consideration played no part in the majority's refusal to take up this issue. Certainly, such matters should not be of concern to the court. Whatever consequences might flow from a determination that an illegal exaction occurred would be the result of Pulaski County's blatant disregard of an explicit decision by the county court and applicable statutory law. I would remand this case back to the circuit court for proceedings on damages with a clear statement that the circuit court has subject-matter jurisdiction by virtue of the fact that an illegal exaction has occurred.

Special Justice JAMES E. BAINE joins.

Charles E. SMITH v. PRUDENTIAL PROPERTY and CASUALTY INSURANCE COMPANY

99-378 10 S.W.3d 846

Supreme Court of Arkansas
Opinion delivered February 10, 2000
[Petition for rehearing denied March 9, 2000.]

Lyons, Emerson, & Cone, P.L.C., by: *Scott Emerson*, for appellant.

Wright, Lindsey & Jennings, LLP, by: *Patrick J. Goss*, for appellee.

TOM GLAZE, Justice. The court of appeals certified this case to us on the grounds that there is a perceived conflict in Arkansas insurance case law. The issue certified is whether, when an ambiguity exists in the terms of an insurance policy, that ambiguity is a question of law to be decided by the court or a question of fact for the fact-finder. Our court took jurisdiction under Ark. Sup. Ct. R. 1-2(b)(2) and (5) (1999).

The parties have stipulated to the relevant facts, agreeing that the primary issues depend upon the construction of clauses in insurance policies appellant Charles E. Smith obtained from appellee Prudential Property and Casualty Insurance Co. The parties agree that, when Smith was riding his motorcycle on December 19, 1997, Sylvia Midgett negligently pulled her car in front of Smith, colliding with Smith and causing him to sustain severe injuries and damages in excess of $300,000.00. Midgett had insurance coverage with limits of only $100,000.00, so Smith filed a claim under his underinsured motorist (UIM) coverage. While his motorcycle was uninsured, Smith had $100,000.00 UIM coverage each on his 1978 El Camino and 1988 Silverado. Smith claimed not only that his injuries were covered by his UIM policies, but also that he was

entitled to stack his two policies in order to recover the total amount of $200,000.00—an amount not covered by Midgett's insurance.

Prudential denied Smith's claims, stating that Smith had no insurance on his motorcycle and that he was not an insured under the UIM coverage clauses as defined in his policies. Prudential further countered that, even if he was an insured under his UIM coverage, Smith could not stack his two policies in order to collect the $200,000.00 in UIM coverage. At trial, Smith was the only witness, and his testimony was brief. In fact, Prudential never cross examined Smith, but instead moved for a directed verdict at the end of Smith's testimony, reiterating its argument that Smith was not an insured and was not covered under his UIM policy provisions.

The trial court denied Prudential's directed verdict motion, ruling that the terms defining an insured in Smith's policies were at best ambiguous, and, therefore, presented a question of fact for the jury. The trial court further held that the language in Smith's policies bearing on whether UIM coverage could be stacked was also ambiguous, and should be submitted as a fact question to the jury.

Smith also moved for a directed verdict, and in doing so, he agreed with the trial court that ambiguities existed in the policies. However, he disagreed with the trial court's submitting the case to the jury, since it was his contention that, as a matter of law, that the trial court was obliged to interpret and adopt the UIM coverages in Smith's favor. The trial court denied Smith's motion, and submitted all issues to the jury.

The jury returned answers to interrogatories, finding Smith was not an insured under the UIM coverage provisions of his automobile policies, that Smith was not entitled to stack his UIM policies, and he was not insured under the "additional car accident coverage" provisions of the policies. Accordingly, the trial court entered a judgment dismissing Smith's complaint with prejudice, from which Smith brings this appeal.

First, we point out that both Smith and Prudential initially contended below that the UIM coverage clauses contained in Smith's policies are *un*ambiguous. Smith, on the one hand, asserted he was clearly an insured for UIM coverage purposes in these

circumstances, and Prudential, on the other hand, contended Smith was not covered as an insured under the policies' terms. The trial court rejected the parties' respective contentions, and we believe it did so correctly; the trial court, after studying the policy UIM coverage terms, found the language ambiguous. While we believe the trial court was right in finding that an ambiguity exists, we ultimately disagree with the trial court's ruling that the ambiguity was a question of fact, which must be submitted to the jury.

In reaching its conclusion that it was ambiguous as to whether Smith was covered for UIM purposes, the trial court examined Smith's policies. On page 5 of Part 5, captioned "Underinsured Motorists . . . If You Are Hit By A Motor Vehicle That Is Underinsured," the following relevant language appears:

> OUR OBLIGATIONS TO YOU (PART 5)
>
> UNDERINSURED MOTORISTS BODILY INJURY COVERAGE
>
> UNDERINSURED MOTORISTS PROPERTY DAMAGE COVERAGE
>
> If **you** have these coverages (see the Declarations), we will pay up to **our** limit of liability for **bodily injury** or **property damage** that is covered under this part when an insured (*whether or not occupying a* **car**) or an insured's **car** is struck by an underinsured **motor vehicle**. [Italics supplied.] **Our** payment is based on the amount than an insured is legally entitled to recover for **bodily injury** or **property damage** because:
>
> *** THE OWNER OR DRIVER IS UNDERINSURED**
>
> The owner or driver responsible for the accident has liability insurance or a liability bond in an amount that is less than the limits shown for this coverage on the Declaration.

The trial court determined that, under the above clause, Smith was an insured and entitled to his UIM coverage limits *whether or not he was occupying a car* when he was struck by an underinsured motorist. In other words, Smith was covered under the terms of the above UIM provisions when he was riding a motorcycle, not a car, when Midgett's car hit Smith. Furthermore, the trial court read the definition section of Smith's policies where it defined the term *YOU* to mean the person shown as the *named insured on the Declara-*

tions of this policy. Unquestionably, Smith was the named insured in the Declaration issued with his automobile policies.

However, Prudential contended below that, under other UIM policy language, Smith was not an "insured." In this connection, the trial court studied the UIM language on page 6 of Part 5 of Smith's policies relied on by Prudential. That language reads as follows:

> WHO IS INSURED (PART 5)
>
> IN YOUR CAR (INCLUDES A SUBSTITUTE CAR)
>
> **You** and a **resident relative** are insured while using **your car** or a substitute **car** covered under this part.
>
> Other people are insured while using **your car** as a substitute **car** covered under this part if **you** give them permission to use it. They must use the **car** in the way **you** intended.
>
> IN A NON-OWNED CAR
>
> **You** and a **resident relative** are insured while using a non-owned car. The owner must give permission to use it. It must be used in the way intended by the owner.
>
> HIT BY A MOTOR VEHICLE
>
> **You** and a **resident relative** are insured if hit by an underinsured motor vehicle while a pedestrian.

Using the immediate foregoing policy language, Prudential contended below (and on appeal) that Smith was only an insured for UIM purposes if he was struck by an underinsured motorist when Smith was in one of his covered cars, a substitute car, another car with the owner's permission, or when he was a pedestrian.

In reading the different UIM provisions relied on by Smith and Prudential, it is evident the policy language is confusing. As the trial court said when it denied Prudential's motion for directed verdict, the UIM policy terms appear to provide Smith coverage on page 5 of Part 5, but then takes away the coverage on page 6.

After the trial court found that Smith's policies contained ambiguities pertaining to UIM coverage, it proceeded to instruct

the jury on the issues. In Instructions Number Ten, Eleven, and Twelve, the trial court directed the jury as follows:

> INSTRUCTION NO. TEN: You are instructed that if any ambiguity exists in a policy of insurance, the terms of that insurance policy are to be strictly construed against the insurance company that drafted the policy. In other words, you are to resolve all doubts as to the meaning of the language used in an insurance policy in favor of the policy holder or insured.
>
> INSTRUCTION NO. ELEVEN: An ambiguity exists in an insurance policy if there is any doubt or uncertainty as to the meaning of words or provisions in a policy, if there are conflicting provisions in an insurance policy, or if the policy is fairly susceptible to two interpretations.
>
> INSTRUCTION NO. TWELVE: Policies of insurance are to be liberally construed in favor of providing coverage to an insured.

As the reader can see from the foregoing instructions, the trial court instructed the jury how to determine if an ambiguity exists, even though the trial court had already decided, as a matter of law, that the insurance policies contained an ambiguity. Thus, we conclude the trial court erred, and hold the court should have granted Smith's directed verdict motion on the UIM coverage issue.

Arkansas's controlling case law on this subject is found in *Southhall v. Farm Bureau Mutual Ins. Co.*, 276 Ark. 58, 60, 632 S.W.2d 420, 421 (1982), where Justice George Rose Smith wrote for the majority court as follows:

> An insurance policy is to be construed strictly against the insurer, who chooses its language. The construction and legal effect of written contracts are matters to be determined by the court, not by the jury, *except* when the meaning of the language depends upon disputed extrinsic evidence. (Emphasis added.)

This court has also held that it is a principle of insurance law established in our state that provisions contained in a policy of insurance must be construed most strongly against the insurance company which prepared it, and if a reasonable construction may be given to the contract which would justify recovery, it would be the duty of the court to do so. *Drummond Citizens Ins. v. Sergeant*, 266 Ark. 611, 588 S.W.2d 419 (1979). It is also a cardinal rule of insurance law that a policy of insurance is to be construed liberally

in favor of the insured and strictly against the insurer or, as more fully stated, if the language employed is ambiguous, or there is doubt or uncertainty as to its meaning and it is fairly susceptible of two interpretations, one favorable to the insured and the other favorable to the insurer, the former will be adopted. *Id.*; *see also Nationwide Mut. Ins. Co. v. Worthey*, 314 Ark. 185, 861 S.W.2d 307 (1993).

In the instant case, the parties considered the UIM coverage as an issue dependent merely upon the construction to be given the language contained in the insurance policies. Certainly, Prudential offered no extrinsic evidence bearing on the meaning of the policy language. Although the meaning of an ambiguity may become a question for the fact-finder if parol evidence has been admitted to resolve that ambiguity, *see Minerva Enter., Inc. v. Bituminous Cas. Corp.*, 312 Ark. 128, 851 S.W.2d 403 (1993), where the meaning of the language of a written contract does not depend on disputed extrinsic evidence, the construction and legal effect of the contract are questions of law. *See Duvall v. Massachusetts Indem. & Life Ins. Co.*, 295 Ark. 412, 748 S.W.2d 650 (1988); *Security Ins. Co. v. Owen*, 252 Ark. 720, 480 S.W.2d 558 (1972). Accordingly, we hold that, as to the UIM coverage issue, the trial court erred in submitting that issue to the jury rather than directing a verdict in Smith's behalf.

We mention at this point that the court of appeals, in recommending certification of this case, suggested that *Farm Bureau Mutual Insurance Co. v. Whitten*, 51 Ark. App. 124, 911 S.W.2d 270 (1995), is in conflict with other Arkansas cases. We agree. Upon examining that case, we have determined that it was wrongly decided. To the extent that *Whitten* holds that when the terms of a written contract are ambiguous, its meaning is always a question of fact, that case is overruled.

On the question of whether Smith is entitled to stack his two policies to obtain the $100,000.00 UIM coverage provided in both of them, we reach a different result. We do so because our review of Smith's policies reflects no ambiguity as to the stacking issue. In fact, the policies contain anti-stacking provisions which prevent such double coverage. On this point, Smith largely relies on page 8 of Part 5 of the policy which relates that the limit of liability is stated on the declarations page and his declaration page shows that

he has coverage on two cars. Thus, he claims he should be able to stack his coverage.

Prudential, however, refers to the general provisions in the policies captioned "Limit of Coverage" which, in pertinent part, provide that "Coverages on other cars insured by us cannot be added to or stacked on the coverage of the particular car involved." Such anti-stacking language clearly prevents Smith from obtaining UIM coverage from both of his policies. Because the trial court erred in finding an ambiguity on this stacking issue, we agree that Prudential was entitled to a directed verdict.

For the above reasons, we reverse and remand with directions for the trial court to enter a judgment in Smith's favor, but limiting the coverage amount to $100,000.00. In light of our holding in the direct appeal, we also dismiss Prudential's cross-appeal.[1]

SMITH, J., dissents.

LAVENSKI R. SMITH, Justice, dissenting. I join the majority in holding that the subject policy contains no ambiguity as to coverage stacking. I also join in the overruling of *Farm Bureau Mutual Insurance Co. v. Whitten, supra.* However, I disagree with the court's holding that the subject policy contains an ambiguity as to underinsured motorist coverage. In December of 1997, Charles Smith purchased insurance for his two Chevrolet trucks. The policy in question, when read as a whole, contains no ambiguity as to the identity of those covered by underinsured motorist coverage. The policy states that the company will pay "when an insured (whether or not occupying a car)" is struck by an underinsured motor vehicle. The trial court and the majority find ambiguity in the parenthetical language. No ambiguity exists if the policy provisions contained in Part 5 are reasonably read together. Part 5, as each other Part in the policy, contains sections which address the company's obligations, the insured's obligations, cars that are covered, who is insured, losses the company will pay for and how the compay will settle the claims. The "WHO IS INSURED" section of part 5 describes three circumstances where the underinsured coverage applies. The first is when the policy holder or a relative are in the

[1] Prudential had filed a cross-appeal, suggesting that, despite the fact that the jury returned a verdict in its favor, the trial court erred in failing to find the policies to be unambiguous and granting Prudential's motion for directed verdict.

policy holder's car that is insured by policy. The second covered circumstance is where the policy holder or relative are in a non-owned car by permission of the owner. The third and final circumstance is where the policy holder or relative are hit by an underinsured motorist while a pedestrian. Neither of these include a circumstance where the policy holder is riding in or on an uninsured motor vehicle owned by the policy holder. Mr. Smith simply did not buy that kind of coverage. Construing the provisions in the context of Part 5, I conclude "whether or not occupying a car" is susceptible of only one reasonable interpretation and that is either riding in a car or walking as a pedestrian. It should not be necessary that a policy eliminate every conceivable alternate construction in order to avoid an ambiguity finding.

I respectfully dissent.

Patrick OLIVE v. STATE of Arkansas

CR 99-926 10 S.W.3d 443

Supreme Court of Arkansas
Opinion delivered February 10, 2000

[redacted]

William R. Simpson, Jr., Public Defender, by: *Tammy L. Harris*, Deputy Public Defender, for appellant.

Mark Pryor, Att'y Gen., by: *Kelly S. Terry*, Ass't Att'y Gen., for appellee.

DONALD L. CORBIN, Justice. Appellant Patrick Olive appeals the judgment of the Pulaski County Circuit Court convicting him of first-degree murder and terroristic act and sentencing him to twenty years' and ten years' imprisonment, respectively. The evidence showed that on November 16, 1997, Mrs. Bernice Nichols was in her bed when numerous gunfire shots struck her residence. She died as a result of gunshot wounds to her head and neck. Appellant's sole point for reversal is that the trial court erred in denying suppression of his custodial statement under Article 2, sections 8 and 10, of the Arkansas Constitution. The issue is whether, under the Arkansas Constitution, a defendant's invocation of the right to counsel after prosecution has commenced on one charge is also an invocation of the right to counsel during custodial interrogation for a separate, uncharged offense. Because this issue is one of first impression, our jurisdiction is pursuant to Ark. Sup. Ct. R. 1-2(b)(1). We find no error and affirm.

The record reflects that Appellant was initially arrested for an aggravated robbery that occurred on June 28, 1997. Defense counsel was appointed in that case on January 14, 1998. Approximately two months later, on March 13, 1998, while he was still in custody on the robbery charge, Appellant was approached by officers about the murder of Mrs. Nichols. Prior to asking any questions, the

officers read Appellant his *Miranda* rights. Appellant signed a form indicating that he understood his rights and agreed to waive them. During the interview, Appellant confessed to participating in the murder. He was then arrested for that charge.

Appellant moved to suppress the confession on the ground that it had been obtained outside the presence of counsel. He contended that because he had invoked his right to counsel on the robbery charge, and because he had continuously remained in custody, the statement regarding the murder was taken in violation of his rights to counsel under Article 2, sections 8 and 10. The trial court disagreed and denied suppression of the statement.

We begin our analysis of this issue with an examination of the Supreme Court's decision in *McNeil v. Wisconsin*, 501 U.S. 171 (1991). There, the Court held that the defendant's invocation of his Sixth Amendment right to counsel during a judicial proceeding for a charged offense did not constitute an invocation of his Fifth Amendment right to counsel on unrelated and uncharged offenses. The Court concluded that the right to counsel guaranteed by the Fifth Amendment, as interpreted in *Miranda v. Arizona*, 384 U.S. 436 (1966), and *Edwards v. Arizona*, 451 U.S. 477 (1981), was not "offense specific," but that the right to counsel under the Sixth Amendment was. *Id.* at 177. The Court explained that once a suspect has invoked the Fifth Amendment right to counsel for interrogation regarding one offense, he may not be reapproached by the police regarding any offense unless counsel is present. On the other hand, the Court concluded:

> The Sixth Amendment right, however, is offense specific. It cannot be invoked once for all future prosecutions, for it does not attach until a prosecution is commenced, that is, " 'at or after the initiation of adversary judicial criminal proceedings — whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.' " *United States v. Gouveia*, 467 U.S. 180, 188 (1984) (quoting *Kirby v. Illinois*, 406 U.S. 682, 689 (1972) (plurality opinion)).

Id. at 175. The Court concluded that it would not be sound policy to view the assertion of the Sixth Amendment right to counsel as an assertion of the Fifth Amendment right, as provided in *Miranda*. The Court explained that the two rights serve different purposes:

> The purpose of the Sixth Amendment counsel guarantee — and hence the purpose of invoking it — is to "protec[t] the unaided layman at critical confrontations" with his "expert adversary," the government, *after* "the adverse positions of government and defendant have solidified" with respect to a particular alleged crime. *Gouveia*, 467 U.S., at 189. The purpose of the *Miranda-Edwards* guarantee, on the other hand — and hence the purpose of invoking it -- is to protect a quite different interest: the suspect's "desire to deal with the police only through counsel," *Edwards, supra*, at 484. This is in one respect narrower than the interest protected by the Sixth Amendment guarantee (because it relates only to custodial interrogation), and in another respect broader (because it relates to interrogation regarding *any* suspected crime and attaches whether or not the "adversarial relationship" produced by a pending prosecution has yet arisen). To invoke the Sixth Amendment interest is, as a matter of *fact*, *not* to invoke the *Miranda-Edwards* interest.

Id. at 177-78.

Appellant acknowledges that the holding in *McNeil* is on point with the particular facts of this case. He urges, however, that the Court's decision should be limited to those rights guaranteed by the United States Constitution in the Fifth and Sixth Amendments. In other words, Appellant asserts that the rights to counsel under the Arkansas Constitution should be interpreted more liberally than those in the federal constitution. We disagree.

In the first place, Appellant has failed to cite to any authority in support of his argument, and we are not aware of any such authority. To the contrary, this court has consistently viewed the right to counsel provided by Article 2, section 10, as guaranteeing the same right conferred by the Sixth Amendment. *See e.g., Beyer v. State*, 331 Ark. 197, 962 S.W.2d 751 (1998); *Jones v. State*, 314 Ark. 383, 862 S.W.2d 273 (1993), *cert. denied*, 512 U.S. 1237 (1994); *Clements v. State*, 306 Ark. 596, 817 S.W.2d 194 (1991). Likewise, this court has observed that Article 2, section 8, is "our state constitutional equivalent" to the Fifth Amendment. *Clark v. State*, 256 Ark. 658, 659, 509 S.W.2d 812, 814 (1974). Additionally, this court has frequently relied on the Supreme Court's decisions in determining the scope of the right to counsel during custodial interrogation. *See e.g., Riggs v. State*, 339 Ark. 111, 3 S.W.3d 305 (1999); *Esmeyer v. State*, 325 Ark. 491, 930 S.W.2d 302 (1996);

Bowen v. State, 322 Ark. 483, 911 S.W.2d 555 (1995), *cert. denied*, 517 U.S. 1226 (1996). Accordingly, we see no reason to deviate from that practice here.

[redacted] In the second place, this court has twice embraced the Supreme Court's holding in *McNeil*, 501 U.S. 171, as a correct statement of the law. In *Brenk v. State*, 311 Ark. 579, 847 S.W.2d 1 (1993), the evidence showed that the severed torso of a woman, later identified as Brenk's wife, was discovered in Lake Norfolk in August 1990. Around two weeks later, on September 10, Brenk was arrested for failure to pay a misdemeanor fine. Simultaneously, Brenk was served with a petition to revoke his probation. The probation officer advised Brenk that he would need an attorney for the revocation hearing. Brenk requested an attorney, and on September 12, the sheriff informed the attorney that Brenk wanted to speak with him. That same date, officers approached Brenk at the jail and asked him to answer some questions about his wife's death. Brenk answered several questions, but then indicated that he wanted to talk to his attorney. On appeal, Brenk argued that the statement he made to police should have been suppressed because it was taken outside the presence of counsel and after counsel had been retained. This court rejected his argument on the ground that the invocation of the Sixth Amendment right to counsel does not constitute an invocation of the right to counsel under the Fifth Amendment. This court reasoned:

> In the recent case *McNeil v. Wisconsin*, 501 U.S. 171, 111 S. Ct. 2204 (1991), the Supreme Court held an accused's invocation of his Sixth Amendment right to counsel during a judicial proceeding does not constitute an invocation of the right to counsel derived by *Miranda v. Arizona*, 384 U.S. 436 (1966), from the Fifth Amendment's guarantee against compelled self-incrimination. As in the *McNeil* case, appellant invoked his Sixth Amendment right to counsel *for a judicial proceeding unrelated to the present charge*, but did not make any indication that he only wished to deal with the police through counsel and, therefore, did not invoke his Fifth Amendment right to counsel. *The Sixth Amendment right to counsel is case specific. Appellant's request for counsel to represent him at the revocation hearing applied only to the revocation matter and not to any other potential charges. Since appellant did not invoke his Fifth Amendment right to counsel by indicating that he wished to deal with the police only through counsel, the* Edwards *rule which appellant cites does not apply.*

311 Ark. at 587, 847 S.W.2d at 5-6 (citation omitted) (emphasis added).

In *Landrum v. State*, 326 Ark. 994, 936 S.W.2d 505 (1996), this court had yet another occasion to apply the holding in *McNeil*. The facts there revealed that Landrum was arrested for the rape and aggravated assault of Kristie Anderson on December 12, 1994. He was scheduled to be arraigned on those charges at 8:30 a.m., December 14. On December 13, Landrum was read his *Miranda* rights and questioned about the murder of Lucille Hassler. Landrum initially made no admissions about the murder; however, he agreed to take a polygraph examination later that evening. Landrum was again informed of his *Miranda* rights. Afterwards, Landrum was told that he had done poorly on the polygraph. He then asked to speak privately with a particular officer. Landrum agreed to tell the officer what he knew about the murder once he knew what to expect from the prosecuting attorney. The officer then gave Landrum the choice of whether he wanted to talk to the prosecuting attorney that night or wait until the next morning. Landrum elected to wait. The following morning, December 14, Landrum confessed to the murder of Ms. Hassler. Meanwhile, he missed his scheduled arraignment on the Anderson charges. Landrum argued on appeal that his confession should have been suppressed because it was taken in violation of his right to counsel. Specifically, he argued that had he been arraigned as scheduled on the morning of December 14, he would have had an attorney at the time of his confession. This court rejected Landrum's argument, relying on the Court's opinion in *McNeil*, 501 U.S. 171. This court held:

> Applying *McNeil* to the present case, even if Landrum had been arraigned on the Anderson charges on the morning of December 14, 1994, as scheduled, and an attorney had been appointed for that case, *he still could have been questioned regarding the murder of Ms. Hassler.* Landrum was repeatedly given his *Miranda* warnings and repeatedly gave valid waivers. There was simply no police misconduct and no connection between appellant's missing his scheduled arraignment in the Anderson matter and giving the confession in the present case. Therefore, the trial court properly refused to suppress the confession.

Landrum, 326 Ark. at 1003, 936 S.W.2d at 509 (emphasis added).

Applying the foregoing holdings to the facts of this case, we conclude that the trial court did not err in denying suppression of Appellant's confession. It makes no difference whether we analyze this issue under our constitution or the federal constitution, because we arrive at the same conclusion. An accused's right to counsel after a prosecution has commenced, guaranteed by both the Sixth Amendment and Article 2, section 10, is case specific and cannot be invoked once for all future prosecutions. Thus, Appellant's invocation of his right to counsel in the robbery case did not constitute an invocation of the right to counsel during his subsequent custodial interrogation regarding the murder. Furthermore, Appellant was fully informed of his right to counsel as guaranteed by the Fifth Amendment and Article 2, section 8, and he waived those rights prior to confessing to the murder. Accordingly, we affirm the judgment of conviction.

BNL EQUITY CORPORATION
(Formerly Known as United Arkansas Corporation),
BNL Financial Corporation (Formerly Known as
United Iowa Corporation), Wayne E. Ahart, Kenneth Tobey, and
Barry N. Shamas *v.* Myra Jo PEARSON, Paul Pearson,
and James Stilwell

99-78 10 S.W.3d 838

Supreme Court of Arkansas
Opinion delivered February 10, 2000
[Petition for rehearing denied March 16, 2000.*]

* THORNTON, J., would grant. SMITH, J., not participating.

Friday, Eldredge & Clark, by: *Larry W. Burks*, *Harry A. Light*, and *Ellen M. Owens*, for appellants.

Pender, McCastlain & Ptak, P.A., by: *James R. Pender* and *Michael J. Ptak*; and *Williams & Anderson LLP*, by: *Peter G. Kumpe*, *John E. Tull III*, and *Stephen B. Niswanger*, for appellees.

ROBERT L. BROWN, Justice. This is an appeal from an order by the trial court granting class certification to the

proposed class under Ark. R. Civ. P. 23. The appellants in this appeal are BNL Financial Corporation, the parent company (BNL); BNL Equity Corporation, a wholly-owned subsidiary of the parent; Brokers National Life Assurance Company, a wholly-owned subsidiary of BNL Equity Corporation (BNLAC); Wayne Ahart, chairman of the board of BNL Financial and BNLAC, and also chairman of the board of the predecessor companies; Kenneth Tobey, president of BNL Financial and BNLAC, and president of the predecessor companies; Barry Shamas, executive vice president of BNL Financial and BNLAC, and vice president of the predecessor companies. Prior to 1994, the predecessor company for BNL was United Arkansas Corporation (UAC) and the predecessor company for BNLAC was United Arkansas Life Assurance Company (UALAC). The appellees in this appeal are the plaintiffs and class representatives in the class action — Myra Jo Pearson, Paul Pearson, and James Stilwell.

On April 30, 1996, the Pearsons filed the original complaint against the appellees for violation of the Arkansas Securities Act and specifically for violation of Ark. Code Ann. § 23-42-106(a)(1) (Supp. 1999). The defendants moved the trial court to dismiss the case for lack of subject-matter jurisdiction or to transfer the case to chancery court because the equitable defense of laches had been asserted. The motion was denied. On May 19, 1998, Stilwell joined as a party plaintiff in the third amended complaint. The cause of action centered around misrepresentations or omissions in two public offering prospectuses and a scripted sales presentation. The first public offering sought purchasers of stock in UAC between the dates of May 1, 1989, and May 1, 1991. The second public offering also sought purchasers of stock in UAC. That offering commenced on May 1, 1991, and ended on May 1, 1992.

According to their complaint, the Pearsons purchased stock under both offerings on the dates of April 24, 1991; May 9, 1991; and February 20, 1992. Their total investment in UAC stock was $10,660. Stilwell purchased stock under the first offering on August 30, 1990. His total investment was $2,000. During the first offering, UAC raised $4,110,050 from 1,251 investors. Under the second offering, it raised $2,071,300 from 590 investors.

In their complaint, the Pearsons and Stilwell alleged pervasive deception by the appellants with regard to their entire investment

plan. Specifically, the Pearsons and Stilwell alleged five material misrepresentations or omissions of material facts that were made through the use of the two public offering prospectuses and the scripted sales presentation. Those misrepresentations or omissions were: (1) that UAC's primary business objective and principal business activity would be the ownership and operation of a life insurance subsidiary which would primarily offer customary forms of life insurance products; (2) that UAC and its life insurance subsidiary (UALAC) would hire and license captive sales agents and that the captive sales force would use a one-on-one sales method with clients and use personal visits by agents to homes and businesses; (3) that there were no then-existing opportunities known to UAC or its management to purchase any existing insurance company or other business; (4) that the key management team of UAC, primarily appellants Ahart, Shamas, and Tobey, had achieved a strong record of success and built four successful insurance holding companies; and (5) that appellant Tobey had nine or ten years experience in the life insurance business. According to the complaint, contrary to these representations, the primary business activity of the appellants has been dental insurance, a captive sales force was not utilized, opportunities to purchase existing insurance companies were available, and the experience of the management team in the insurance business was misrepresented. The plaintiffs tendered their shares of UAC to the company and prayed for class certification, damages, interest, and attorneys' fees.

The Pearsons and Stilwell moved the trial court to certify a class consisting of all of the purchasers of UAC stock under the first and second offerings. A hearing was held, and briefs were submitted by the parties.

On August 27, 1997, the trial court entered an order granting class certification.

I. Rule 23 Arguments

The primary thrust of the appellants' appeal is that these multiple lawsuits simply cannot be tried as a class action because the Rule 23 criteria of typicality, predominance, and superiority have not been met. *See* Ark. R. Civ. P. 23(a) & (b). The claims of the class representatives are atypical, according to the appellants. Moreover,

they contend that common issues of law or fact do not predominate over individual issues. They point out, in particular, that the knowledge of each investor about the investment purchased is an element of the alleged Securities Act violation under § 23-42-106(a)(1). Thus, individual trials on the knowledge issue would be a necessity. In short, they contend that a class action is not the superior means of resolving the multiple causes of action. As a secondary matter, they urge that should this court affirm the class certification, it should direct the trial court to provide more specifics on how the matter will be managed and tried.

We have held that the determination of whether Rule 23 criteria have been satisfied and whether the class action should proceed rests within the broad discretion of the trial court and will not be reversed absent an abuse of discretion. *See, e.g., Fraley v. Williams Ford Tractor and Equip. Co.*, 339 Ark. 322, 5 S.W.3d 423 (1999); *Mega Life & Health Ins. Co. v. Jacola*, 330 Ark. 261, 954 S.W.2d 898 (1997); *International Union of Elec., Radio & Mach. Workers v. Hudson*, 295 Ark. 107, 747 S.W.2d 81 (1988) (broad discretion in trial court extends to protection of absent class members but also to question of whether class action should proceed).

Before we examine the Rule 23 criteria, however, we feel constrained to address a common thread that runs throughout the appellants' appeal. The appellants contend that discussion of the Rule 23 criteria must, by necessity, bring into play some examination of the merits of the claims including their defenses, and that we should not rigidly enforce our proscription against a merits analysis at this stage. Without weighing the merits, the appellants posit that this court cannot decide whether the claims of the class representatives are typical or that claims of the class members are common and predominate.

The appellants, however, are plowing old ground in raising an issue that has clearly been decided by this court. Most recently, we said:

> We have held that neither the trial court nor the appellate court may delve into the merits of the underlying claim in determining whether the elements of Rule 23 have been satisfied. In that regard a trial court may not consider whether the plaintiffs will ultimately prevail, or even whether they have a cause of action.

> Thus, the propriety of a class action is "basically a procedural question." (Citations omitted.)

Fraley v. Williams Ford Tractor & Equip. Co., 339 Ark. at 335, 5 S.W.3d at 431 (1999). In *Fraley*, we held that the trial court could not examine the affirmative defenses of release and consent in deciding whether the class should be certified. The *Fraley* case was not an anomaly. This court has been consistent in holding that, whether the plaintiff class will ultimately prevail on the merits is immaterial to the issue of class certification. *See, e.g., Mega Life & Health Ins. Co. v. Jacola, supra; Farm Bureau Mut. Ins. Co. v. Farm Bureau Policy Holders & Members*, 323 Ark. 706, 918 S.W.2d 129 (1996).

We hold once more that we will not look to the merits of the class claims or to the appellants' defenses in determining the procedural issue of whether the Rule 23 factors are satisfied. We turn then to the Rule 23 criteria of typicality, predominance, and superiority, which we will discuss *seriatim*. We will conclude by addressing the management point.

a. Typicality

Rule 23(a)(3) requires that the "claims or defenses of the representative parties are typical of the claims or defenses of the class." The appellants vigorously contend that the amount of information provided to the Pearsons and Stilwell concerning their UAC investments defeats their ability to show that their knowledge is *typical* of the knowledge of all other class members, as Rule 23(a)(3) requires. They further argue that there are substantial questions relating to unique defenses applicable to the Pearsons and Stilwell that would not be applicable to other class members. Their argument is best summarized by a statement on this point from the Second Circuit Court of Appeals that a class certification is not appropriate when a putative class representative is subject to unique defenses that threaten to become the focus of the litigation. *See Gary Plastic Packaging v. Merrill Lynch*, 903 F.2d 176 (2nd Cir. 1990), *cert denied*. 498 U.S. 1025 (1991).

We disagree that typicality is lacking in the instant case. Our caselaw is clear that the essence of the typicality requirement is the conduct of the defendants and not the varying fact patterns and

degree of injury or damage to individual class members. *See Mega Life and Health Ins. Co. v. Jacola, supra*; *Direct Gen. Ins. Co. v. Lane*, 328 Ark. 476, 944 S.W.2d 528 (1997); *Farm Bureau Mut. Ins. v. Farm Bureau Policyholders, supra*; *Chequenet Systems, Inc. v. Montgomery*, 322 Ark. 742, 911 S.W.2d 956 (1995); *Summons v. Missouri Pac., R.R.*, 306 Ark. 116, 813 S.W.2d 240 (1991); *see also* I Herbert B. Newberg, *Newberg On Class Actions*, § 3.13, at 74-77 (3d ed. 1992).

We have stated that "claims are typical when they " 'arise from the same wrong allegedly committed against the class.' " *Farm Bureau Mut. Ins. Co.*, 323 Ark. at 711, 918 S.W.2d at 131, *quoting Chequenet Systems, Inc. v. Montgomery*, 322 Ark. at 749, 911 S.W.2d at 959. In the case before us, there is no question but that the class representatives have alleged a common wrong by the appellants that affects every class member. That conduct surrounds two misrepresented public offerings and the allegations that the appellants induced investors to invest in UAC with either false statements or omissions in the two offering prospectuses and the scripted sales presentation.

We are persuaded that the Pearsons and Stilwell have established that their claims are typical of all class members for certification purposes. There was no abuse of discretion by the trial court on this point.

b. Preponderance

The appellants next contend that Rule 23(b) requires that the trial court find that "the questions of law and fact common to the members of the class predominate over any questions affecting only individual members," and that that requirement has not been met. They urge that the predominance difficulty in this case relates to the three-year time period for the alleged wrongdoing and the varying degrees of knowledge of individual class members about the offerings during that time frame. For example, they show this court that the first offering covered the period between May 1, 1989, and May 1, 1991, and that the second offering covered the period between May 1, 1991, and May 1, 1992. They then argue that though the class representatives only base their claims on three documents (first offering prospectus, second offering prospectus, and a scripted sales presentation), there was a "host of other information" available to

prospective investors in UAC stock during this time. As examples, they direct us to the thirty-two regional meetings held for potential shareholders and investors; a 1991 annual report on the company; an April 10, 1992 letter and brochure sent to shareholders; and forty-four public filings with the Arkansas Insurance Commissioner relating to the insurance being offered by UAC and UALAC.

The appellants contend that the availability of this additional information to class members raises substantial individual questions of the degree of knowledge surrounding the UAC investment. They claim that by defining the class as all purchasers who purchased UAC's securities, the trial court's analysis was "too cursory" and ignored the critical element of each class member's cause of action, which is that purchaser's knowledge of what the investment entailed. They maintain that this court has previously refused to certify a class in two mass tort actions in the medical field where individual issues relating to knowledge predominated. *See Baker v. Wyeth-Ayerst Lab. Div.*, 338 Ark. 242, 992 S.W.2d 797 (1999); *Arthur v. Zearley*, 320 Ark. 273, 895 S.W.2d 928 (1995).

The starting point for our examination of the predominance issue is whether a common question of law or fact exists in this case for all class members. *See* Ark. R. Civ. P. 23(b); *Mega Life & Health Ins. Co. v. Jacola, supra. Lemarco, Inc. v. Wood*, 305 Ark. 1, 804 S.W.2d 724 (1991); *International Union of Elec., Radio & Mach. Workers, supra.* We conclude that it does. That common question relates to the allegations of fraudulent representations or omissions by the appellants in the two prospectuses and scripted sales presentation which induced the class members to buy the UAC securities. The next issue is whether this common question predominates over individual questions. We believe that it does.

This case, to our way of thinking, raises an issue comparable to that asserted in *Seeco, Inc. v. Hales*, 330 Ark. 402, 954 S.W.2d 234 (1997). There, the argument mounted by the defendants was that the class sought recovery on a fraud theory which required, as an element, proof of reliance on the misrepresentation by each class member. We held that even though lack of reliance by individual class members might be an argument raised by the defendants as a defense, the existence of the alleged scheme to defraud royalty owners was a common question for all class members. We concluded that the alleged scheme was the overarching issue and the

starting point in resolving the matter. We held to the same effect in *Fraley v. Williams Ford Tractor and Equip. Co., supra*, where the plaintiffs alleged that the equipment dealer had intentionally converted insurance premiums from the class members as the central fraudulent scheme. Proof of that scheme, we concluded, predominated over individual questions.

Similarly, in the case at hand, a common question of misrepresentation under § 23-42-106(a)(1) is the linchpin of every class member's case and must be resolved as the first step. Resolution of this issue predominates over potential individual issues relating to investor knowledge or affirmative defenses.

The medical mass tort cases, on the other hand, are readily distinguishable in that individual issues clearly predominated in those cases. In *Arthur v. Zearley, supra*, the thrust of the plaintiffs' cause of action in the Orthoblock cases was lack of informed consent under the Medical Malpractice Act, which necessarily brought into play the extent of the information imparted to each patient by his or her physician and that patient's medical condition. In *Baker v. Wyeth-Ayerst Lab. Div., supra*, which was a products-liability case related to prescriptions for differing combinations of diet drugs, the cause of action was premised on varying combinations of drugs taken by each patient as well as time of patient usage, quantities taken, and medical histories. Thus, in neither *Arthur v. Zearley, supra*, nor *Baker v. Wyeth-Ayerst Lab. Div., supra*, did a common fraudulent scheme predominate over the individual circumstances of each patient. In short, the information conveyed by the defendant physicians varied with each patient in the Orthoblock cases and, likewise, the prescriptions of the diet pills in *Baker*, were patient specific. This is categorically different from the matter at hand where all class members predicate their claims of § 23-42-106(a)(1) misrepresentations on the offering prospectuses and the scripted sales presentation.

We hold that the trial court correctly found that the wrongful conduct alleged is common to the class and that this issue of liability predominates over individual questions.

c. Superiority

Next, the appellants contest the trial court's conclusion "that a class action is superior to other available methods for the fair and efficient adjudication of the controversy" under Rule 23(b). The appellants' contention on this point is analogous to their predominance argument. They claim that the trial court's "simple" finding that the class was numerous and the claims small was not enough to satisfy the superiority requirement. They again contend that the knowledge issue for individual claimants will render a class action grossly inefficient and will undercut any notion of judicial economy. Only three claimants filed the lawsuit, they emphasize, and this hardly justifies the time and expense of a class action.

Again, we disagree. The avoidance of a multitude of suits lies at the heart of any class action certification. And though smallness of the claims may not be the sole basis for certifying a class, it is a factor to be considered in deciding superiority. *See International Union of Elec., Radio & Mach. Workers v. Hudson, supra.* Furthermore, here the alternative to a class action would be numerous joinders, wholesale intervention, and several hundred small lawsuits which would be totally inefficient and wholly unmanageable. Surely, neither the parties nor the judicial system would benefit from a legion of lawsuits that are numerous, duplicative, and time consuming. *See Snider v. Upjohn,* 115 F.R.D. 536 (E.D. Pa. 1987).

There is, too, the point that without the class action procedure, numerous meritorious claims might go unaddressed. *See Phillips Petroleum Co. v. Shutts,* 472 U.S. 797 (1985). Plus, by limiting the issues to be tried to the ones that are common to all class members such as the alleged scheme of misrepresentation or omission and common defenses, the trial court can achieve real efficiency. *See Seeco, Inc. v. Hales, supra.*

The appellants raise the spectre that with the potential for individual suits splintering on issues like investor knowledge, trial of the class action could unravel and turn into a procedural nightmare. We will not speculate on this eventuality. We simply hold that at this stage there is a common issue related to the appellants' conduct and liability that predominates over individual questions and renders a class action the superior method for litigating the matter.

[redacted] We are further convinced that a class action is fair to both sides. As we said in *Seeco, Inc. v. Hales, supra*, and *Lemarco, Inc. v. Wood*, 305 Ark. 1, 804 S.W.2d 724 (1991), even if the trial court eventually decides that individual claims have to splinter in bifurcated proceedings, resolution of the issue of wrongful conduct common to all class members can achieve real efficiency as a starting point. We also note that there is a real benefit to the appellants in a class action in that they have the opportunity to nip multiple claims in the bud with common defenses such as the investors' knowledge of the investment purchased, lack of the appellants' knowledge concerning the misrepresentations, and statute of limitations. We conclude that the superiority requirement has been met.

d. Management

Because we hold that the contested Rule 23 criteria have been satisfied, we now address the appellants' request for guidance from the trial court on how the trial of this matter will be managed.

[redacted] We first observe that the trial court in this case has a firm grasp of what is involved in this class action as is evidenced by its well-reasoned, twenty-four-page order granting class certification. The trial court determined that a class action was appropriate, after analyzing the Rule 23 factors that are at issue in this appeal. This court has recognized that the ability to manage and guide a class action is a necessary part of a trial court's decision to certify. *See International union of Elec., Radio & Mach. Workers v. Hudson, supra.* We further have alluded to the substantial power in the trial court to manage a class action. *Id.; see also Summons v. Missouri Pac., R.R., supra.*

[redacted] We have also noted the ability of the trial court to decertify should the action become too unwieldy. Rule 23 specifically contemplates that circumstance when it states: "An order under this section may be conditional and it may be altered or amended before the decision on the merits." Ark. R. Civ. P. 23(b). In the recent case of *Fraley v. Williams Ford Tractor & Equip. Co., supra*, we quoted from *Newberg On Class Actions*regarding the decertification option and the fact that this flexibility in the trial court is vital to "judicious use of the class device." *See I Newberg On Class Actions* § 7.47, at 146 (3d ed. 1992).

We have no hesitancy in placing the management of this class action in the trial court. That is what the rule contemplates, and, as already described, real efficiencies can be obtained by resolving common issues, both for the plaintiff class and the appellants. Were we, on the other hand, to speculate on class management or direct the trial court at this stage to present the parties with a management plan, we would be interfering in matters that clearly fall within the trial court's bailiwick.

II. Statute of Limitations

The appellants next take the trial court to task for refusing to consider their statute-of-limitations defense to class member claims as a class certification issue. The trial court was correct. We have made it clear in our cases that any analysis of the limitations defense at the class-certification stage is a merits determination, and, therefore, inappropriate. *See Fraley v. Williams Ford Tractor and Equip. Co., supra; see also Seeco, Inc. v. Hales, supra, quoting,* I Herbert B. Newberg, *Newberg On Class Actions* § 4.26, at 104 (3d ed. 1992). The trial court was correct in stating that consideration of the limitations defense amounted to delving into the merits.

Ironically, after stating the law correctly in its order, the trial court proceeded to decide the limitations question. It was error for the court to do so, and we will disregard its discussion of this issue.

III. General Issues

The appellants conclude that the trial court's certification order would require bifurcated trials. This raises, in their judgment, an issue under the Seventh Amendment to the United States Constitution. They contend that any process which contemplates using two different juries for one lawsuit to resolve common issues and individual issues violates this amendment.

We said in *Seeco, Inc. v. Hales, supra,* when a comparable issue was raised under Article 7, Section 2, of the Arkansas Constitution, that we did not know at the certification point whether more than one jury would ultimately be necessary. This continues to be our position. We will not speculate on the question of the

inevitability of bifurcated trials or issue an advisory opinion on an issue that well may not develop.

The appellants also raise the issue of subject-matter jurisdiction in connection with their affirmative defense of laches. Raising this defense, they maintain, requires dismissal or a transfer of the entire case to chancery court. This is the same issue that was presented to the trial court in 1996 and denied. The appellants are incorrect in their conclusion. It is true that laches is a defense cognizable only in equity when equitable relief is sought. *See Landreth v. First National Bank*, 45 F.3d 267 (8th Cir. 1995); *J.W. Reynolds Lumber Co. v. Smackover State Bank*, 310 Ark. 342, 836 S.W.2d 853 (1992). It is not true, however, that a defendant can assert an equitable defense to a complaint at law and thereby divest a plaintiff of jurisdiction to have his claim heard in circuit court. The appellants draw our attention to *Schultz v. Rector Phillips Morse, Inc.*, 261 Ark. 769, 522 S.W.2d 4 (1977), where we held that the affirmative defense of laches was applicable to a claim under the predecessor statute to § 23-42-106. But in *Schultz*, the plaintiffs initiated their suit in chancery court. That is altogether different from the situation we have before us.

We conclude that the trial court did not abuse its discretion in any respect in certifying this class.

Affirmed.

THORNTON, J., dissents.

RAY THORNTON, Justice, dissenting. I am concerned that the court has opened the door to class actions without requiring the careful analysis that should be given before certification. The court once held that "with regard to Rule 23 motions, we have specifically stated that we will follow the federal rules in class actions" *Farm Bureau Mut. Ins. v. Farm Bureau Policy Holders*, 323 Ark. 206, 918 S.W.2d 129 (1996). However, we have eliminated the requirement under federal rules that there must be a rigorous analysis for certification as outlined in *General Telephone Company of South West v. Falcon*, 457 U.S. 147 (1982). *See Mega Life & Health Ins. Co. v. Jacola*, 330 Ark. 261, 954 S.W.2d 898 (1997).

In my view, we are approaching the point that class actions have been so extended that they elevate efficiency over legal principles. While I respectfully dissent from the direction the majority is

taking, I recognize that the grounds for my dissent are being eroded by the cases we have recently decided. I respectfully dissent.

Lona McCASTLAIN *v.* Barbara ELMORE

99-541 10 S.W.3d 835

Supreme Court of Arkansas
Opinion delivered February 10, 2000

Sloan-Rubens, by: *Kent J. Rubens*; and *Stuart & McCastlain*, by: *J. Michael Stuart*, for appellant.

Appellee, pro se.

ANNABELLE CLINTON IMBER, Justice. This is an election-contest case. On appeal, Lona Horne McCastlain argues that the trial court erred when it dismissed Barbara Elmore's complaint without prejudice. Ms. McCastlain contends that the trial court should have dismissed Ms. Elmore's election contest with prejudice because the statutory time for filing an election-contest complaint had expired. We agree that the complaint should have been dismissed with prejudice, and affirm the trial court's order as modified.

Lona Horne McCastlain and Barbara Elmore were candidates in the 1998 general election for the office of Prosecuting Attorney in the Seventeenth Judicial District (West). On November 13, 1998, the Lonoke County Board of Election commissioners certified the election results and declared Ms. McCastlain the winner by a vote of 6,651 to 6,650, a margin of only one vote. Ms. Elmore filed an election-contest complaint on December 2, 1998, against Lona McCastlain, Myrtle Finch in her official capacity as Lonoke County Clerk, the Lonoke County Board of Election Commissioners and Clayton Shurley, Mickey Stumbaugh, and Jimmie Taylor in their official capacities as Lonoke County Election Commissioners. The complaint signed by Ms. Elmore and her attorneys reflected the following jurat executed by the notary public: "Subscribed and Sworn to before me this 2nd day of December, 1998."

Ms. McCastlain initially asserted that the court was without jurisdiction to hear the matter and moved for dismissal of the complaint pursuant to Ark. R. Civ. P. 12(b)(1). Specifically, Ms. McCastlain alleged that Ms. Elmore failed to timely file an affidavit in which she verified that she believed the statements in her complaint to be true, as required by Ark. Code Ann. § 7-5-801(d) (Repl. 1993), thereby depriving the trial court of subject matter jurisdiction. The trial court held a hearing and ruled that Ms. Elmore's notarized signature and the "statement of verification" quoted above satisfied the affidavit requirement in section 7-5-801(d) and denied Ms. McCastlain's motion to dismiss.

The trial court scheduled the case for trial on May 18, 1999; however, on May 10, 1999, Ms. McCastlain's attorneys were notified by Ms. Elmore's attorneys that she wished to dismiss her complaint. That same day, the attorneys for both parties advised the trial court's case coordinator that Ms. Elmore was dismissing her complaint and that an order of dismissal would be sent to the trial court for its signature. The attorneys also confirmed with the case coordinator that the two days scheduled for trial, May 18 and 19, 1999, were released. Later that day, Ms. McCastlain's attorneys were notified that Ms. Elmore had changed her mind and would not dismiss her complaint. One of Ms. Elmore's attorneys indicated that he would seek the court's permission to withdraw, and her other attorney contacted the trial court's case coordinator about keeping the trial dates previously released. Following a conference call with the attorneys on May 17, 1999, the trial court entered an order on

May 20, 1999, in which it ruled that Ms. Elmore could not withdraw her request for a dismissal or nonsuit. However, the trial court dismissed Ms. Elmore's complaint without prejudice and gave her the option to refile her election contest. Ms. McCastlain now appeals and asserts two grounds: (1) it was error for the trial court to dismiss Ms. Elmore's complaint without prejudice; and (2) it was error for the trial court to deny the motion to dismiss for failure to comply with the affidavit requirement in section 7-5-801(d). Because we find merit in Ms. McCastlain's first assertion of error, we need not address her second argument.

The right to contest an election is purely statutory. *Casey v. Burdine*, 214 Ark. 680, 217 S.W.2d 613 (1949). Because election contests are special proceedings, the rules of civil procedure do not apply. *See* Ark. R. Civ. P. 81(1999); *Womack v. Foster*, 340 Ark. 124, 8 S.W.3d 854 (2000); *Rubens v. Hodges*, 310 Ark. 451, 837 S.W.2d 465 (1992). The provision requiring an election contest to be filed within a certain number of days of the certification is mandatory and jurisdictional. *See Jenkins v. Bogard*, 335 Ark. 334, 980 S.W.2d 270 (1998); *Gay v. Brooks*, 251 Ark. 565, 473 S.W.2d 441 (1971); *Moore v. Childers*, 186 Ark. 563, 54 S.W.2d 409 (1932); *Gower v. Johnson*, 173 Ark. 120, 292 S.W. 382 (1927). We have also held that "[T]he right to contest a[n] ... election is a statutory proceeding, the purpose of which is to furnish a summary remedy and to secure a speedy trial." *Gower v. Johnson,* 173 Ark. at 122, 292 S.W. at 383. In light of the fact that such statutory proceedings are special and summary in nature, the statutory requirements to secure jurisdiction must be strictly observed, and the jurisdictional facts must appear on the face of the proceedings. *Casey v. Burdine, supra.*

The General Assembly has specifically mandated that election-contest proceedings be expedited with abbreviated deadlines for initiating an election contest and appealing a trial court's determination of an election. *See* Ark. Code Ann. § 7-5-801 (Repl. 1993)(twenty-day time period for filing a complaint); Ark. Code Ann. § 7-5-810 (Supp. 1999)(seven-day time period for filing an appeal). Statutory provisions also require the trial courts and the Supreme Court to hear and decide election-contest cases promptly. *See* Ark. Code Ann. § 7-5-804 (Supp. 1999)("It shall be the duty of the Supreme Court to advance the hearing of any such appeal."); Ark. Code Ann. § 7-5-802 (Repl. 1993)(requiring circuit court to "proceed at once" to hear the case, and the case shall be given

"precedence and be speedily determined"). In this regard, we have noted the legislature's mandate for speedy determination and this court's condemnation of "fishing expeditions" in the context of election contests. *See Cartwright v. Carney*, 286 Ark. 121, 690 S.W.2d 716 (1985).

Additionally, Arkansas law does not allow an election-contest complaint that was deficient when filed to be later amended and corrected to allege a cause of action after the twenty-day time period for filing the complaint has elapsed. *Cowger & Stewart v. Mathis*, 255 Ark. 511, 501 S.W.2d 212 (1973); *Jones v. Etheridge*, 242 Ark. 907, 416 S.W.2d 306 (1967); *Wheeler v. Jones*, 239 Ark. 455, 390 S.W.2d 129 (1965); *see also, King v. Whitfield*, 339 Ark. 176, 5 S.W.3d 21 (Glaze, J., concurring). Furthermore, where a complaint fails to allege sufficient facts to state a cause of action in an election contest, it may not be subsequently amended by pointing to facts outside the complaint after the time for contesting the election has expired. *King v. Whitfield, supra*; *Rubens v. Hodges, supra*; *see also Wheeler v. Jones, supra*. These cases demonstrate a strict adherence to the statutory time constraints articulated for election contests.

Finally, we have previously addressed the applicability of the savings statute in the context of an election contest. *Casey v. Burdine, supra*. Pursuant to the savings statute, a claimant may refile an action within one year after taking a nonsuit upon the original action brought within the statutory limitations period. Ark. Code Ann. § 16-56-126 (1987). In *Casey v. Burdine*, we specifically held that the savings statute applies only to actions governed by a general statute of limitations, and not to proceedings, such as election contests, in which the right to file is limited to a very short period:

> Both the continuity of administration, as well as the sanctity of the acts of a person holding office and exercising its powers, require the strict enforcement of a short period for contesting the right to hold the office.

Casey v. Burdine, 214 Ark. at 683, 217 S.W.2d at 615. Likewise, the election contest in this case must be governed by our holding in *Casey v. Burdine* because the statutory time limit for filing an election contest is jurisdictional. We also note that the case law cited by Ms. Elmore, *Walton v. Rucker*, 193 Ark. 40, 97 S.W.2d 442 (1936), does not address the applicability of the savings statute to election-

contest proceedings, and is therefore inapposite.[1]

We have also refused to permit nonsuits in analogous special proceedings where the legislature has expressly provided for expedited proceedings. *See In re Adoption of Martindale*, 327 Ark. 685, 940 S.W.2d 491 (1997)(holding that a petition to set aside an adoption decree could not be dismissed without prejudice); and *Screeton v. Crumpler*, 273 Ark. 167, 617 S.W.2d 847 (1981)(holding that a will contestant could not take a nonsuit). In *Screeton v. Crumpler*, we stated:

> The appellant's brief implies that the dismissal should have been without prejudice, but we do not think that procedure . . . was available. A proceeding to probate a will is a special proceeding, not an "action" as that term is ordinarily used. It does not constitute a civil action within [the Arkansas Rules of Civil Procedure], Rules 2 and 3. A will contestant cannot take a nonsuit under Rule 41, because such a contest is not an independent proceeding in itself. It would seriously disrupt the administration and distribution of estates if a will contest could be dismissed, voluntarily or without prejudice, and refiled at some indefinite later date. Hence the dismissal in the probate court was necessarily with prejudice.

Screeton v. Crumpler, 273 Ark. at 168, 617 S.W.2d at 848 (citations omitted). While these cases involve probate proceedings, the principles enunciated therein apply equally to election-contest proceedings. If an election contest could be dismissed voluntarily or without prejudice, it would seriously disrupt the administration of government and would effectively subvert the time limitations established by the legislature. We therefore hold that Ms. Elmore's complaint should have been dismissed with prejudice.

Affirmed as modified.

THORNTON, J., not participating.

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[1] Although not cited by the parties, our decisions in *Spires v. Election Comm'n Union County Ark.*, 302 Ark. 407, 790 S.W.2d 167 (1990) (*Spires I*) and *Spires v. Compton*, 310 Ark. 431, 837 S.W.2d 459 (1992) (*Spires II*) are also inapposite for the same reason.

Joe McCUTCHEN *v.* J. Fred PATTON *et al.*

99-718 10 S.W.3d 439

Supreme Court of Arkansas
Opinion delivered February 10, 2000

Oscar Stilley, for appellant.

Daily & Woods, P.L.L.C., by: *Jerry L. Canfield* and *Leigh M. Chiles*, for appellees.

LAVENSKI R. SMITH, Justice. Appellant Joe McCutchen appeals a summary judgment entered by the Sebastian County Chancery Court dismissing his complaint. McCutchen

filed suit against appellees J. Fred Patton, the City of Fort Smith, and Mayor Ray Baker. McCutchen alleged that the appellees illegally created a city agency and improperly appropriated city funds for use by that agency. The appellees contended in response that the entity in question, known as the "Multi-Ethnic Committee," was not a department or other city agency comprehended within Ark. Code Ann. §14-48-124 (Repl. 1998). Jurisdiction lies with this court pursuant to Ark. Sup. Ct. R. 1-2(a)(8). We affirm.

Facts

Sometime in 1998, Mayor Baker created and appointed members to an advisory committee identified as the "Multi-Ethnic Committee." On December 28, 1998, appellant filed the instant action. The appellees responded by answer on January 15, 1999. Following their answer, the appellees filed a motion to dismiss supported by affidavits on January 20, 1999. Appellant filed a response to the dismissal motion and filed a cross-motion for summary judgment on his own behalf. The trial court treated appellees' motion to dismiss as a motion for summary judgment and granted appellees' motion by order entered March 4, 1999. Appellant timely filed a notice of appeal. On appeal, McCutchen contends that the trial court erred in its construction of Ark. Code Ann. §14-48-124.

Standard of Review

The parties filed opposing motions for summary judgment and thus, in essence, agreed that there are no material facts remaining. Summary judgment, therefore, was an entirely appropriate means for resolution of this case. As we have oft stated, summary judgment is to be granted by a trial court only when it is clear that there are no genuine issues of material fact to be litigated, and the party is entitled to judgment as a matter of law. *Mashburn v. Meeker Sharkey Financial Group, Inc.*, 339 Ark. 411, 5 S.W.3d 469 (1999). 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. 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 of material fact and that the moving party is entitled to judgment as a matter of law. Ark. R. Civ. P. 56; *Estate of R. Donley v. Pace Indus.*, 336 Ark. 101, 984 S.W.2d 421 (1999).

Committee as an Agency of the City

In that no facts are in question, the only issue is whether one party was entitled to judgment as a matter of law. The disposition of the case thus depends upon the meaning of Ark. Code Ann. § 14-48-124 [Creation of new departments, etc.] which controls the creation of "Departments, offices, employments, boards, authorities, commissions and agencies...." The statute provides, in pertinent part, as follows:

> (a)(1) The board of directors may from time to time, by ordinance, create, reorganize, or abolish, except as provided in § 14-48-102, any municipal departments, offices, employments, boards, authorities, commissions, and agencies and fix the term of employment and compensation of each appointee.
>
> (2) The city administrator, with the approval of the board, shall appoint the personnel to serve in the departments, offices, employments, boards, authorities, commissions, and agencies.
>
> (b)(1) The board also in the exercise of its discretion, by ordinance, may consolidate the office of the city treasurer with the office of the city clerk or such other department, office, or position as the board, by ordinance, may charge with the responsibility of administering the financial affairs of the city.

Appellant contends that the statute applies to the Multi-Ethnic Committee. Appellant asserts that the mayor could not lawfully create the committee because subsection (a) of the statute only authorizes the city board of directors, by ordinance, to establish new subdivisions of city government.

We have not previously interpreted this statute. When interpreting a statute we construe it just as it reads, giving the words their ordinary and usually accepted meaning in common language. *Green v. Mills*, 339 Ark. 200, 5 S.W.3d 493 (1999). In order for the statute to apply to the Multi-Ethnic Committee, the committee

must be shown to constitute a subdivision of city government listed in subsection (a)(1).

Based on the proof submitted below, we hold that the trial court correctly granted appellees' motion for summary judgment. The evidence, even when viewed in a light most favorable to the appellant, shows that the committee is not an entity covered by this statute. Appellees submitted affidavits of Kara Bushkuhl, Ray Baker, Cynthia Remler, and a copy of City Board Resolution No. R-10-99 attached to their motion to dismiss. Bushkuhl, Director of Finance for the City of Fort Smith, stated that the Board of Directors appropriated $20,000 related to the Multi-Ethnic Committee but that neither the mayor nor any other appellee had authority to authorize the expenditure of the funds. Mayor Baker stated that he has on other occasions sought input from citizens through advisory committees including the "Community Crime Task Force," and the "Water Supply Task Force." He stated that the Board of Directors were advised of the committee as early as 1995. He indicated that the committee is an advisory group intended to give citizen input on health, safety, and welfare issues related to multiple ethnic groups. City Board Resolution No. R-10-99 acknowledged and commended the mayor for seeking community input. It further stated that no funds had been expended nor was there any "currently identified project for the expenditure of the appropriated funds."

In response, the appellant submitted no affidavit, document, discovery response, or other proof but relied entirely upon legal argument and conjecture based upon the appellees' factual submissions and appellant's interpretation of subsection (a)(1). The appellant failed to provide any evidence that the Multi-Ethnic Committee constituted anything other than a mere citizen advisory group with no authority to officially act on behalf of the city or expend its resources. Given the undisputed facts, we cannot say the trial court erred in granting appellees' motion for summary judgment.

Affirmed.

Sonny EADS and Viki Lynn Eads *v.* Bill (Rick) HALL; Jeanita Ives; Laura Bohannon; and Joyce L. Lindsey d/b/a Century 21 Southgate Realty

99-1247 10 S.W.3d 441

Supreme Court of Arkansas
Opinion delivered February 10, 2000

J. Hudson Shepard, for appellants.

Davis, Cox & Wright, PLC, by: *Mark W. Dossett*, for appellees.

PER CURIAM. The appellees, who are Bill (Rick) Hall, Jeanita Ives, Laura Bohannon, and Joyce L. Lindsey d/b/a Century 21 Southgate Realty, move this court for costs and attorney's fees pursuant to Ark. R. App. P.—Civil 11. The history of this matter reveals that the appellees' motion to dismiss the appellants' appeal was granted on November 11, 1999, and the mandate was issued to the parties. On December 30, 1999, appellants moved this court for a rule on clerk to have their appeal accepted. This court denied that motion on January 20, 2000. On January 6, 2000, which was prior to this court's denial of that motion, the appellees moved for attorney's fees and costs under Appellate Rule 11 on the basis that the appellants' motion for rule on clerk was frivolous. The appellants tendered their response on January 27, 2000, but offer no defense to the allegation that the motion for rule on clerk regarded a matter already decided by this court. Because the response was filed within twenty-one days of the motion, it was timely filed under Ark. R. App. P.—Civil 11(d), and we accept it as filed.

Rule 11(d) of our Rules of Appellate Procedure—Civil does provide for sanctions, including attorney's fees, when a pleading, motion or other paper is signed by an attorney and is not well

grounded in fact or warranted by existing law or made in good faith. Under the rule, this court shall impose sanctions under the following circumstances:

> (b) The Supreme Court or the Court of Appeals shall impose a sanction upon a party or attorney or both for (1) taking or continuing a frivolous appeal or initiating a frivolous proceeding, (2) filing a brief, motion, or other paper in violation of subdivision (a) of this rule, (3) prosecuting an appeal for purposes of delay in violation of Rule 6-2 of the Rules of the Supreme Court and Court of Appeals, and (4) any act of commission or omission that has an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. For purposes of this rule, a frivolous appeal or proceeding is one that has no reasonable legal or factual basis.

Ark. R. App. P.—Civil 11(b).

Unlike Ark. R. Civ. P. 11, which provides for sanctions under comparable circumstances before the trial court, Appellate Rule 11 does not require a twenty-one day safe-harbor period during which the offending writing may be withdrawn by opposing counsel.

We grant the motion for costs and attorney's fees. When the motion to dismiss the appellants' appeal was before this court, the timeliness of their notice of appeal and the filing of the record were precisely the issue. The appellants have offered no explanation for why they filed a motion for rule on clerk for us to accept the record for appeal purposes after their appeal had been dismissed and the mandate handed down.

Accordingly, we conclude that the appellants' motion is frivolous in that it is not well grounded in fact or warranted by existing law and, as a result, attorneys' fees and costs should be awarded. *See Jones v. Jones*, 329 Ark. 320, 947 S.W.2d 6 (1997) (per curiam). Also, by filing the motion there has been a needless increase in the cost of litigation to the appellees. *Id.*

The appellees are directed to furnish this court with information relating to actual costs and expenses, including reasonable attorneys' fees. Upon receiving the same, this court will award appropriate costs and attorney's fees.

Vernon WOODALL *v.* HUNNICUTT CONSTRUCTION;
Employer's Insurance of Wausau, Carrier

99-858 12 S.W.3d 630

Supreme Court of Arkansas
Opinion delivered February 17, 2000

Daniel E. Wren, for appellant.

Michael E. Ryburn, for appellees.

WH. "DUB" ARNOLD, Chief Justice. This case is before us on petition for review from the Arkansas Court of Appeals, pursuant to Ark. Sup. Ct. R. 1-2(e). Vernon Woodall appealed the Workers' Compensation Commission's denial of benefits to him, arguing on appeal that (1) there is no substantial evidence to support the Commission's decision and (2) the fact that appellant's co-worker was not injured is not evidence of appellant's impairment. The Court of Appeals agreed with appellant's arguments and reversed and remanded for an award of benefits in *Woodall v. Hunnicutt Constr.*, 67 Ark. App. 196, 994 S.W.2d 490 (1999).

Appellee, Hunnicutt Construction, then petitioned this Court for review, contending that the Court of Appeals erred in using the wrong standard of review and in substituting its own judgment on credibility for the Commission's decision on credibility. Appellee asserts that the Court of Appeals, by its holding, created an exception for future drug-intoxication cases. We granted appellee's petition for review pursuant to Ark. Sup. Ct. R. 1-2(e). We agree with appellee that the Court of Appeals should be reversed, and we affirm the Workers' Compensation Commission's denial of benefits to appellant.

Standard of Review

Upon a petition for review, we consider a case as though it had been originally filed in this Court. *White v. Georgia-Pacific Corp.*, 339 Ark. 474, 6 S.W.3d 98 (1999); *Burlington Indus. v. Pickett*, 336 Ark. 515, 988 S.W.2d 3 (1999). We view the evidence in a light most favorable to the Commission's decision, and we uphold that decision if it is supported by substantial evidence. *Id.*; *Deffenbaugh Indus. v. Angus*, 313 Ark. 100, 852 S.W.2d 804 (1993). We will not reverse the Commission's decision unless we are convinced that fair-minded persons with the same facts before them could not have reached the conclusions arrived at by the Commission. *Pickett*, 336 Ark. 515, 988 S.W.2d 3; *ERC Contr. Yard & Sales v. Robertson*, 335 Ark. 63, 977 S.W.2d 212 (1998).

Facts and Procedural History

On June 5, 1997, while assisting in the construction of a roof, appellant fell when a scaffold collapsed. Appellant, a thirty-seven-year-old carpenter, sustained bilateral calcaneal fractures to both of his heels as a result of the fall. When appellant went to the emergency room for treatment, his urine sample was tested for the presence of illegal drugs. That screen showed the presence of cocaine metabolites. At the hearing on December 16, 1997, appellant admitted that he had smoked a rock of crack cocaine at approximately 6 p.m. the night before the accident.

Appellant testified that he and his co-worker, James Summerhill, were in the process of framing a house on June 5, 1997. According to appellant's testimony, he told Summerhill to put

together scaffolding so that they could "fly the ridge" and proceed in putting the roof together. Appellant testified that he did not check the scaffolding to make sure Summerhill had built it strong enough to support appellant's weight because Summerhill has "always built good scaffolding and we never had ... problems."

Summerhill testified that he had nailed down one side of the scaffolding to the wall but not the other side when appellant, who was Summerhill's supervisor, said it would be all right. At that point, appellant and Summerhill proceeded to "fly the ridge." Summerhill testified that, in his opinion, he felt it was safe to do. When the board that the two workers were standing on fell off the scaffolding, appellant fell down to the ground, but Summerhill, being on the other side of the board, was thrown up eleven feet. Summerhill was thrown to the roof, where he landed uninjured.

In reversing the Administrative Law Judge's finding that appellant had rebutted the presumption set out in Arkansas Code Annotated § 11-9-102(5)(B)(iv) (Repl. 1996), the Commission found that, on *de novo* review of the testimony, it believed that appellant failed to prove by a preponderance of the credible evidence that his accident and injury were not substantially occasioned by the use of cocaine. The Commission stated that the greater weight of the credible evidence established that appellant's accident was attributable to his impaired judgment. The Commission opined that appellant's "actions of climbing up on the scaffolding which was not nailed down on his end was a sheer disregard for his own personal safety which strongly suggests impairment resulting from drug use."

Merits of the Case

Arkansas Code Annotated § 11-9-102(5)(B)(iv)(b) provided that "The presence of alcohol, illegal drugs, or prescription drugs used in contravention of a physician's orders shall create a rebuttable presumption that the injury or accident was substantially occasioned by the use of alcohol, illegal drugs, or prescription drugs used in contravention of physician's orders." Whether the rebuttable presumption is overcome by the evidence is a question of fact for the Commission to determine. *Weaver v. Whitaker Furniture Co.*, 55 Ark. App. 400, 935 S.W.2d 584 (1996). Further, when reviewing findings of fact made by the Workers' Compensation Commission,

the appellate court must affirm if the Commission's decision is supported by substantial evidence. *Id.*

[redacted] Again, on appellate review of workers' compensation cases, the Supreme Court veiws the evidence and all reasonable inferences deducible therefrom in the light most favorable to the findings of the Commission. *White v. Georgie-Pacific Corp., supra.* When, as here, the Commission denies coverage because the claimant failed to meet his burden of proof, the substantial-evidence standard of review requires that we affirm the Commission's decision if its opinion displays a substantial basis for the denial of relief.

[redacted] Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Minnesota Mining & Mfg. v. Baker,* 337 Ark. 94, 989 S.W.2d 151 (1999). The question is not whether the evidence would have supported findings contrary to the ones made by the Commission; there may be substantial evidence to support the Commission's decision even though we might have reached a different conclusion if we sat as the trier of fact or heard the case *de novo. Id.*

[redacted] Again, whether the rebuttable presumption previously set out in Ark. Code Ann. § 11-9-102(5)(B)(iv)(b) (and currently set out in Ark. Code Ann. § 11-9-102(4)(B)(iv)(b) (Supp. 1999)) is overcome by the evidence is a question of fact for the Commission to determine. *See Weaver, supra.* Further, it is the function of the Commission to determine the credibility of the witnesses and the weight to be given to their testimony. When, as here, the Commission denies coverage because the claimant failed to meet his burden of proof, the substantial-evidence standard of review *requires* that we affirm the Commission's decision if its opinion displays a substantial basis for the denial of relief.

[redacted] There is no question in this case that substantial evidence existed for the Commission to deny relief. Unlike many of the drug-intoxication workers' compensation cases, there is no question in this case whether the claimant did or did not have the presence of an illegal drug in his blood. He both readily admitted smoking crack cocaine the night before the incident and admitted that he tested positive for a drug screen on the date of the accident. This automatically raises the presumption that drugs were the cause of

the accident and placed the burden on the injured employee to prove that they were not.

Because our standard of review is whether reasonable men could have reached the same conclusion as the Commission, this case must be affirmed. The Court of Appeals reasoned that because appellant's co-worker, Mr. Summerhill, chose to climb on the rickety scaffolding when he was *not* under the influence of drugs, then the Commission's finding that appellant's decision to do the same was illogical because he was under the influence of drugs, is indicative of "inconsistent logic" on the part of the Commission. In fact, it is *not* indicative of inconsistent logic, but is in fact quite logical. The claimant was Mr. Summerhill's supervisor, and had in fact directed Mr. Summerhill to cease nailing the scaffolding, stating that it would be "all right." Regardless of the claimant's presence of mind, Mr. Summerhill was under *his* direction.

The bottom line is that the appellant was on a rickety scaffolding and had drugs present in his bloodstream. He fell and was injured. The only question we need address is whether the accident could have happened because of the use of illegal drugs. The answer is, of course, that it could have happened just the way the Commission found. Because of the presumption created by former Ark. Code Ann. § 11-9-102(5)(B)(iv)(b), regarding drug use of the injured worker, which the Commission determined appellant failed to rebut, coupled with this Court's standard of review in workers' compensation cases wherein we do not hear the case *de novo*, but rather affirm the Commission's decision if reasonable men could have reached the same conclusion as the Commission, we must affirm the Commission's denial of benefits to appellant, thereby reversing the Court of Appeals decision in *Woodall v. Hunnicutt Constr.*, 67 Ark. App. 196, 994 S.W.2d 490 (1999).

Affirmed.

Teddy GRAHAM *v.* Larry NORRIS, Director,
Arkansas Department of Correction

98-1124 10 S.W.3d 457

Supreme Court of Arkansas
Opinion delivered February 17, 2000

Appellant, pro se.

Winston Bryant, Att'y Gen., by: *Darnisa Evans Johnson*, Sr. Ass't Att'y Gen., for appellee.

TOM GLAZE, Justice. This appeal represents the last in a trilogy of cases in which inmates contend they were unlawfully denied meritorious good time when the General Assembly enacted what Teddy Graham contends to be *ex post facto* legislation. *Duncan v. State*, 337 Ark. 306, 987 S.W.2d 721 (1999); *Ellis v. Norris*, 333 Ark. 200, 968 S.W.2d 609 (1998). Our court took jurisdiction of this case to interpret certain Arkansas acts and statutes that deal with prisoners' meritorious good time and to determine if those laws, or the State's application of them, have violated Arkansas's or the United States' *Ex Post Facto* Clauses. Ark. Sup. Ct. R. 1-2(b).

In June of 1986, appellant Teddy Graham was convicted of aggravated robbery and of being a felon in possession of a firearm and given a forty-year sentence. While serving his sentence, Graham was transferred pursuant to the Interstate Corrections Compact (Ark. Code Ann. § 12-49-101 (Repl. 1999)) to the Ellis County Jail in Arnett, Oklahoma; during his confinement there, he performed volunteer work authorized under Ark. Code Ann. § 12-30-408 (1987). Before its repeal, § 12-30-408 provided that inmates who engaged in volunteer work shall earn an additional day of *meritorious good time* for every day engaged in the volunteer time. (Emphasis added.)

Section 12-30-408, the law under which Graham earned 544 days of meritorious good time, was repealed in 1989 by Act 503. That Act reads as follows:

> SECTION 1. Arkansas code 12-30-408 is hereby repealed.
>
> * * *
>
> SECTION 4. Emergency. It is hereby found and determined by the General Assembly that Arkansas Code 12-30-408 establishes good time credit for contractual and volunteer work by inmates at a higher rate than is provided for job assignments within the Department of Correction; that this law creates inequities that are detrimental to the overall operations of the Department of Correction; that Arkansas Code 12-29-202 makes adequate provision for good time awards; and that this Act should be given immediate effect in order to clarify the law as soon as possible.

Although § 12-30-408 had been repealed in 1989, Graham performed and accumulated 544 days of volunteer work at the Oklahoma facility during the period between February 1, 1995, and July 29, 1996. Graham claimed entitlement to these days under § 12-30-408 because that statute was in effect at the time he committed the crimes for which he was convicted in 1986. Sometime in 1996, he first petitioned the Arkansas Records Supervisor of the Diagnostic Unit to credit his records with 544 days of meritorious good time. This request was denied, and his next request was again rejected by the warden of the unit. Graham's request was finally denied by the Assistant Director of Institutional Services on the grounds that § 12-30-408 had been repealed.

On January 9, 1998, Graham filed a petition for declaratory judgment and writ of mandamus in the Jefferson County Circuit Court where he claimed the 544 days in good-time credit, and contended that Act 503, which repealed § 12-30-408, violated the *Ex Post Facto* Clauses of the Arkansas and United States Constitutions. On June 29, 1998, the circuit court denied Graham's claims for relief because the good-time credit he sought resulted from a program which was available to an inmate at the State's discretion and was thus not mandatory. For this reason, the trial court held that the State's withdrawal of that volunteer-work program and good time did not violate the *Ex Post Facto*Clauses.

In this appeal, Graham continues his argument that Act 503 violated the *Ex Post Facto* Clauses because its retroactive application worked to his disadvantage by extending his period of confinement before he is eligible for release or parole and by increasing his punishment. He also cites Ark. Code Ann. § 16-93-607(4) (1987), and submits this statute mandates that he must serve three-fourths of his sentence, with credit for good-time allowances, before he can be released on parole. Section 12-30-408's repeal, he argues, eliminated his ability to reduce his maximum term.

[redacted] Graham's arguments are almost identical to the ones we dealt with in our recent *Ellis* and *Duncan*decisions. In *Ellis*, the prisoner challenged as *ex post facto* Acts 536 and 558 of 1993, which repealed "good-time allowances" provided in Act 273 of 1987. Act 273 permitted prisoners extra good time when they completed rehabilitative programs or performed special jobs. Prisoner Ellis premised his constitutional argument on the case of *Weaver v. Gra-*

ham, 450 U.S. 24 (1981), where the Supreme Court pointed out 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." *Weaver,* 450 U.S. at 29. Our court rejected Ellis's arguments, but, in doing so, distinguished *Weaver* from Ellis's situation because the *Weaver* case dealt with *automatic* good time, rather than the *discretionary* good time Ellis would earn under Arkansas's law. In disposing of Ellis's arguments, our court further discussed the Supreme Court's more recent case of *California Department of Corrections v. Morales*, 514 U.S. 499 (1995). There, the Supreme Court observed that its language in the *Weaver* opinion was inconsistent with its decision in *Collins v. Youngblood*, 497 U.S. 37 (1990), and in a footnote the court stated the following:

> Our opinions in *Lindsey, Weaver* and *Miller* suggested that enhancements to the measure of criminal punishment fall within the *ex post facto* prohibition because they operate to the "disadvantage" of the accused offenders. [citations omitted] *But that language was unnecessary to the results of those cases and is inconsistent with the framework developed in* Collins v. Youngblood. [citation omitted] [emphasis added]. After *Collins* the focus of the *ex post facto* inquiry is not on whether a legislative change produces some ambiguous sort of "disadvantage," nor, as the dissent seems to suggest, on whether an amendment affects a prisoner's "*opportunity* to take advantage of early release," [citation omitted], but on whether any such change alters the definition of criminal conduct or increases the penalty by which a crime is punishable.

We considered the foregoing language in our *Ellis* case and interpreted it as follows:

> We think a fair interpretation of this footnote is that it was not a disadvantage in the form of the lost opportunity to reduce the prison sentence that was dispositive in *Weaver*. Rather, it was the fact that a reduction in the amount of good time that was automatically awarded operated to increase the length of time Weaver would be in prison. In other words, the disadvantage suffered by Weaver, in the form of an increase in the punishment for his crime, is within the scope of the *Ex Post Facto* Clause. Consequently, *Weaver* is not helpful to Ellis unless the repeal of "extra good time" actually operates to increase his sentence, rather than merely remove his opportunity to reduce his time in prison. We hold that it does not.

Ellis, 333 Ark. at 205, 968 S.W.2d at 611-12.

In conclusion, the *Ellis* court stated that Act 273 of 1987 provided that "the director *may* recommend ... good time awards" for completing rehabilitation programs and special jobs, and by performing such acts, a prisoner had the *opportunity* to add to the meritorious good time he has earned automatically. We further held in *Ellis* that when Act 273 was repealed in 1993, all that was lost was the *opportunity* to earn discretionary good time which was not violative of the *Ex Post Facto* Clauses. In *Duncan*, 337 Ark. 306, 987 S.W.2d 721 (1999), we reached the same decision on almost identical facts.

Graham argues that, while the good-time credits provided in the *Ellis* and *Duncan* cases may be discretionary under Act 273, the extra good time earned here under § 12-30-408 is mandatory, not discretionary. Graham cites to the language in § 12-30-408, which in relevant part, provides as follows:

> Inmates who engage in volunteer work by contractual agreement with state departments, agencies, counties, school districts, civic organizations, and other non-profit organizations, *shall* earn an additional day of meritorious good time for every day engaged in volunteer work. (Emphasis added.)

Relying on the above provision, Graham urges that an inmate's good time earned under § 12-30-408 is mandatory and not discretionary, and as such, Act 503's repeal of § 12-30-408 operates as an *ex post facto* law which deprives him of 544 days' credit earned under the statute. We disagree.

As we pointed out in *Ellis*, an inmate, whether under Arkansas's prior special programs provided in Act 273 or § 12-30-408 before their repeal, had the opportunity to add meritorious good time to that which he had earned automatically. However, it is clear from the wording of those laws that the time earned and awarded was at the discretion of the Director. *Ellis*, 333 Ark. at 206, 968 S.W.2d at 612.

[redacted] In the present case, when Arkansas's volunteer work program was authorized under § 12-30-408, other related statutes and regulations were in effect that explained the discretionary nature of the good time earned by a prisoner under such a program. For

example, Ark. Code Ann. § 12-30-401 (1987)[1] prescribed that inmates committed to the Department of Correction for institutional care be required to participate in the various work programs and *may* be afforded vocational training and rehabilitative opportunities in accordance with the rules, regulations, and procedures promulgated by the Director, with the approval of the Board of Correction. The Board's regulation bearing on meritorious good time when § 12-30-408 was law stated as follows:

> Meritorious Good Time is *not* something to which an inmate is entitled as a matter of right, but is awarded in proportion to his good discipline, good behavior, work practices, and job responsibilities. (Emphasis added.) Department of Correction Regulation 826.

The foregoing regulation was promulgated pursuant to Act 50 of 1968, as amended, which encompassed the laws that established the volunteer work and meritorious good time provided under § 12-30-408. Also consistent with the discretionary nature of Arkansas's laws providing for extra or meritorious good time was Ark. Code Ann. § 12-29-201 (1987), which was in effect when § 12-30-408 was law.[2] Section 12-29-201 provided (and still provides) that an inmate *may* be entitled to a reduction, to be known as "meritorious good time" from his maximum term and parole eligibility date of up to thirty days for each month served in one of the institutions maintained by the Department of Correction.

In sum, Graham's situation, while involving a different statute, § 12-30-408, is controlled by the same analysis and rationale we expressed in our holdings in *Ellis* and *Duncan*. When the General Assembly passed Act 503 to repeal § 12-30-408, Graham merely lost what was the opportunity to earn discretionary good time towards the reduction of his prison sentence. Therefore, we agree and affirm the trial court's ruling that such a lost opportunity did not violate the *Ex Post Facto* Clauses.

BROWN and IMBER, JJ., concur.

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[1] Now appears at Ark. Code Ann. § 12-30-401 (Repl. 1999).

[2] Now recodified with other provisions at Ark. Code Ann. § 12-29-201 (1999). The recent codification reflects changes the General Assembly made in 1993 by Acts 536 and 558 which, among other things, clarified that meritorious good time will not be applied to reduce the length of a sentence *See* § 12-29-201(c).

ROBERT L. BROWN, Justice, concurring. I do not disagree with the majority's analysis. However, there is one other factor in this case that distinguishes it from *Duncan v. State*, 337 Ark. 306, 987 S.W.2d 721 (1999) (*per curiam*), and *Ellis v. Norris*, 333 Ark. 200, 968 S.W.2d 609 (1998) (*per curiam*). Graham was serving time in the Ellis County Jail in Oklahoma under the Interstate Compact. Six years after the Arkansas statute authorizing meritorious good time for volunteer work was repealed, Graham began doing volunteer work in Oklahoma for the city, county, and school district. *See* Ark. Code Ann. § 12-30-408 (1987) (referred to as Act 309), *repealed by* Act 503 of 1989. As his supervisor in the county jail pointed out by affidavit, Graham was not required to work but did so voluntarily. The record does not reflect that the Arkansas Department of Correction was aware of Graham's volunteer work. In fact, during Graham's subsequent grievance proceeding in 1997, Warden Harris denied relief because "No Act 309 shows at anytime."

The Arkansas Department of Correction should not be held responsible for volunteer work done in Oklahoma, which was not done under its auspices or rules or with its blessing. It is quite a stretch in my judgment for Graham to argue that Arkansas enhanced his punishment by denying this good time, when Graham was performing the volunteer services unbeknownst to the Department.

I concur for the reasons stated by the majority but also for this additional reason.

ANNABELLE CLINTON IMBER, Justice, concurring. I agree with the majority's holding, but write only to point out a difference between the present case and the cases of *Ellis* and *Duncan*. The statute at issue in *Ellis* and *Duncan*, Act 273 of 1987, provided that meritorious good time could be awarded at the discretion of the Director if a prisoner, among other things, completed rehabilitative programs or performed other special jobs. The statute at issue here provides that inmates who are engaged in volunteer work "shall earn an additional day of meritorious good time for every day engaged in volunteer work." Although the language of section 12-30-408(a) appears mandatory, nothing in the statutory scheme suggests that an inmate will automatically be entitled to or qualify for the opportunity to engage in a volunteer-work program.

Rather, an inmate's opportunity to engage in a volunteer work program is solely at the discretion of the Department of Correction. Therefore, by repealing § 12-30-408, Mr. Graham only lost the opportunity to earn discretionary good time toward the reduction of his prison sentence. For this reason, I agree with the trial court that the State's withdrawal of the volunteer work program and good time did not violate the *Ex Post Facto* Clauses in the Arkansas Constitution and the United States Constitution.

Larry JONES v. STATE of Arkansas

CR 99-630 10 S.W.3d 449

Supreme Court of Arkansas
Opinion delivered February 17, 2000

[redacted]

[redacted]

Bart E. Ziegenhorn, Deputy Public Defender, for appellant.

Mark Pryor, Att'y Gen., by: *James R. Gowen, Jr.*, Ass't Att'y Gen., for appellee.

TOM GLAZE, Justice. Larry Jones was convicted on three counts of capital murder for the deaths of his wife, Sandra Jones, and her two sons, Courtney Jones, 17, and Daron Davis, 10. For his wife's murder, Jones was sentenced to life in prison without possibility of parole; for the murders of the two boys, Jones received two sentences of death by lethal injection. We take jurisdiction pursuant to Ark. Sup. Ct. R. 1-2(a)(2). On appeal, Jones raises seven points for reversal, but because we find that none of them has merit, we affirm.

Because Jones does not challenge the sufficiency of the evidence, we summarize the facts briefly. Sandra Jones spent the evening of April 10, 1998, at the house of her brother-in-law, Gary Jones, visiting and drinking with several friends. She left for home shortly after 10:30 that night. About two hours later, Larry Jones

showed up at Gary's house; Larry told his brother he had "just killed all three of them." Larry asked his brother to come back to his house with him and to provide him with an alibi. On the way back to Larry's house, he told Gary that Sandra had come home and taken a bath; while she was bathing, he claimed he inspected her underwear and found "some discharge" in them.

Larry Jones later gave the police a different story, stating Sandra came into the bedroom, woke him up, and told him that she wanted to break up with him. When he asked why, she allegedly said that she had been unfaithful to him and threw a pair of panties in his face. During their conversation, Jones had been "fixing on" a stack of videotapes with a butterfly knife. As Sandra continued to taunt him about her infidelity, Jones said, he hit her. "I thought I was hitting her with my right hand ... the hand I had my butterfly knife in. I hit her twice. I thought I was hitting her in the face area, but it turned out that I hit her twice in the neck." Sandra died of a single slicing stab wound that penetrated four and a half inches through her neck.

Jones further claimed that the two boys came in while he and Sandra were fighting and that he only swung at them to push them away from him. Courtney died in the kitchen, having been struck twice with the knife; his right carotid artery was severed with a blow that sliced approximately four and three-eighths inches through his neck. Daron, whose body was found on the floor next to his bed in the front bedroom, sustained four wounds; his jugular vein was cut, and the muscles that supported his larynx were severed. Gary Jones later testified that it looked like "his throat was almost cut off."

Larry Jones opened a window in a back bedroom, and then called the police to report that someone had broken into his house and murdered his family. When the police arrived, Gary Jones told them that his brother had confessed to the killings. Larry was arrested, given his *Miranda* warnings, and taken to the police station.

Following a jury trial in February of 1999, Jones was convicted on all three counts of capital murder. The jury found that four aggravating circumstances existed and no mitigating factors were present; thus, they sentenced Jones to death for the murders of

Courtney Jones and Daron Davis and to life in prison for the murder of Sandra Jones.

For his first point on appeal, Jones argues that the trial court erred in granting the prosecutor's motion to suppress evidence that an autopsy report showed Sandra Jones to have cocaine in her bloodstream. In its motion, the State asserted that the finding of cocaine was not relevant to the cause of death, and would be extremely prejudicial. The defense responded that the evidence could be probative of the issue of whether or not Sandra was likely to have provoked Jones to react as he did. The trial court granted the motion before the trial began, agreeing that the cocaine evidence would be more prejudicial than probative, and noting that there was nothing to show that the cocaine had anything to do with the confrontation. However, the court said that if, during the trial, any proof to that effect was shown, he would reconsider his ruling.

No such proof was adduced at trial, and as the court considered the likely effect that the evidence would have on the jury, it reiterated several times that it would be highly prejudicial. The court offered Jones the opportunity to introduce the less inflammatory evidence that Sandra had a blood-alcohol content of .13% in order to support his theory that she was acting aggressively and provoked him; however, he declined to do so.

[redacted] Although all relevant evidence is admissible, Ark. R. Evid. 402, even relevant evidence can be excluded if its probative value is substantially outweighed by the danger of unfair prejudice or confusion of the issues. Ark. R. Evid. 403; *Smith v. State*, 33 Ark. App. 37, 801 S.W.2d 655 (1990). Trial courts have broad discretion in deciding evidentiary issues, including the admissibility of evidence under Rule 403, and those decisions will not be reversed absent an abuse of discretion. *Williams v. State*, 338 Ark. 97, 991 S.W.2d 565 (1999).

[redacted] In this instance, we can find no abuse of discretion in the trial court's decision. No evidence was ever introduced to show that the cocaine was linked to the murder. Indeed, it was Sandra's alleged infidelity, not her use of cocaine, that led to the altercation between her and Jones. Because the defense was unable to show that the cocaine use prompted the killing, the trial court did not err

in ruling that the probative value of the evidence was far outweighed by its prejudicial nature.

The defense also attempted to introduce the cocaine usage in response to the prosecution's introduction of character evidence. During the trial, when the last of three witnesses testified that Sandra was a "good, sweet, nice person," Jones finally objected to such testimony and asked to be allowed to cross-examine the witness about the cocaine. The trial court sustained the objection and refused to permit this line of questioning, admonishing the prosecutor that he was putting Sandra's character into issue. While Jones argued that the State had "opened the door" to allowing the cocaine evidence, the trial court stood on its earlier ruling that the probative value of this evidence was outweighed by the danger of prejudice.

[redacted] On this point, we first note that Jones did not object to the first two witnesses who testified as to Sandra's character. We have frequently held that a contemporaneous objection must be made to the trial court before we will review an alleged error on appeal. *State v. Donahue*, 334 Ark. 429, 978 S.W.2d 748 (1998). Thus, this argument is procedurally barred.

[redacted] Finally, we note that even if the trial court erred in its decision to exclude this evidence, the error was harmless in light of the overwhelming evidence of Jones's guilt. *See Abernathy v. State*, 325 Ark. 61, 925 S.W.2d 380 (1994). Jones confessed the killings to his brother and attempted to use his brother to create an alibi for himself. He lied to the police when they began to question him, telling them that he came home and found the bodies. He only admitted to the murders after the police informed him that his brother had given them a differing version of the evening's events. In addition, there was overwhelming evidence that Jones acted with premeditation and deliberation, and not out of a sudden rage provoked by Sandra. He told his brother that he had inspected Sandra's panties while she took a bath, contradicting his story to the police that she had thrown them at him. Evidence showed that Daron was killed in his bed, and that Courtney was attacked in the kitchen as he entered the house later in the evening. In light of this evidence, the trial court's decision to exclude evidence of Sandra's cocaine use cannot be said to be reversible error.

For his second point on appeal, Jones contends that the trial court erred in admitting five photographs of the crime scene. Three photos showed Daron's body (two full-length shots and one close-up of his face), one showed Courtney's face and wounds, and one depicted Sandra's face and wounds. Jones objected to these photographs at trial on the basis that they were gory, inflammatory, and did not accurately depict the scene. This last point arose from the fact that one police officer testified that he was certain that he found Daron's body on his bed, but the photo showed the boy's body lying on the floor.

The prosecutor responded that although the photos were gruesome, they helped establish the premeditated and deliberate nature of the crime and, because they demonstrated that all three victims suffered from similar lethal neck wounds, refuted Jones's theory that he had accidentally hit the victims as they struggled. The trial court overruled Jones's objection and allowed the photos into evidence.

[redacted] On appeal, Jones now argues that the introduction of the photographs was in error because they were cumulative and unduly prejudicial. However, Jones did not raise the cumulative argument below, and therefore, that point is not preserved. *See Tabor v. State*, 333 Ark. 439, 971 S.W.2d 227 (1998). As for his second contention, that the photos were prejudicial, we restate the following general rules with which we comply when dealing with the admissibility of photographs.

> This court has often stated that the admission and relevancy of photographs is a matter within the sound discretion of the trial court, and the mere fact that photos are inflammatory will not render them inadmissible. *Davis v. State*, 325 Ark. 96, 925 S.W.2d 768 (1996). Even the most gruesome photos may be admissible if they tend to shed some light on any issue, to corroborate testimony, or if they are essential in proving a necessary element of the case, are useful to enable a witness to testify more effectively, or enable the jury to better understand testimony. *Jones v. State*. 329 Ark. 62, 947 S.W.2d 339 (1997). Other acceptable purposes are to show the condition of the victims' bodies, the probable type or location of the injuries, and the position in which the bodies were discovered. *Id.*

Greene v. State, 331 Ark. 1, 26, 977 S.W.2d 192 (1998); *see also Camargo v. State*, 327 Ark. 631, 940 S.W.2d 631 (1997).

[redacted] Here, the photos were introduced not for shock value, but to show the premeditated and deliberate nature of the murders. In addition to proving a necessary element of the crime, they also showed the condition of the bodies and the locations of the injuries. The trial judge engaged in the kind of balancing required under Rule 403, and he did not abuse his discretion in allowing the photographs to be admitted.

[redacted] Jones's third point on appeal is that the introduction of victim impact evidence was reversible error. He contends that the testimony from the victims' families was not relevant to any aggravating factor and violated his Fifth, Sixth, and Fourteenth Amendment rights. While Jones asks this court to reconsider our prior rulings on this subject, he provides us with no compelling reason to do so. Ark. Code Ann. § 5-4-602(4) (Repl. 1997) specifically allows the State to introduce victim impact evidence during the sentencing phase of capital murder trials, and we have repeatedly upheld the constitutionality of this statute. *See Williams v. State*, 338 Ark. 97, 991 S.W.2d 565 (1999); *Noel v. State*, 331 Ark. 79, 960 S.W.2d 439 (1998); *Kemp v. State*, 324 Ark. 178, 919 S.W.2d 943 (1996).

For his fourth point, Jones argues that the trial court erred in submitting both of the following aggravating factors: Ark. Code Ann. § 5-4-604(4) (Repl. 1997), that the defendant caused the death of more than one person in the same criminal episode, and Ark. Code Ann. § 5-4-604(5) (Repl. 1997), that the murders were committed for the purpose of avoiding or preventing arrest. He contends that the mere fact that he committed more than one murder does not necessarily lead to the conclusion that the later ones were committed in order to avoid being arrested.

[redacted] However, we have held that whenever there is any evidence of an aggravating or mitigating circumstance, however slight, the matter should be submitted to the jury for consideration. *Kemp v. State*, 324 Ark. 178, 919 S.W.2d 943 (1996). On appellate review of a finding of an aggravating circumstance, the question is whether there was substantial evidence to support the jury's finding that the aggravating circumstance was proven beyond a reasonable doubt. *Willett v. State*, 335 Ark. 427, 983 S.W.2d 409 (1998). The suffi-

ciency of the evidence is reviewed in the light most favorable to the state. *Kemp*, 324 Ark. at 200.

Although Jones contended at trial that he killed the two boys accidentally, forgetting there was a knife in his hand when he swung at them in a rage, the State presented evidence that Jones killed Daron in his bed and killed Courtney later as the boy entered the house. Both boys were murdered after Sandra was killed. They were the only potential witnesses to the murder of Sandra, and the killing of both boys would further Jones's alibi that an intruder broke in and murdered all three victims. In addition, the nature of their wounds does not support an inference that Jones accidentally hit them with the knife when he was trying to fend them off. Viewing this evidence in the light most favorable to the state, as we must, there was substantial evidence not only to warrant submitting this aggravating factor to the jury, but also to support the jury's finding that this factor existed beyond a reasonable doubt.

Jones also argues that these two aggravating factors are inconsistent and mutually exclusive, although he offers no law in support of this proposition. Ark. Code Ann. § 5-4-602(4) (Repl. 1997), however, allows the jury to consider evidence as to *any* matter relating to the aggravating circumstances enumerated in § 5-4-604; additionally, the jury may consider any aggravating circumstance for which there is the slightest evidence, although it must be convinced beyond a reasonable doubt that the circumstance exists. *Willett*, 335 Ark. at 435-36. Here, there was clearly evidence to support the submission of both aggravating factors, and the trial court did not err in submitting them simultaneously.

Jones's fifth argument on appeal is that there was insufficient evidence to support the submission of Ark. Code Ann. § 5-4-604(8) — that the murder was committed in an especially cruel or depraved manner — as an aggravating factor. We need not discuss this sufficiency-of-the-evidence argument, because even if the evidence failed to support the conclusion that Jones committed the murders in a cruel or depraved manner, such an insufficiency would be harmless error because the jury found no mitigating factors existed. We conduct a harmless error review as follows:

> On appellate review of a death sentence, if the Arkansas Supreme Court finds that the jury erred in finding the existence of any aggravating circumstance or circumstances for any reason and if the

> jury found no mitigating circumstances, the ... Court shall conduct a harmless error review of the defendant's death sentence. The ... Court shall conduct this harmless error review by:
>
> (1) Determining that the remaining aggravating circumstance or circumstances exist beyond a reasonable doubt; and
>
> (2) Determining that the remaining aggravating circumstance or circumstances justify a sentence of death beyond a reasonable doubt.

Ark. Code Ann. § 5-4-603(d) (Repl 1997).

[redacted] The jury in Jones's case found four aggravating circumstances existed: 1) he had committed prior violent felonies; 2) the murders were committed for the purpose of avoiding or preventing arrest; 3) the commission of the murders caused the death of more than one person in the same criminal episode; and 4) the murders were committed in an especially cruel or depraved manner. Even striking this fourth factor, three factors remain, each of which, standing alone, would justify the imposition of a death sentence in the absence of any mitigating factors. Thus, any error by the trial court in submitting this aggravating circumstance to the jury would be harmless, and this point does not present a ground for reversal.

For his sixth argument on appeal, Jones contends that the prosecutor made a veiled reference to Jones's failure to testify during his closing argument, and the trial court erred in denying his motion for a mistrial on that point. During his own closing argument, Jones again asserted his theory that the crime was committed in the heat of passion and that he had only been provoked by his wife's statements of infidelity: "These are things that would incite any husband. What were the things this couple was doing ten days earlier? Do they hate each other so much that this guy was planning to kill her ten days before? No. ... They had been off on an over-the-road truck trip.... They came home, cleaned up, and had relations. They were living like any other normal family would be living."

In response, the prosecutor made the following statement: "He talks about his loving wife. Why would Larry Jones do this to his loving wife? What remorse when he says loving wife did you see in this case? Absolutely no [*sic*]. You didn't see any remorse." Defense counsel immediately objected, moving for a mistrial on the grounds

that the prosecutor had impermissibly commented on Jones's failure to testify. The trial court denied the motion, but warned the prosecutor to "stay away from that."

A mistrial is a drastic remedy, to be employed only when an error is so prejudicial that justice cannot be served by continuing the trial and when it cannot be cured by an instruction. *Gates v. State*, 338 Ark. 530, 21 S.W.3d 40 (1999). The decision to grant a mistrial is within the sound discretion of the trial court, and will not be overturned absent a showing of abuse or upon manifest prejudice to the complaining party. *Id.* When a prosecutor is alleged to have made an improper comment on a defendant's failure to testify, we review the statements in a two-step process.

> First, we determine whether the comment itself is an improper comment on the defendant's failure to testify. The basic rule is that a prosecutor may not draw attention to the fact of, or comment on, the defendant's failure to testify, because this then makes the defendant testify against himself in violation of the Fifth Amendment. A veiled reference to the defendant's failure to testify is improper, as well. Should we determine that the prosecutor's closing argument statement did indeed refer to [the defendant's] choice not to testify, we would then determine whether it can be shown beyond a reasonable doubt that the error did not influence the verdict.

Id. at 538.

Here, the prosecutor's comment was not a veiled reference to Jones's failure to testify; rather, the prosecutor was referring to Jones's lack of remorse as evidenced by his statements to his brother and to the police and by his actions after the murders. His brother Gary testified that Jones "looked mean" and that there were no tears in his eyes when he confessed to the killings. Jones did not cry until after he had called the police, and Gary said that this was "because he knew what he had done, and he was going to be in trouble for it." Jones asked his brother to lie for him to the police, and he concocted a story to hide his own guilt. This was evidence, completely aside from Jones's own non-appearance on the witness stand, on which the prosecutor was free to comment.

In addition, Jones essentially invited the statements by making comments during his own closing arguments that were meant to imply how much he loved his wife. When a defendant

opens the door to the State's comments, he cannot complain about it later. *Sheridan v. State*, 313 Ark. 23, 852 S.W.2d 772 (1993). For these reasons, the trial court did not err in refusing to grant a mistrial.

Jones's final point on appeal is that the imposition of the death penalty was improper because he fit the current definition of a mentally retarded person. He challenges the statute that creates a rebuttable presumption of mental retardation when a defendant has an intelligence quotient of 65 or below, Ark. Code Ann. § 5-4-618(a)(2) (Repl. 1997), and argues that this standard should be replaced with a more progressive one, established by the current Diagnostic and Statistical Manual and followed in other jurisdictions, that sets the standard at an IQ of 70. However, the standard of 65 is our law, and therefore, Jones cannot show that he was prejudiced by the failure to use this suggested higher standard. Even if his argument had merit, Jones could not benefit from our adopting the so-called current standard of an IQ of 70 because his own expert evaluated Jones as having an IQ of at least 71.

The record has been examined in accordance with Ark. Sup. Ct. R. 4-3(h), and it has been determined that there were no rulings adverse to Jones which constituted prejudicial error. Therefore, we affirm.

Kelley CHRISTOPHER v. STATE of Arkansas

CR 99-787 10 S.W.3d 852

Supreme Court of Arkansas
Opinion delivered February 17, 2000

[redacted]

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

Mark Pryor, Att'y Gen., by: *C. Joseph Cordi, Jr.*, Ass't Att'y Gen., for appellee.

DONALD L. CORBIN, Justice. Appellant Kelley Christopher appeals the judgment of the Pulaski County Circuit Court convicting him of the capital murder of Drajah Morrow and sentencing him to life imprisonment without the possibility of parole. Our jurisdiction is thus pursuant to Ark. Sup. Ct. R. 1-2(a)(2). Appellant's sole point for reversal is that the trial court abused its discretion in restricting his *voir dire* of prospective jurors. We find no merit and affirm.

The record reflects that Appellant attacked Mr. Morrow as he was walking down the sidewalk in front of Appellant's apartment. Appellant stabbed Mr. Morrow repeatedly, using both a butcher knife and a meat fork. The medical examiner testified that Mr. Morrow died as a result of five of those stab wounds. The State alleged that Appellant killed Mr. Morrow with premeditation and deliberation, and thus, charged him with capital murder. The State later agreed to waive the death penalty. Appellant subsequently exercised his right to a trial by jury. During *voir dire*, Appellant's attorney attempted to question jurors with regard to lesser offenses, and the following colloquy took place:

> [Q]: . . . Is there anybody — anybody think that [capital murder is] the only charge there should be when there's murder involved?
>
> You know, there's murder in the first degree, murder in the second degree, which each offer lesser punishments but a homicide has still taken place.
>
> Miss Gieringer, do you think it always should be capital murder? Or do you think there's [*sic*] circumstances where there should be a lesser?

> [A]: I was going to ask you or Mrs. Raney what it is — why do you term it capital murder. I don't know the difference between them.
>
> [Q]: They get to choose. I don't have any control over that. So I don't know. Premeditated and deliberated is what they need in capital murder.
>
> [A]: The other ones are not?
>
> [Q]:. . . [F]irst-degree murder is purpose and second-degree murder is someone causes the death showing extreme indifference to [the] value of human life. And each individual one comes down a little bit on his mental state. Do you think that's proper? Or do you think it should always be capital murder, death penalty or life without for everyone?

At that point, the State objected to the line of questioning on the grounds that it was unknown whether the jury would receive instructions on any lesser offense. The trial court sustained the State's objection and instructed Appellant's counsel to simply ask the prospective jurors if they would be able to follow any instruction submitted to them. After considering all the evidence, the jury convicted Appellant of capital murder.

For reversal, Appellant argues that the trial court improperly restricted his *voir dire* of potential jurors, thus impeding his ability to ascertain the jurors' understanding of the distinctions among the classes of homicide. He claims that this, in turn, restricted his ability to determine when to exercise his peremptory challenges. The State argues that Appellant is procedurally barred from arguing this on appeal because the defense conceded that the jury was acceptable at the close of jury selection. We agree with the State that Appellant has not preserved this issue for appeal.

[redacted] In order to preserve an argument for appeal, there must be an objection in the trial court that is sufficient to appraise that court of the particular error alleged. *Love v. State*, 324 Ark. 526, 922 S.W.2d 701 (1996); *Moore v. State*, 321 Ark. 249, 903 S.W.2d 154 (1995). The failure to object at the first opportunity waives any right to raise that point on appeal. *Id.* Here, Appellant never took exception to the trial court's decision to restrict his *voir dire* of the potential jurors. Likewise, he never noted on the record that he had any objection to the impanelment of the jury even though he now argues that he was unable to adequately question the potential

jurors. It was necessary for Appellant to raise his objection at this point in order to establish that he was prejudiced by the trial court's decision. Accordingly, Appellant has waived his right to raise this issue on appeal.

[redacted] Even absent this procedural defect, there is no merit to Appellant's argument that the trial court abused its discretion in limiting *voir dire*. This court has held that the extent and scope of *voir dire* is left to the sound discretion of the trial judge, and the trial judge's ruling will not be disturbed on appeal, absent an abuse of discretion. *Britt v. State*, 334 Ark. 142, 974 S.W.2d 436 (1998); *Ferrell v. State*, 325 Ark. 455, 929 S.W.2d 697 (1996). The proper role of a trial judge in *voir dire* is to direct the process, and he is given great discretion to ensure that no undue advantage is gained. *Britt*, 334 Ark. 142, 974 S.W.2d 436; *Anderson v. State*, 278 Ark. 171, 644 S.W.2d 278 (1983).

[redacted] Rule 32.2 of the Arkansas Rules of Criminal Procedure provides for *voir dire* examination of potential jurors and specifically grants the trial judge the power to "permit such additional questions by the defendant or his attorney and the prosecuting attorney *as the judge deems reasonable and proper*." (Emphasis added.) *See also Danzie v. State*, 326 Ark. 34, 930 S.W.2d 310 (1996). This court in *Danzie* held that the rule has been interpreted as providing trial judges with wide latitude in conducting and monitoring *voir dire*. Furthermore, this court has held that the purpose of *voir dire* is to discover if there is any basis for a challenge for cause and to gain knowledge for the intelligent exercise of peremptory challenges. *Henry v. State*, 309 Ark. 1, 828 S.W.2d 346 (1992); *Sanders v. State*, 278 Ark. 420, 646 S.W.2d 14 (1983). In the present matter, the trial court found that Appellant's line of questioning was irrelevant because it was unknown at that point whether instructions on lesser charges would even be submitted to the jury. Considering the wide latitude allowed trial judges in managing *voir dire*, we cannot say that this was an abuse of the trial court's discretion.

Pursuant to Ark. Sup. Ct. R. 4-3(h), the record has been reviewed for rulings decided adversely to Appellant. No reversible errors were found.

Affirmed.

Nakia BAKER *v.*
ARKANSAS DEPARTMENT OF HUMAN SERVICES

99-526 12 S.W.3d 200

Supreme Court of Arkansas
Opinion delivered February 17, 2000
[Supplemental opinion on granting of rehearing issued April 27, 2000.]

Blackmon-Solis & Moak, L.L.P., by: *DeeNita Moak*, for appellant.

No response.

PER CURIAM. On July 8, 1998, attorney DeeNita Moak was appointed by the chancery court to represent Appellant Nakia Baker in a termination of parental rights case. The order of appointment specifically required Ms. Moak to represent Appellant through all stages of the proceedings, including the appeal. Appellant's parental rights were ultimately terminated, and that decision was affirmed by this court in *Baker v. Ark. Dep't Human Servs.*, 340 Ark. 42, 8 S.W.3d 499 (1999). During the pendency of this appeal,

Ms. Moak filed a motion for attorney's fees with the chancery court. The chancery court granted her fees for work performed at the trial level, but denied fees for any appellate work performed. Ms. Moak subsequently filed a motion for attorney's fees with this court.

After considering Ms. Moak's motion and supporting affidavit, we hold that Ms. Moak is entitled to payment of attorney's fees for sixty-seven hours of services rendered in connection with this appeal. The number of hours represent the time expended on services essential to the pursuit of this appeal. Such a determination is consistent with the manner we use in awarding reasonable attorney's fees in criminal appellate cases. Because the funds established to pay attorneys for appellate representation are limited, we are required to closely scrutinize the services performed and order payment for only those services that are essential to the appellate process. The rate of compensation is to be $55.00 per hour, which is within the range of payment established by the chancery court for appointed counsel in these types of cases. Furthermore, we hold that Ms. Moak is entitled to reimbursement of $842.49 in costs incurred as a result of her work on this appeal.

Because this court has no funds from which to pay these fees, we remand the matter to the chancery court for payment of fees and costs from the Juvenile Court Representation Fund established in Ark. Code Ann. § 9-27-316 (Supp. 1999). The Fund provides for the payment of attorney's fees and costs pursuant to an appointment to represent an indigent parent in cases where termination of parental rights is sought. We realize that the statute does not specifically authorize payment for appellate representation, but it also does not exclude such payment. Absent any other provisions, we deem the Juvenile Court Representation Fund to be the proper source of payment for these attorney's fees. If this was not the intention of the General Assembly, we invite it to consider an alternative in the next legislative session.

Accordingly, we order the chancery court to pay Ms. Moak attorney's fees in the amount of $3,685.00 and costs of $842.49 from the Juvenile Court Representation Fund. In the event there are insufficient monies in that fund, then Ms. Moak may seek compensation from the Arkansas Claims Commission.

SUPPLEMENTAL OPINION ON GRANT OF REHEARING APRIL 27, 2000

Blackmon-Solis & Moak, L.L.P., by: *DeeNita Moak*, for appellant.

Mark Pryor, Att'y Gen., by: *Patricia Van Ausdall*, Ass't Att'y Gen., for appellee.

PER CURIAM. DeeNita Moak, counsel for Appellant Nakia Baker petitions this court for rehearing of our *per curiam* opinion ordering payment of attorney's fees from the Juvenile

Court Representation Fund. *See Baker v. Arkansas Dep't Human Servs.*, 340 Ark. 408, 12 S.W.3d 200 (2000). Ms. Moak asserts in her petition that this court erred in designating payment from that fund pursuant to Ark. Code Ann. § 9-27-316 (Supp. 1999). Specifically, Ms. Moak argues that the fund is not designated for payment of attorney's fees in cases involving the termination of parental rights. We agree.

As originally enacted, section 9-27-316 provided that attorneys who represented indigent parents in termination cases were to be paid from the Juvenile Court Representation Fund. The General Assembly, however, made several changes to section 9-27-316 in 1997, including the provision concerning the Juvenile Court Representation Fund. As the section now reads, monies in the Juvenile Court Representation Fund are to be used for payment of attorney's fees only in cases of juvenile delinquency and families in need of services. The section continues to require that counsel be appointed to represent indigent parents in termination cases, but no longer provides a source for payment of such appointed counsel.

The failure of the legislature to designate a source for payment does not render Ms. Moak's claim for attorney's fees null, however. Ms. Moak's claim is a claim against the state for services performed on behalf of the state; therefore, the state is responsible for payment of her fees and expenses. *See State v. Post*, 311 Ark. 510, 845 S.W.2d 487 (1993).

We find no merit in Ms. Moak's argument that the chancellor has funds available to her to pay the fees in this case, as neither her affidavit nor the supporting exhibits are part of the record in this matter. We have repeatedly stated that we will not consider matters not contained in the record. *See e.g., Smith v. Smith*, 337 Ark. 583, 990 S.W.2d 550 (1999); *Black v. Van Steenwyk*, 333 Ark. 629, 970 S.W.2d 280 (1998); *Boswell, Tucker & Brewster v. Shiron*, 324 Ark. 276, 921 S.W.2d 580 (1996). Accordingly, we grant Ms. Moak's petition for rehearing and reverse only that part of our opinion ordering payment of attorney's fees from the Juvenile Court Representation Fund.

Roy Lee BOLES *v.* Mike HUCKABEE

98-1056 12 S.W.3d 201

Supreme Court of Arkansas
Opinion delivered February 17, 2000

Appellant, pro se.

Winston Bryant, Att'y Gen., by: *Darnisa Evans Johnson*, Sr. Ass't Att'y Gen., for appellee.

PER CURIAM. Roy Lee Boles is appealing the trial court's denial of his petition to proceed *in forma pauperis* in a declaratory-judgment action. The trial court denied the petition pursuant to Rule 72 of the Arkansas Rules of Civil Procedure, which conditions the right to proceed *in forma pauperis* on, among other things, the trial court's satisfaction that the alleged facts indicate a colorable cause of action. Boles now contends that the trial

court erroneously concluded that his petition for declaratory judgment failed to state a colorable claim.

Boles is incarcerated in the Arkansas Department of Correction pursuant to convictions in two drug-related cases. The first conviction occurred in 1993, when he was convicted of possession of a controlled substance with intent to deliver. He was sentenced to twenty years' imprisonment. The second conviction occurred in 1995, when Boles pleaded guilty to a series of offenses including possession of a controlled substance, possession of drug paraphernalia, and maintaining a drug premises. He received an aggregate term of twenty-five years' imprisonment for those offenses, and he was ordered to serve that term concurrently with twenty-year sentence he received in 1993.

According to Boles's petition for declaratory relief, the Arkansas Department of Correction erroneously applied Ark. Code Ann. § 16-93-607(c)(5) (1987) to his 1993 conviction to compute his parole eligibility for *both* sentences. Pursuant to that statute, the Department of Correction classified Boles as a fourth offender, and as such, he is only able to obtain an early release from prison through good-time allowances. Boles alleged that under that formula, he would not be eligible for early release until after he served approximately ten years.

Boles's petition for declaratory relief further contended that his parole eligibility should have been calculated according to the law that was in effect at the time he was sentenced in 1995. He argued, in essence, that if the law in effect in 1995 were applied to the calculation of his parole eligibility, he would be eligible for early release after serving only four and one-half years. Boles also contended that the Department of Correction's failure to compute his parole eligibility in this manner violated his constitutional rights to due process and equal protection under the law, and also, that it constituted cruel and unusual punishment.

Boles's petition for declaratory relief, in essence, calls for the retroactive application of a more favorable parole-eligibility law to the sentence he received in 1993. He argues that the 1995 conviction, and the parole-eligibility laws that existed at that time, should control his eligibility for parole for *both* sentences.

This court has previously held, however, that parole eligibility is determined by the law in effect at the time the crime is committed. *Woods v. Lockhart*, 292 Ark. 37, 727 S.W.2d 849 (1987). Consequently, the law prevailing at the time of *each* conviction would apply to the sentences that Boles received. According to Boles's calculations, when 16-93-607(c)(5) is applied to the sentence that he received in 1993, his release date would arrive no earlier than ten years. Likewise, when 16-93-206 is applied to the twenty-five-year sentence he received in 1995, he calculates that his release date could arrive as early as four and one-half years into that sentence.

The fact that Boles is serving both sentences concurrently, or simultaneously, leads to the illusion that only one of the parole-eligibility laws is being used to calculate his release date. If the Department of Correction has informed Boles that he would not be eligible for release until after he has served ten years, rather than four and one-half, it is merely because it is the longer of the two sentences that were ordered to be served concurrently.

A colorable cause of action is "a claim that is legitimate and that may reasonably be asserted, given the facts presented and the current law (or a reasonable and logical extension of modification of current law)." *Black's Law Dictionary*, 240 (7th ed. 1999). As we explained, Boles's claim that his 1995 conviction should control his parole eligibility is not consistent with the law, nor does it call for a reasonable modification of the law. Accordingly, it was proper for the trial court to conclude that this claim was not "colorable."

Boles's petition also alleged that when officials in the Department of Correction determined that he was a fourth offender, they improperly used prior felonies that were classified as "C" and "D," rather than the "A," "B," and "Y" felonies specified by Ark. Code Ann. § 16-93-607 (1987). Boles's petition failed to include, however, any factual allegation that set forth the number and classification of any of his prior felonies. Consequently, Boles did not allege sufficient facts to support his allegation that the Department of Correction improperly calculated his fourth offender status.

Affirmed.

Ronnie Drew JOHNSON *v.* STATE of Arkansas

98-1123 12 S.W.3d 203

Supreme Court of Arkansas
Opinion delivered February 17, 2000

Appellant, pro se.

Winston Bryant, Att'y Gen., by: *Gil Dudley*, Ass't Att'y Gen., for appellee.

PER CURIAM. In 1984, Ronnie Drew Johnson pleaded guilty to first-degree murder, aggravated robbery, theft of property, and felon in possession of a firearm. In another case, he pleaded guilty to robbery. His aggregate sentence for all of these offenses is forty years in the Department of Correction. Johnson had also been convicted of aggravated robbery in 1977.

In 1998, Johnson filed a petition for declaratory judgment and a writ of mandamus, alleging that the Department of Correction was using an invalid prior conviction to compute his parole eligibility. Specifically, Johnson alleged that his 1977 aggravated-robbery conviction was invalid because he was a juvenile tried as an adult in circuit court without benefit of a transfer hearing. The trial court denied Johnson's petition because he did not state a cognizable ground for declaratory relief or mandamus. The court found that "[p]etitioner is trying to collaterally attack a prior juvenile conviction through a petition for writ of mandamus and declaratory

judgment on a later conviction. This is not a cognizable claim. Whether a hearing was held, prior to his being tried as an adult in 1977, is not a claim that can be addressed in this petition." Johnson, proceeding *pro se*, now assigns error to the court's finding regarding the cognizability of his claim. We affirm.

In *St. John v. Lockhart*, 286 Ark. 234, 691 S.W.2d 148 (1985), we held that in determining parole eligibility, a state need not look behind a valid judgment of conviction. Johnson's petition did not allege that the judgment of conviction that was entered in 1977 was facially invalid. Rather, he argued that the Department of Correction should look beyond the judgment and make a determination of whether his due process rights were violated when a transfer hearing was not held.

Johnson cites *Abdullah v. Lockhart*, 302 Ark. 506, 790 S.W.2d 440 (1990), to support his argument that his petition did raise a cognizable ground for relief. In that case, Abdullah filed a petition for declaratory relief and a writ of mandamus alleging that the Department of Correction used invalid prior convictions to compute his parole eligibility. Specifically, Abdullah alleged that he was not represented by counsel. We noted that the certified copies of the judgments from those cases did not show whether Abdullah was represented by counsel. We concluded, however, that other documents indicated that Abdullah either did have an attorney or waived his right to an attorney in the previous convictions. Accordingly, we affirmed the lower court's denial of declaratory and mandamus relief.[1]

Johnson apparently relies on the fact that we addressed Abdullah's constitutional claim as authority to support his argument that a petition for declaratory judgment is the proper means to attack the 1977 conviction on the basis that he was denied a transfer hearing. *Abdullah* can be distinguished, however, because the petitioner in that case alleged that the certified copies of the judgments from the prior convictions did not indicate that he was represented by counsel, or that he had waived that right.

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[1] The United States District Court for the Eastern District of Arkansas later found that the record did not support that Abdullah received effective assistance of counsel in two of his prior convictions, and it granted Abdullah's petition for a writ of habeas corpus. *Abdullah v. Lockhart*, 780 F.Supp. 1221 (E.D. Ark. 1991).

In this case, Johnson's petition did not raise an issue about the facial validity of the 1977 conviction. Consequently, he did not state a cognizable ground for relief in his petition for declaratory judgment and a writ of mandamus.

Affirmed.

Larry LADWIG *v.* Honorable Fred DAVIS, Judge

CR 98-350 10 S.W.3d 461

Supreme Court of Arkansas
Opinion delivered February 17, 2000

Appellant, pro se.

No response.

PER CURIAM. In 1998, Larry Ladwig filed a petition for writ of mandamus in this court contending that the Honorable Fred Davis, Circuit Judge, had failed to act within a reasona-

ble time on a petition for postconviction relief pursuant to Criminal Procedure Rule 37 that had been filed in 1997.

Shortly thereafter, Judge Davis entered an order declaring Ladwig indigent and appointing counsel to represent him in the Rule 37 proceeding. The attorney was relieved in November 1998, and a second attorney was appointed. The second attorney was relieved in May 1999, and a third attorney was appointed for Ladwig. A hearing was set for September 2, 1999, on the Rule 37 petition.

When no order had been entered on the Rule 37 petition by November 2, 1999, one of our staff attorneys wrote to Judge Davis to ascertain the status of the matter. There was no response to the letter, and the staff attorney wrote to Judge Davis again on November 16, 1999. There was also no response to that letter, and Judge Davis's office was contacted by telephone on December 8, 1999.

Judge Davis's case coordinator said at that time that the hearing had indeed been held on September 2, 1999, and that the hearing record had been prepared and a ruling would be entered by January 1, 2000. On January 10, 2000, a second call was placed to Judge Davis's office at which time the case coordinator said the order was being prepared and would likely be entered by February 4, 2000. (The compliance report filed by Judge Davis with the Administrative Office of the Courts for the period since the Rule 37 hearing indicated that the ruling would be entered by January 31, 2000.) On February 10, 2000, our staff attorney contacted the circuit clerk who reported that the *Ladwig* order had still not been entered.

[redacted] While we have consistently recognized that the independence of the bench in our judicial system requires that the trial judge control his docket and the disposition of matters filed, this is not to say that a motion or case should be delayed beyond a time reasonably necessary to dispose of it. *Eason v. Erwin*, 300 Ark. 384, 781 S.W.2d 1 (1989). The Code of Judicial Conduct, Canon 3(B)(8), requires that a judge dispose of all judicial matters promptly. As Judge Davis has not responded to letters inquiring about the *Ladwig* petition, we must conclude that there is no good cause to justify the delay in ruling on the Rule 37 petition. The writ of mandamus is granted. We direct that Judge Davis enter a order on

Ladwig's Rule 37 petition within seven days of the date of this decision.

Petition granted.

James BILYEU *v.* STATE of Arkansas

CR 98-1480 10 S.W.3d 105

Supreme Court of Arkansas
Motion for Permission to File Belated Brief
granted February 17, 2000
Concurring opinion delivered February 17, 2000

Hurst Law Offices, by: *Q. Byrum Hurst, Jr.*, for appellant.

Mark Pryor, Att'y Gen., by: *O. Milton Fine II*, Ass't Att'y Gen., for appellee.

ROBERT L. BROWN, Justice, concurring. I agree to grant the State's motion for permission to file belated brief. I am troubled, however, by the five-month gap between the filing of appellant's brief on August 16, 1999, and the tender of the State's brief on January 24, 2000, especially since the appellant apparently is in prison.[1] The State did not receive a copy of the appellant's brief after it was filed. But the State, no doubt, did receive a copy of the briefing schedule from the Supreme Court Clerk, showing that the appellant's brief was due in August 1999. This should have alerted the State to determine whether the appellant's brief had indeed been filed. Had the State checked, this considerable delay in moving ahead on this appeal could have been avoided.

[1] This is a Rule 37 appeal, and in order to file a Rule 37 petition, a petitioner must be in custody. *See* Ark. R. Crim. P. 37.1; *Bohanan v. State*, 336 Ark. 367, 985 S.W.2d 708 (1999).

Carl MENY v. Larry NORRIS, Director,
Arkansas Department of Correction

98-1143 13 S.W.3d 143

Supreme Court of Arkansas
Opinion delivered February 17, 2000

Appellant, pro se.

Mark Pryor, Att'y Gen., by: *Todd L. Newton*, Ass't Att'y Gen., for appellee.

PER CURIAM. In 1992, appellant was found guilty by a jury of three counts of rape, kidnapping, and attempted capital felony murder. He was sentenced to three life terms for the three counts of rape, to run consecutively, with twenty years for kidnapping and thirty years for attempted felony murder. We affirmed. *See Meny v. State*, 314 Ark. 158, 861 S.W.2d 303 (1993). In 1998, appellant filed a petition for writ of *habeas corpus* seeking to have the judgments vacated. The petition was denied, and appellant has appealed that decision to us.

We have repeatedly held that a writ of *habeas corpus* will issue only if the commitment was invalid on its face or the committing court lacked jurisdiction. *McConaughy v. Lockhart*, 310 Ark. 686, 840 S.W.2d 166 (1992); *See, e.g., Mackey v. Lockhart*, 307 Ark. 321, 819 S.W.2d 702 (1991); *Wallace v. Willock*, 301 Ark. 69, 781 S.W.2d 478 (1989). A *habeas corpus* proceeding does not afford a prisoner an opportunity to retry his case. A writ of *habeas corpus* will not be issued to correct errors or irregularities that occurred at trial. The remedy in such a case is direct appeal. *Birchett v. State*, 303 Ark. 220, 795 S.W.2d 53 (1990). A writ of *habeas corpus* will not be issued as a substitute for postconviction relief. The petitioner must plead either the facial invalidity or the lack of jurisdiction and make a "showing, by affidavit or other evidence, [of] probable cause to believe" he is so detained. Ark. Code Ann. § 16-112-103 (1987). A hearing is not required if the petition does not allege either of the bases of relief proper in a *habeas* proceeding, *George v. State*, 285 Ark. 84, 685 S.W.2d 141 (1985), and, even if a cognizable claim is made, the writ does not have to be issued unless probable cause is shown. Ark. Code Ann. § 16-112-103 (1987).

First, appellant argues that the trial court erred in holding that appellant's *habeas* claims were not cognizable under the state *habeas* statute. We find appellant's argument misconstrues the court's order. In denying appellant's petition, the trial court found "petitioner has failed to state a claim upon which *habeas* relief can issue and the Court cannot grant the relief requested pursuant to this petition." It is clear that the trial court did not hold that appellant's

claims were cognizable. Thus, we find no merit in appellant's first point.

Next, appellant argues that Judge Fred Davis should have recused himself from appellant's *habeas* proceedings. There is no indication in appellant's abstract or the record that appellant raised this issue below. In addition, this is not a claim cognizable under *habeas* review. Based on the foregoing reasons, we decline to address this issue.

For his third point on appeal, appellant argues that the trial court erred in failing to grant *habeas* relief because the trial court lacked jurisdiction to enter a judgment of commitment and sentence. Appellant contends that he was charged with the crimes in the 7th Judicial District; however, the sentence and commitment order was issued in the 11th Judicial District. Appellant asserts that Judge Davis was acting outside the territorial boundaries of the 7th Judicial District when he entered the commitment order and sentence; thus, under *Waddle v. Sargent*, 313 Ark. 539, 855 S.W.2d 919 (1993), the order is void. In support of this contention, appellant relies only on a purported affidavit of J. Sky Tapp, appellant's attorney.

In reviewing this issue, we determined that the record does not contain an affidavit by Mr. Tapp nor does the record contain any evidence that Judge Davis held a hearing in the 11th Judicial District or entered the judgment and commitment order in the 11th Judicial District. The record does indicate that the jury returned a verdict and sentence was pronounced in the 7th Judicial District. The court did allow for arguments on the issue of whether to run the sentences consecutively or concurrently; however, there is no evidence in the record before us that any actions were taken in the 11th Judicial District involving appellant's case. It is appellant's burden to bring forth a record that demonstrates error. *Lukach v. State*, 310 Ark. 38, 835 S.W.2d 642 (1992). Because appellant has failed to demonstrate that the affidavit of Mr. Tapp was part of the record considered by the Circuit Court and because appellant has failed to obtain a recording of the sentencing hearing, he has not demonstrated error.

For his fourth point, appellant argues that the change of venue that occurred in this case was void; consequently, the Saline County Circuit Court lacked jurisdiction to try appellant. We disagree.

To begin with, venue and jurisdiction, though sometimes used interchangeably, are two distinct legal concepts. Venue is the geographic area, like a county, where an action is brought to trial. *Davis v. Reed*, 316 Ark. 575, 873 S.W.2d 524 (1994). Jurisdiction is the power of a court to decide cases and presupposes control over the subject matter and parties. *Id.* This court has stated that venue may be waived in a criminal case within the territorial boundaries of the judicial district. *See Waddle v. Sargent, supra*; *see also* Ark. R. Crim. P. 24.8(c)(1) (waiver of venue for plea of guilty for a second offense committed in another jurisdiction).

Here, appellant requested a change of venue. Judge Cole granted appellant's motion by changing venue from Hot Spring County to Saline County. Appellant asked the court to reconsider changing the venue to Grant County, which is outside the territorial boundaries of the 7th Judicial District. It appears that Judge Cole denied appellant's request. The trial was conducted in Saline County, and the judgment and commitment order was entered in Saline County. There is no indication from the record that appellant raised any other objections to the order changing venue prior to trial. Appellant voluntarily appeared for trial in Saline County and was convicted and sentenced. Based on the facts before us, any venue argument which Appellant might have had was waived, and any challenge to the order entered by Judge Cole changing venue cannot be raised for the first time in this *habeas* appeal.

Finally, appellant argues that the trial court erred in failing to grant *habeas* relief because the sentencing court lacked jurisdiction to sentence appellant to terms of imprisonment for the underlying felonies of kidnapping and rape to support attempted capital felony murder.

Detention for an illegal period of time is precisely what a writ of *habeas corpus* is designed to correct. *Renshaw v. Norris*, 337 Ark. 494, 989 S.W.2d 515 (1999). *American Jurisprudence* 2d states the fundamental principle of law:

> Challenges to the length of confinement are properly considered in the context of habeas corpus proceedings. Thus, the unlawful

> confinement of an individual under a sentence longer than that permitted by statute constitutes a denial of liberty without due process of law, and a petitioner alleging such confinement is entitled to seek habeas corpus relief under the Great Writ.

39 AM.JUR.2d § 66 (1999). The Great Writ provides protection for petitioners who are confined under sentences longer than that permitted by statute. *See, e.g., Manville v. Hampton*, 471 S.E.2d 872 (Ga. 1996); *State v. Purkett*, 908 S.W.2d 691 (Mo. App. W.D. 1995). In *Manville*, the Georgia Supreme Court noted that if the petitioner was confined for a sentence longer than that permitted by statute, this would be a denial of liberty without due process of law and a writ of *habeas corpus* would issue. In *Purkett,* the petitioner was sentenced to fifteen years for attempted sodomy when the maximum sentence was seven years. The Missouri Supreme Court wrote that *habeas corpus* was the proper remedy for one sentenced in excess of what was authorized by law. Because the petitioner had served the authorized sentence, he was ordered discharged from detention.

Many jurisdictions employ the writ of *habeas corpus* to reduce the term of an excessive sentence to that authorized by statute although the petitioner has not yet completed the valid portion of his sentences. *See, e.g., In re Tartar*, 339 P.2d 553 (Cal. 1959); *Landreth v. Gladden*, 324 P.2d 475 (Ore. 1958); *Ex parte Hill,* 528 S.W.2d 125 (Tex. Crim. App. 1975). *See also, United States v. Wilson*, 997 F.2d 429 (8th Cir. 1993).

Here, appellant argues that the judgment and commitment order is void because the trial court lacked jurisdiction to sentence him for the underlying felonies supporting the conviction for attempted capital murder as well as for attempted capital murder. We disagree with appellant that his conviction is void; however, we do agree that appellant is being illegally detained to the extent that the sentences are excessive.

[redacted] Appellant was convicted of three counts of rape, one count of kidnapping, and one count of attempted capital murder. He was sentenced on all five counts. The information in the record does not indicate which felony was used to support the charge of attempted capital murder. Even so, appellant is now entitled to relief because the attempted capital murder conviction requires at least one underlying felony to be merged into the capital murder convic-

tion. *See Richie v. State*, 298 Ark. 358, 767 S.W.2d 522 (1989). The doctrine of merger then prevents conviction and sentencing on the underlying felony. *Id.* Accordingly, we hold that one felony conviction, for one count of rape, merged into the conviction for the attempted capital murder. The judgment and commitment is modified to show two life sentences for two rape convictions as opposed to three, with the two life sentences to run consecutively. The other convictions and sentences remain in effect.

Affirmed as modified.

Pamela D. BALL *v.* ARKANSAS DEPARTMENT of COMMUNITY PUNISHMENT

99-917 10 S.W.3d 873

Supreme Court of Arkansas
Opinion delivered February 24, 2000

Law Office of Treeca J. Dyer, P.A., by: *Treeca J. Dyer*, for appellant.

Mark Pryor, Att'y Gen., by: *Brian G. Brooks*, Ass't Att'y Gen., for appellees.

TOM GLAZE, Justice. Pamela Ball brings this appeal from the trial court's dismissal of her complaint against the Arkansas Department of Community Punishment (hereinafter "DCP" or "Department") and its director, Paula Pumphrey, and employees, Dave Johnson and Donald Webb. The court of appeals certified this case to us, and we accept jurisdiction pursuant to Ark. Sup. Ct. R. 1-2(a)(1) and 1-2(b)(4) and (5).

Ball, a parole officer with the DCP, was fired on September 5, 1997. Shortly before her termination, she had initiated a parole revocation hearing against a parolee represented by State Representative Michael Booker. Ball's attorney and her father were present at the hearing, held at the Area 12 parole office in Little Rock.[1] Field Services Administrator Dave Johnson became concerned about the situation, and attempted to have the meeting closed so that Ball's attorney and father could not attend; however, he was unsuccessful, and the hearing proceeded. During the hearing, Booker apparently made some hearsay allegations that Ball had made threatening

[1] Ball had alleged some kind of prior difficulties with Rep. Booker, and she had requested that her attorney and father be at the hearing to make sure that Booker would not attempt to "harass or intimidate" her.

remarks about him. After the hearing was over, some kind of confrontation arose between Booker and Ball's father. No one present in the hearing room heard what the two men said.

Johnson asked Donald Webb, the Area 12 Parole Supervisor, to have persons present at the hearing turn in written memoranda detailing what happened. Ball and two other DCP employees were asked for memos, but Ball refused. She demanded that Johnson put his request in writing, detailing the reasons he wanted the memo. Johnson refused to comply with this demand and had Webb instruct Ball to turn in the memo by 4:00 that afternoon or face discipline for insubordination.

Rather than turn in a memo as requested, Ball had her attorney draft a letter and fax it to Johnson. The letter stated that Ball had no knowledge of what happened between her father and Booker. In addition, Ball's attorney stated that she was protesting the "strong-arm tactics" being used against Ball, and advised Johnson to let the matter rest. Finally, the letter instructed Johnson to contact Ball's attorney if he had any further questions to ask of Ball.

Webb informed Ball that the letter was not sufficient and terminated her for insubordination, basing his decision not only on the fact that Ball had her attorney write the letter, but also that she had demanded Johnson's request in writing. Ball appealed her dismissal to the DCP's internal grievance panel, which upheld the firing. Claiming that decision was tainted because one panel member allegedly called her a "troublemaker," Ball appealed again, this time to the State Employee Grievance Appeal Panel, or SEGAP. SEGAP reversed the lower panel, saying that Ball had not failed to comply with her supervisor's request, but merely responded in an "unconventional way." SEGAP decided suspension, rather than termination, was the appropriate discipline.

The DCP appealed SEGAP's decision to Richard Weiss, Chief Fiscal Officer of the State of Arkansas. In an opinion signed by Tim Leathers, the SEGAP decision was reversed and Ball's termination reinstated. Leathers noted that "[a] state agency, particularly one connected to law enforcement, cannot be expected to channel its reasonable requests of employees through the employee's attorney. Public policy dictates that an agency has the authority to establish reasonable rules and orders."

Following that appeal, Ball filed a complaint against the DCP with the Pulaski County Circuit Court, alleging wrongful termination, based on "an implied contract of employment," and adding a claim of outrage. The DCP moved to dismiss pursuant to Ark. R. Civ. P. 12(b)(6), arguing that the state was immune from suit under Ark. Const. art. 5, § 20, that Ball was an at-will employee, and that there were insufficient facts to support an outrage claim. Subsequently, Ball filed an amended complaint naming Pumphrey, Johnson, and Webb individually and asserting that, as individuals, they were not immune. In her response to the motion to dismiss, she alleged that Ark. Code Ann. § 19-10-305(a) (Supp. 1999) waived the defendants' tort immunity because they acted with malice and outside the scope of their employment. She also argued that her equal protection rights were violated because she was terminated in violation of the Department's written policies. Finally, she contended that there was a factual question with respect to her outrage claim.

On December 1, 1998, the trial court entered an order dismissing the DCP on the grounds of sovereign immunity. Because the Department was immune, the court held it had no jurisdiction to entertain the suit. On May 4, 1999, the judge dismissed Pumphrey, Johnson, and Webb, finding that they were also immune from suit, and consequently his court lacked jurisdiction to hear the matter. In addition, the court noted that even if it could hear the matter, it would grant the motion to dismiss on the merits because Ball was an at-will employee, so her wrongful-discharge and breach-of-contract claims failed as a matter of law. Finally, the court stated that Ball failed to state a cause of action for outrage.[2] From this order, Ball brings her appeal.

As an initial matter, we point out that although the trial court stated that it was granting a motion to dismiss, it appears that matters outside of the pleadings were considered in reaching this conclusion. When matters outside the pleadings are presented and not excluded by the trial court in connection with a 12(b) motion, we treat the motion as one for summary judgment under Rule 56 of the Arkansas Rules of Civil Procedure. *See Martin v. Arthur*, 339 Ark. 149, 3 S.W.3d 684 (1999); *Clark v. Ridgeway*, 323 Ark. 378,

[2] Ball abandoned her outrage claim on appeal, so we need not address it.

914 S.W.2d 745 (1996). The issue then becomes whether or not there was any genuine issue of material fact and whether the moving party was entitled to judgment as a matter of law. *National Bank of Commerce v. Dow Chem. Co.*, 338 Ark. 752, 1 S.W.3d 443 (1999).

Ball does not challenge the trial court's ruling as to the Department and its entitlement to sovereign immunity. Rather, she limits her argument to whether or not the Department's employees, Pumphrey, Johnson, and Webb, are immune under Ark. Const. art. 5, § 20, and Ark. Code Ann. § 19-10-305(a) (Supp. 1999). We hold that they are.

When a suit is filed against employees of the state, § 19-10-305 provides them with immunity from civil liability for non-malicious acts occurring within the course of their employment. *Beaulieu v. Gray*, 288 Ark. 395, 705 S.W.2d 880 (1986). To determine whether a suit against state employees is in reality a suit against the State, we use the following standard, set out in *Page v. McKinley*, 196 Ark. 331, 118 S.W.2d 235 (1938):

> [W]here 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.

Beaulieu, 288 Ark. at 398 (quoting *Page*, *supra*).

Ball's action sought reinstatement to her position and restoration of her benefits, seniority, annual and sick leave, compensatory time, and longevity bonus pay. It is clear that she sought a judgment that would have operated to control the action of the state, so the trial court was obviously correct to dismiss the complaint against the DCP. The question then becomes one of immunity for Pumphrey, Webb, and Johnson. As employees of the state, they are immune unless they acted either maliciously or outside the scope of their employment.

However, it is actually unnecessary to explore that point, because Ball was an at-will employee. In Arkansas, the general rule is that an employer or an employee may terminate an employment

relationship at will. *See Crain Indus., Inc. v. Cass*, 305 Ark. 566, 810 S.W.2d 910 (1990); *Gladden v. Arkansas Children's Hospital*, 292 Ark. 130, 728 S.W.2d 501 (1987). There are two basic exceptions to the at-will doctrine: (1) where an employee relies upon a personnel manual that contains *an express agreement* against termination except for cause; and (2) where the employment agreement contains a provision that the employee will not be discharged except for cause, even if the agreement has an unspecified term. *Gladden*, 292 Ark. at 136.

Neither of these exceptions applies here, because Ball had no employment agreement or contract. She attempts to rely on one section of a DCP Administrative Regulation, entitled "Disciplinary Action," for her argument that she had an "implied" contract of employment. This section, however, provides only that an attempt should be made to apply formal disciplinary action in a progressive manner, but it further recognizes that certain situations can necessitate a deviation from the progressive discipline policy. Under Arkansas law, this is not enough to create a contract of employment, and to decide that it did "would be contrary to [this court's] directive in *Gladden*, that an implied provision against the right to discharge will not be sufficient to invoke the exception." *St. Edward Mercy Med. Ctr. v. Ellison*, 58 Ark. App. 100, 108, 946 S.W.2d 726, 729 (1997).

Because Ball was an at-will employee, she could have been fired for any reason, no reason, or even a morally wrong reason. *Smith v. American Greetings Corp.*, 304 Ark. 596, 804 S.W.2d 683 (1991); *Ellison*, 58 Ark. App. at 105. Thus, the question of malice on the part of her employer is irrelevant.

Ball also attempts to bring herself within one other narrow exception to the employment-at-will doctrine — the public policy exception. This exception was established in *Sterling Drug, Inc. v. Oxford*, 294 Ark. 239, 743 S.W.2d 380 (1988). In that case, this court held that an at-will employee has a cause of action for wrongful discharge if he or she is fired in violation of a well-established public policy of the state. The public policy of a state is found in its constitution and statutes, *Wal-Mart Stores, Inc. v. Baysinger*, 306 Ark. 239, 812 S.W.2d 463 (1991), but Ball fails to point us to any statutory or constitutional provisions that would support her argument. Although she attempts to argue in her brief that she

was fired as the result of the political influence of Rep. Booker and in retaliation for "blowing the whistle" on DCP's course of conduct in the way it handles parole hearings, this is the first time she raises these points. This court will not consider an argument for the first time on appeal. *Dobie v. Rogers*, 339 Ark. 242, 5 S.W.3d 30 (1999).

For the reasons stated above, we hold that there was no genuine issue of material fact presented to the trial court. Ball was an at-will employee, and the Department was free to terminate her employment. Thus, we affirm the trial court's decision, holding that the appellees are immune from suit, but we modify or clarify the dismissal to be one with prejudice.

Owen D. OATES *v.* Maria Teresa OATES

99-108 10 S.W.3d 861

Supreme Court of Arkansas
Opinion delivered February 24, 2000

[redacted]

H. Oscar Hirby, for appellant.

Herby Branscum, Jr., for appellee.

TOM GLAZE, Justice. This divorce case was filed by appellee Maria Teresa Oates against her husband, appellant Owen D. Oates. Maria alleged general indignities. Owen filed an answer, denying Maria's allegations and countered, requesting that he be granted a divorce and that the parties' liabilities and property rights be adjudicated.

At trial, Maria proceeded on her complaint and testified in support of her alleged grounds, stating that Owen no longer loved her and did not want to live with her, that she felt she had been abused mentally and emotionally, that there had been some unfaithfulness in the marriage, and that Owen had a drinking problem. Maria said the stress from all these matters made her ill. Maria further averred that she and Owen had separated on October 28, 1997, and had been apart continuously since then.

Owen's counsel cross-examined Maria and asked her whether she was aware when they married that Owen's job would require him to be transferred to other cities. She agreed, but said when they moved to New York, she became unhappy because she was from a small town. Maria also complained that Owen was gone from dark-to-dark. She admitted that Owen had had a drinking problem all of his life, and she had coped with it. Maria stated that she asked Owen if she could return to her home town. Later she left Owen in New York and returned to Texas where she taught and worked on her retirement. Maria would visit Owen in New York when she took her vacation. She conceded she was not interested in filing for divorce even after Owen left her in Perry, Arkansas; she begged him to stay. At this stage of Maria's cross-examination, her counsel interrupted. The following colloquy occurred:

> MR. BRANSCUM: *I thought they had stipulated to the grounds.* I don't know that the relevance of this is — I thought the issue was the property.

MR. JAMES: There is a question about alimony, or *if you are waiving alimony, then we won't get into that.*

MR. BRANSCUM: *I've asked for an equalization of the retirement that was acquired during the marriage in lieu of alimony.*

MR. JAMES: You're asking for one-half (1/2) interest in the pension.

MR. BRANSCUM: Yeah.

MR. JAMES: Okay. That's all?

MR. BRANSCUM: Yeah.

THE COURT: Did you say "yes," Mr. Branscum?

MR. BRANSCUM: That is the prayer. I've asked for the equalization in the pension in lieu of alimony. I think that's the way it's pled.

THE COURT: Did you understand that, Mr. James?

MR. JAMES: Let me ask some questions.

Owen's counsel then questioned Maria concerning her and Owen's pensions and inquired about other property and insurance as well. After testifying, Maria called Tina Sawyer as her corroborating witness, who testified that Maria had been a resident of the state at least 90 days prior to filing this divorce action, and that Sawyer knew Maria and Owen had been separated since October of 1997. Maria then rested her case.

Owen took the stand and testified to the parties' problems over the years and said that the longest period he and Maria lived together was four years. He stated that Maria appeared a little bit more stable when she was in Texas, but admitted their marriage never worked. Owen said, "I suppose *she is aggrieved at me as we cannot have this thing happen without her finding fault. But I have no drinking problem.*" The balance of Owen's testimony bore largely on the parties' properties and pensions in dispute. Owen's testimony reflected he never agreed to Maria's demand that she be awarded one-half of pension, or that the one-half amount be paid in lieu of alimony.

After both parties rested, the trial court entered a final decree, awarding Maria a divorce. The court awarded Maria 27.5% of Owen's retirement and Owen 27.27% of Maria's retirement and then ordered various properties it found marital to be divided or sold and the proceeds divided equally. The chancellor also found Maria to be the sole owner of inheritance property located in Texas, and divided other personal property equally.[1] The chancellor also ordered Owen to continue Maria on his health insurance.

Owen appealed from the chancellor's decree, raising six issues for reversal. The first issue questions whether the chancellor erred in granting Maria a divorce. In this first point, Owen argues Maria failed to corroborate her grounds for divorce. We agree. Thus, we must reverse and dismiss this case without prejudice. In so holding, the remaining issues bearing on the property awards and other matters argued will not be addressed.

The premise of Owen's argument is that this is a contested divorce, and at no time did Maria provide an expressed waiver of the requirement of corroboration to her alleged grounds as she could have done under Ark. Code Ann. § 9-12-306(b) (Repl. 1998) (in contested suits, corroboration of the injured party's grounds may be expressly waived in writing by the other spouse). Our courts have held that divorce is a creature of statute and can only be granted when statutory grounds have been proved and corroborated. *Russell v. Russell*, 275 Ark. 193, 628 S.W.2d 315 (1982); *Copeland v. Copeland*, 2 Ark. App. 55, 616 S.W.2d 773 (1981). Here, Maria concedes the record reflects no writing whereby she waived corroboration of grounds. However, she submits that some sort of "understanding" had been presented to the court in a pretrial in-chambers session, but then admits that nothing in the record actually reflects a written waiver or "understanding."

Maria argues that, while the record reveals no written waiver by Owen, she claims that such a waiver was evident from the exchanges between counsel at trial. Our review reveals that colloquy made nothing clear. Owen's counsel questioned Maria regarding her ground allegation that she previously mentioned on direct examination, at which point Maria's counsel interrupted and asserted that he *thought* they had stipulated to divorce grounds and

[1] The chancellor also had each party retain the personal property in their possession.

that only the parties' property was in issue.[2] Owen's counsel responded, indicating such was not the case if she was asserting a claim to alimony or to one-half of Owen's pension. Maria's counsel made it clear that Maria sought one-half of Owen's pension in lieu of alimony. In short, a fair reading of Owen's remarks reflects that he was contesting the divorce, so long as the alimony/pension issues remained unresolved.

Maria cites to *Rachel v. Rachel*, 294 Ark. 110, 741 S.W.2d 240 (1987), to support her proposition that Owen's counsel waived corroboration, but the situation in *Rachel* was vastly different. There, the defendant-husband's counsel specifically informed the trial court that defendant, Mr. Rachel, had waived plaintiff's, Mrs. Rachel's, having to corroborate her grounds. Having been informed of Mr. Rachel's waiver, the trial court properly entered Mr. Rachel's waiver on record, so the waiver would be in writing and meet the statutory requirement under § 9-12-306(b). In the instant case, neither Maria's counsel nor the chancellor showed or clarified whether a waiver or so-called stipulation had been reached.

Finally, Maria's arguments suggest that Owen had some obligation to object to her having failed to prove corroboration at trial, and that, if he had done so, Maria would have offered additional testimony. Our law is long settled that in a non-jury trial, a party who does not challenge the sufficiency of evidence does not waive the right to do so on appeal. *Harpole v. Harpole*, 10 Ark. App. 298, 664 S.W.2d 480 (1984); *see also Strickland v. State*, 322 Ark. 312, 909 S.W.2d 318 (1995); *Bass v. Koller*, 276 Ark. 93, 632 S.W.2d 410 (1982); Ark. R. Civ. P. 50(e). As was the disposition in *Harpole*, we reverse and dismiss this case without prejudice.

ARNOLD, C.J., BROWN and THORNTON, JJ., dissent.

RAY THORNTON, Justice, dissenting. I respectfully dissent from the opinion of the majority, on the grounds that the decision of the trial court in granting appellee a divorce should be affirmed. The fundamental issue to this appeal is appellant's contention that the grant of the divorce was in error because appellee failed to provide corroboration of her grounds for divorce.

[2] Administrative Order Number 4 provides that, unless waived on the record by the parties, it shall be the duty of any circuit, chancery, or probate court to require that a verbatim record be made of all proceedings pertaining to any contested matter before it.

Appellee contends that appellant orally agreed to waive corroboration at a pre-trial conference in the judge's chambers, an exchange which was not made a part of the record but which appellee argues was alluded to by both attorneys during the trial itself. Appellant has responded that Ark. Code Ann. § 9-12-306 (Repl. 1998) requires that in contested suits such as this, corroboration of the injured party's grounds may be expressly waived only in writing by the other party.[1]

Section 306 provides that: "Corroboration of the injured party's grounds may be expressly waived in writing by the other spouse." *Id.* Corroboration must be testimony of a substantial fact or circumstance which leads an impartial and reasonable mind to believe that material testimony as to a valid fact or circumstance is true; and that it was vital to a complaining spouse's suit for divorce on this ground to show that a course of conduct pursued by the other spouse was the cause of an intolerable condition of the complaining spouse. *Welch v. Welch*, 254 Ark. 84, 491 S.W.2d 598 (1973).

We have previously interpreted the requirement of corroboration to include an oral waiver made in open court and recorded by the reporter. Such a waiver is just as valid as though transcribed and executed. *Rachel v. Rachel*, 294 Ark. 110, 741 S.W.2d 240 (1987). In that case, we relied upon Ark. R. Civ. P. 15(b), which provides that, notwithstanding Rules 10 and 11, which require that pleadings be in writing, when issues are not pleaded in writing, but are tried with the implicit consent of the parties in open court, the written pleadings may be considered to be amended as though the amendment were reduced to writing. *Rachel, supra.*

Appellee asserts that the oral waiver was made in chambers at a pre-trial conference, but the agreement was not reduced to writing, nor was it transcribed and made a part of the record. Through his new counsel on appeal, appellant argues that he did not give an express written waiver of the requirement of corroboration, but he does not argue on appeal that a verbal waiver was not discussed or even agreed upon. My reading of the record indicates that the two attorneys and the chancellor shared knowledge of an agreement

[1] The word "only" does not appear in the statutory language. *See* Ark. Code Ann. § 9-12-306.

between the parties not to contest corroboration. During cross-examination of appellee, plaintiff below, counsel for appellant began to question her about the separations between the couple and how much time the parties had actually spent living together during their thirty-one years of marriage. In objecting, appellee's counsel stated: "Now, your Honor, I thought that they had stipulated to the grounds. I don't know what the relevance of this is, and it — I thought the issue was the property. That was my understanding."

Appellant's counsel responded: "Well, it — I mean if there's a question about alimony, or if they're — if you all are waiving alimony then — *then we won't get into that*" (emphasis supplied). Appellant's counsel did not continue his previous line of questioning, but moved on to inquire of appellee whether she felt that she had helped appellant acquire financial benefits during the marriage. Appellant did not dispute appellee's counsel's statement that grounds had been stipulated. A review of the testimony elicited at trial reveals that the remainder of the questioning, particularly the cross-examination of appellee, concerns primarily the financial issues attendant to the divorce rather than a contest of the underlying grounds for divorce.

In *Rachel, supra*, the trial judge made a statement for the record that it had been advised that Mr. Rachel was waiving corroboration of the grounds of divorce by Mrs. Rachel, "in accordance with the statute." The chancellor noted that such waiver should be in writing and directed the attorney charged with preparation of the order to note the waiver; however, this did not take place. Under that set of facts, we held that this recitation for the record, made in open court and recorded by the reporter, was sufficient to satisfy the requirements of the statute. *Id.*

The grounds presented by appellee in this case included her testimony that appellant had left her "many times" during their thirty-one years of marriage. Appellee told the court that she retired from her job in Texas to follow her husband to Perry County, then saw him "[take] off again for a whole year," leaving her in his hometown. According to appellee, the last time appellant left her he told her he wouldn't be back, and he sent her letters telling her he no longer loved her and did not want to live with her, so she should seek a divorce. Appellee alleged drinking problems and infidelity on the part of appellant, and it was revealed that he

had kept secret from her a bank account and his purchase of real property. She also described the physical toll the stress of her marriage had placed on her, including bouts with pneumonia and hepatitis that forced her to quit her job in Morrilton. Even appellant claimed that the couple had lived together only ten years during the marriage.

The statements of counsel, and indeed, the conduct of the entire case supports the existence of an agreement by the parties that appellant would not contest the divorce on the issue of corroboration. Without an agreement between the parties that appellant would waive the requirement of corroboration, appellee would no doubt have presented additional evidence from her corroborating witness in support of her grounds for divorce. And, in the absence of such an agreement known to the chancellor, the trial court would not have granted this divorce based solely on the testimony of the two parties. The purpose of requiring corroboration is to prevent parties from obtaining a divorce by collusion. *Rachel, supra.* As indicated by the appeal of the granting of the divorce here, there is obviously no suggestion of collusion on the part of these parties. There are, however, certainly grounds in support of severing the bonds of matrimony between appellant and appellee.

While cases on appeal from the chancery court are tried *de novo*, this court does not reverse unless the findings of the trial court are clearly erroneous. We give due deference to the trial judge's superior position to determine the credibility of the witnesses and the weight to be accorded their testimony in the light of other facts before the judge. *Stover v. Stover,* 287 Ark. 116, 696 S.W.2d 750 (1985). Under the set of facts now before this court, where the statement that the parties had stipulated to grounds was made in open court by appellee's counsel, and was not corrected by appellant, but, rather, was implicitly agreed to by appellant's counsel's actions and statements, I would conclude that this scenario meets the requirements set forth in the *Rachel* case and would therefore uphold the lower court's granting of the divorce to appellee. The trial court here had the opportunity to observe the credibility and demeanor of both the witnesses and their counsel. Because the findings of a chancellor are due great deference by this court, and because there is no showing of collusion in the obtaining of this divorce, I respectfully dissent from the majority opinion.

Dissent.

ARNOLD, C.J., and BROWN, J., join in this dissent.

Lela K. PHELPS, Administratrix of
the Estate of Lincoln D. Phelps *v.*
U.S. CREDIT LIFE INSURANCE COMPANY

99-936 10 S.W.3d 854

Supreme Court of Arkansas
Opinion delivered February 24, 2000

Walters, Hamby & Verkamp, by: *Bill Walters*, for appellant.

Horne, Hollingsworth & Parker, by: *Allan W. Horne* and *Mark H. Allison*, for appellee.

DONALD L. CORBIN, Justice. The sole issue in this case is whether the Sebastian County Chancery Court abused its discretion in setting the amount of attorney's fees awarded to Appellant Lela K. Phelps for her claim against Appellee U.S. Life Credit Life Insurance Company. This is the second appeal of this

matter. *See Phelps v. U.S. Life Credit Life Ins. Co.*, 336 Ark. 257, 984 S.W.2d 425 (1999) (*Phelps I*). Our jurisdiction is thus pursuant to Ark. Sup. Ct. R. 1-2(a)(7). We find no error and affirm.

Our decision in *Phelps I* reflects that Appellee's agent sold a credit life insurance policy to Lincoln Phelps, incident to his purchase of a pickup truck on November 4, 1994. Mr. Phelps died on September 13, 1996, while coverage of the policy was in force, from an acute myocardial infarction with a chronic condition of cardiac arrhythmia. Appellant, the widow of Mr. Phelps and the administratrix of his estate, filed a claim against Appellee, seeking payment of death benefits to the creditor-beneficiary, Ford Motor Credit Company. Appellee refused to pay the claim, contending that Mr. Phelps's application answers misrepresented his true health condition. Appellee asserted that had it known of Mr. Phelps's heart condition, it would not have issued the policy and was therefore entitled to rescind it. The chancellor granted Appellee's request for rescission and dismissed Appellant's complaint. This court reversed the chancellor's decision in *Phelps I*. On remand, the chancellor entered judgment in favor of Appellant, awarding her $12,699.98, plus interest of $2,075.42, and a penalty of $1,524.00. Additionally, the chancellor awarded attorney's fees in the amount of $5,433.13 plus $651.40 for the costs on appeal.

The record on remand reflects that Appellant sought attorney's fees in the amount of $11,812.50 for approximately 94.5 hours of work at $125.00 per hour. Appellant also sought fees in the amount of $1,250.00 for the costs to prepare and argue the postjudgment motion. The fee request was based on an itemization of tasks performed by Appellant's attorney, Bill Walters, as well as the affidavits of four local attorneys, which reflected that a reasonable hourly rate in the area was $150.00.

Appellee challenged the accuracy of Mr. Walters's estimation of time spent working on the case. Appellee also questioned the relevance of Appellant's affidavits, which were taken from another case and specifically referred to the difficulty of representing policyholders on fire insurance claims where they are suspected of arson. Appellee further urged the chancellor to consider the fact that under Ark. Code Ann. § 23-79-208 (Repl. 1999), the attorney's fee is not the property of the attorney, but is indemnity to the litigant. Thus, Appellee argued that the fee should be limited to the amount

that Appellant was obligated to pay her attorney. Appellee contended that the appropriate amount would be between thirty-three and forty percent of the judgment. In support of this contention, Appellee relied on a letter from Mr. Walters to the chancellor, which reflected in part that the case was taken on a contingency-fee basis. The chancellor agreed with Appellee and awarded a fee in the amount of one-third of the judgment and penalty awarded to Appellant.

This court has interpreted section 23-79-208 as providing that "[i]n the event an insurer wrongfully refuses to pay benefits under an insurance policy, the insured may recover the overdue benefits, twelve percent damages upon the amount of the loss, and reasonable attorneys' fees." *Northwestern Nat'l Life Ins. Co. v. Heslip*, 309 Ark. 319, 326-27, 832 S.W.2d 463, 467 (1992) (quoting *State Farm Fire & Cas. Co. v. Stockton*, 295 Ark. 560, 565, 750 S.W.2d 945, 948 (1988)). The following factors are relevant in determining reasonable fees: (1) the experience and ability of the attorney; (2) the time and labor required to perform the service properly; (3) the amount in controversy and the result obtained in the case; (4) the novelty and difficulty of the issues involved; (5) the fee customarily charged for similar services in the local area; (6) whether the fee is fixed or contingent; (7) the time limitations imposed upon the client in the circumstances; and (8) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the attorney. *Parker v. Southern Farm Bureau Cas. Ins. Co.*, 326 Ark. 1073, 935 S.W.2d 556 (1996); *Heslip*, 309 Ark. 319, 832 S.W.2d 463. While courts should be guided by the foregoing factors, there is no fixed formula in determining the reasonableness of an award of attorney's fees. *See Shepherd v. State Auto Prop. & Cas. Ins. Co.*, 312 Ark. 502, 850 S.W.2d 324 (1993); *Stockton*, 295 Ark. 560, 750 S.W.2d 945. Because of its intimate acquaintance with the record and the quality of the service rendered, we recognize the superior perspective of the trial court in assessing the applicable factors. *Id.* Thus, we will not set aside an award of attorney's fees absent an abuse of discretion by the trial court. *Id.*

Appellant argues that the chancellor abused his discretion in setting the amount of fees in this case. She asserts that the chancellor should have awarded fees in accordance with the total time Mr. Walters spent working on her case. We disagree. There

was no evidence of the actual amount of time spent preparing Appellant's case. Mr. Walters merely submitted a five-page itemization of particular tasks and the dates on which they were performed. There was no indication of the time spent on each of the tasks; rather, there was only an estimation of the total time spent performing all of the tasks. It is not known how Mr. Walters arrived at the figure of 94.5 hours. Moreover, according to his letter to the chancellor, Mr. Walters acknowledged that his office's records were not completely accurate, stating that "we had not kept this matter entirely timed during the work we were doing on it because of it being a contingency fee case." Thus, the total time allegedly spent on the case was merely an estimation arrived at after the fact. In any event, the time spent on a case is but one factor to consider, and we do not regard this argument as a persuasive reason to reverse the chancellor's judgment. *See Heslip*, 309 Ark. 319, 832 S.W.2d 463.

Furthermore, we reject Appellant's argument that the chancellor abused his discretion in "arbitrarily" setting a contingency fee in this case without explanation. Mr. Walters admitted in a letter to the chancellor that he had taken the case on a contingency-fee basis. The chancellor thus properly considered that factor in arriving at a reasonable fee. *See Parker*, 326 Ark. 1073, 935 S.W.2d 556; *Heslip*, 309 Ark. 319, 832 S.W.2d 463. Additionally, this court has recognized that the fee provided for in section 23-79-208 "is allowed only to reimburse an insurance policyholder or beneficiary for expenses incurred in enforcing the contract and to compensate him in engaging counsel thoroughly competent to protect his interests." *Equitable Life Assur. Society v. Rummell*, 257 Ark. 90, 91, 514 S.W.2d 224, 225 (1974). The fee is not the property of the attorney; instead, it is indemnity to the litigant. *Id.* Thus, the fee awarded should not exceed the amount that the client is responsible for paying, otherwise the statute would be susceptible to abuse. The purpose of the statute is not to provide a windfall to attorneys; rather, it is to permit the insured to obtain competent representation. *Id.* Accordingly, we cannot say that the chancellor abused his discretion in awarding attorney's fees in the amount of $5,433.13, plus costs of $651.40, on a total judgment of $16,299.40.

Affirmed.

Larry James OSBORN *v.* STATE of Arkansas

CR 99-584 11 S.W.3d 528

Supreme Court of Arkansas
Opinion delivered February 24, 2000

Robert N. Jeffrey, for appellant.

Mark Pryor, Att'y Gen., by: *James R. Gowen, Jr.*, Ass't Att'y Gen., for appellee.

ROBERT L. BROWN, Justice. Appellant Larry James Osborn argues as his sole point on appeal that he was denied a speedy trial under Ark. R. Crim. P. 28.1, and, as a result, the charge against him should have been dismissed. We disagree and affirm his conviction for aggravated robbery and his sentence of life imprisonment as a habitual offender.

At approximately 4:50 a.m. on the morning of May 18, 1996, Herschel Wright was loading his pickup truck in the parking lot of the Ramada Inn in Benton. His wife, Diane Wright, was in the motel room, and his grandson, Nathan, who was age seven, was with him. A car pulled into the parking lot, and the passenger, whom Wright later identified as Osborn, asked for directions. Wright got out of his pickup truck and walked over to the passenger side of the car, where Osborn asked specifically for directions to the interstate highway. Osborn then leaned over in his seat and raised up with a pistol pointed at Wright. Osborn demanded Wright's money, and Wright gave him his wallet. The driver of the car, who was identified later as Cory Jones, said: "Give him all your money or he'll blow you away." Wright replied that Osborn had all his money. The car sped away. It was pursued by police officers and crashed in a single-vehicle accident. Osborn was arrested that same day and charged with aggravated robbery.

On March 24, 1998, Osborn moved for a dismissal of the charge against him based on a speedy-trial violation. The trial court denied the motion. On April 28, 1998, Osborn petitioned this court for a writ of prohibition, also based on speedy-trial grounds. On May 15, 1998, we denied the petition without prejudice to raise the same issue on appeal.

Osborn was tried by a jury on June 4, 1998, and convicted and sentenced as previously stated. Following entry of the judgment, Osborn moved for a new trial based on the fact that three jurors had been misled by the prosecutor's closing argument regarding Osborn's criminal record. The trial court heard testimony on this point. The court set aside the sentence and granted Osborn a new sentencing trial. The State appealed the grant of a new trial, and this court reversed and ordered that the original sentence be rein-

stated. *State v. Osborn*, 337 Ark. 172, 988 S.W.2d 485 (1999).[1]

The essence of Osborn's point on appeal is that he was tried 747 days after his arrest. This exceeded the twelve-month requirement by 382 days. Of those days, he concedes that 218 days were due to his requests for continuances and 64 days were caused by his objection to the trial date set for April 20, 1998. This leaves 100 days over the twelve-month limit. At issue in this appeal are 118 days that accrued between the dates of December 4, 1997, and April 1, 1998. If the full 118 days were properly excluded by the trial court, there was no speedy-trial violation.

After Osborn was granted the continuances, his trial was set for October 17, 1997. He failed to appear for trial on that date and was later arrested in the state of Colorado and returned to Benton on December 4, 1997. Osborn now contends that his trial should have been set within 18 days after his return from Colorado to comply with speedy-trial requirements. He further contends that if the trial delay was due to congestion of the trial docket, no written order or docket notation was made on December 4, 1997, to show that the congestion was due to exceptional circumstances, as required by Ark. R. Crim. P. 28.3(b).[2] Also, he maintains that the excluded period caused by congestion was required to be set out in a court order or docket entry. *See* Ark. R. Crim. P. 28.3(i).[3] In support of his argument, Osborn directs our attention to *Hicks v. State*, 305 Ark. 393, 808 S.W.2d 348 (1991). In *Hicks*, we held that congestion alone did not constitute exceptional circumstances to justify breaching the speedy-trial rule. *See id.* at 397, 808 S.W.2d at 351.

We do not consider *Hicks v. State, supra*, to be precedent for deciding the instant case. Osborn's trial was set for October 17, 1997, and he failed to appear. The duration of a defendant's unavailability is clearly an excludable period for speedy-trial purposes. *See* Ark. R. Crim. P. 28.3(e). Moreover, once he was

[1] The State does not raise the issue of whether Osborn waived his speedy-trial appeal by not cross-appealing on that point in the State's appeal. Accordingly, we will not consider the issue.

[2] Rule 28.3(b) was amended by per curiam order on April 22, 1999, to eliminate the "exceptional circumstances" language. *See In Re Ark. R. Crim. P.* 28, 337 Ark. 627 (1999).

[3] The same per curiam order cited in footnote 2 amended Rule 28.3(i) to permit the trial court to enter the court order or make the docket entry after the speedy-trial motion has been filed.

arrested and returned to Arkansas, he was not entitled to a trial within 18 days, as he now argues. That would have had the effect of disrupting the trial court's entire docket. What the trial court did, upon Osborn's arrest and return to this state, was to set the trial down for the next available trial date. Osborn was entitled to nothing more under our rules. We affirm the trial court's denial of the motion to dismiss.

Osborn also takes issue with the absence of a contemporaneous written order or docket entry at the time the "continuance" was granted on December 4, 1997, after he was returned from Colorado. We do not view the trial court's resetting of a trial date under these circumstances as a traditional continuance. It is clear from the record that Osborn failed to appear for trial on October 17, 1997. It is further clear from the record that Osborn's trial was rescheduled for the first available trial date, after his return to Arkansas.

We have held that failure to make a docket entry or written order relating to excludable periods does not warrant an automatic reversal under Rule 28.3(i). *See Wallace v. State*, 314 Ark. 247, 862 S.W.2d 235 (1993); *Hubbard v. State*, 306 Ark. 153, 812 S.W.2d 107 (1991); *McConaughy v. State*, 301 Ark. 446, 784 S.W.2d 768 (1990); *see also Henson v. State*, 38 Ark. App. 155, 832 S.W.2d 269 (1992). We have further held that when a case is delayed by the accused and the delaying act is memorialized by a record taken at the time it occurred, that record may be sufficient to satisfy the requirements of Rule 28.3(i). *See Wallace v. State, supra; Hubbard v. State, supra; McConaughy v. State, supra; Key v. State*, 300 Ark. 66, 776 S.W.2d 820 (1989).

That is exactly what transpired in the case before us. The record shows that Osborn delayed this case by not showing up for trial on October 17, 1997. It further shows that the trial court reset the case for the next available trial date. Under these circumstances, where the record clearly reveals what occurred, strict compliance with Rule 28.3(i) is not required.

The record in this case has been reviewed for other error in compliance with Ark. Sup. Ct. R. 4-3(h), and no reversible error has been found.

Affirmed.

GLAZE, J.,concurs.

TOM GLAZE, Justice, concurring. Appellant, Larry Osborn, should have raised his speedy-trial claim on cross-appeal in *State v. Osborn*, 337 Ark. 172, 988 S.W.2d 485 (1999) (Osborn I). Prior to trial in *Osborn I*, appellant filed a petition for writ of prohibition with our court on speedy-trial grounds, but we denied the petition without prejudice to raise the issue on appeal. Osborn's case then went to trial, and he was convicted of aggravated robbery and given a life sentence. However, upon Osborn's motion, the trial court awarded him a new sentencing trial, from which the State appealed, as authorized under Ark. R. App. P.—Crim. 3(c). Osborn filed no cross appeal raising his earlier speedy-trial claim. For reasons fully stated in *Osborn I*, we reversed and remanded this cause and directed the trial judge to reinstate Osborn's life sentence. That would seem to have been the end of Osborn's case, but instead he was permitted after reinstatement of his conviction and sentence to raise once again his speedy trial issue which has led to this second appeal.

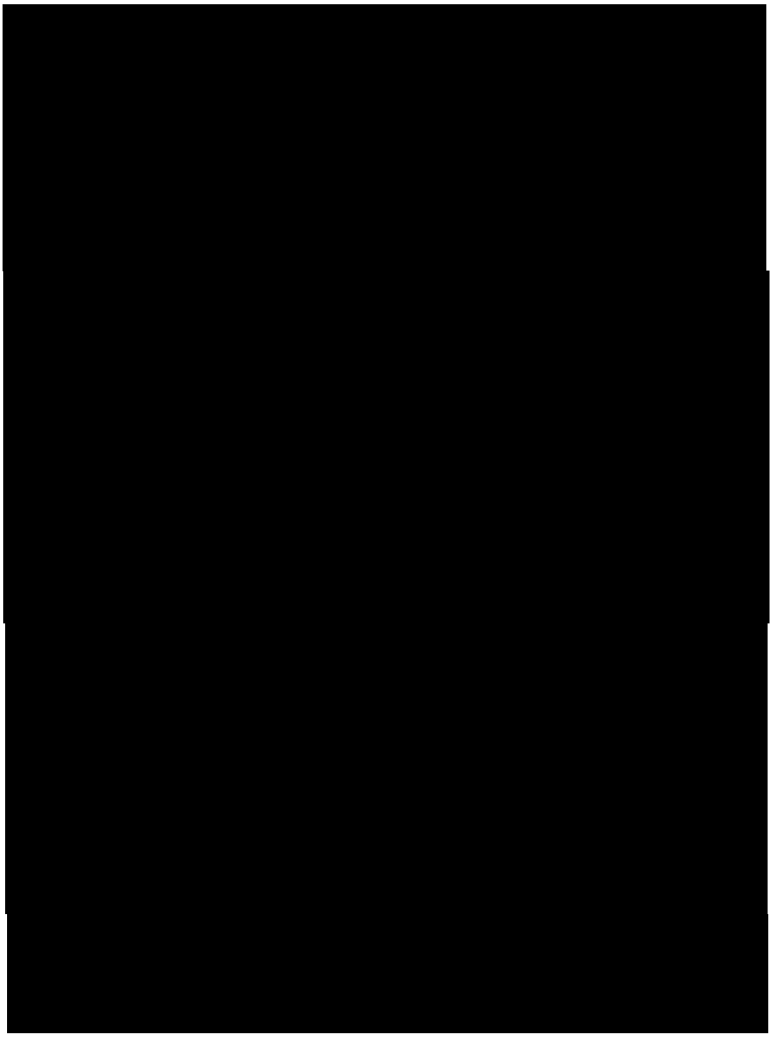
Our criminal rules do not specifically address this situation, and while my research fails to reveal a case where a defendant appellee has cross appealed when the State had appealed, there are numerous cases where the State as appellee has filed cross appeals. *See e.g. Mace v. State*, 328 Ark. 536, 944 S.W.2d 830 (1997); *Moore v. State*, 321 Ark. 249, 258-61, 903 S.W.2d 1544, 158-60 (1995); *Ashe v. State*, 57 Ark. App. 99, 942 S.W.2d 267 (1997). While our Rules of Appellate Procedure—Criminal do not specifically mention cross appeal, as such, our Rules of Appellate Procedure—Civil clearly do (*see* Ark. R. App. P.—Civ. 3(d)), and these civil appellate rules have commonly been referred to and applied when necessary in criminal appeals.

In sum, our procedural and appellate rules do not specifically provide that a defendant, who is denied a writ of prohibition on speedy-trial must raise the issue on cross appeal. Nonetheless, this court denied Osborn's petition without prejudice to raise the issue on appeal, and an appeal procedurally includes a cross appeal. *Cf. Flemings v. Little*, 324 Ark. 112, 918 S.W.2d 718 (1996). To allow Osborn to bring an appeal after his case was finally concluded in *Osborn I* merely encourages piecemeal appeals — a practice this court has repeatedly and steadfastly opposed.

Louis ETOCH and Charles E. Halbert, Jr. *v.* L.T. SIMES II, Circuit Judge

99-467 10 S.W.3d 866

Supreme Court of Arkansas
Opinion delivered February 24, 2000
[Petition for rehearing denied March 30, 2000.]



Appellants, pro se.

Mark Pryor, Att'y Gen., by: *James E. Gowen, Jr.*, Ass't Att'y Gen., for appellee.

ANNABELLE CLINTON IMBER, Justice. Randy Green was charged on April 25, 1997, with the offenses of capital murder, aggravated robbery, and theft of property. In February 1998, he hired attorneys Louis Etoch and Charles E. Halbert, Jr., to defend him. Two other co-defendants, Damon Evans and Randy Green's cousin, Jason Green, were also charged with the same crimes by separate informations. All three co-defendants were scheduled to be tried separately. Damon Evans pled guilty to first-degree murder and was sentenced to forty years imprisonment before the other co-defendants were tried.

Raymond Abramson and Chris Morledge represented Jason Green during his trial, which began on September 14, 1998. On September 17, 1998, while still representing Randy Green, Mr. Etoch appeared at Jason Green's trial in Monroe County Circuit Court. In the trial judge's chambers, the Prosecuting Attorney, Fletcher Long, Jr., asked that Mr. Etoch be shown as attorney of record for Jason Green. Mr. Etoch responded by stating that he already represented co-defendant Randy Green, but that he had come to assist Mr. Abramson at the Jason Green trial because Mr. Morledge had to leave for a seminar in Seattle, Washington.[1] Mr. Etoch then stated: "I don't want to be shown as an attorney of record and have to do an appeal. I don't want to be shown as an

[1] The record does not indicate that Mr. Morledge withdrew from the case.

attorney of record so that it would conflict Randy Green, but I think the law requires two attorneys in a death penalty case." Mr. Long continued to insist that if Mr. Etoch was going to argue jury instructions on behalf of Jason Green and assist Mr. Abramson, he should be shown as an attorney of record. The following colloquy between the trial judge and Mr. Etoch then took place:

> THE COURT: Well, let's just get this straight. We don't have to go through all of that. An objection was made. When this trial began Mr. Abramson advised the court that Mr. Morledge was going to help him and assist him with this case as co-counsel and he was expecting Mr. Halbert or Mr. Etoch. He made that statement but the point is that you can't have your cake and eat it, too. If you want to be on the record representing him you can, but we are not going to be in and out. Otherwise, we have got a problem with the order of the proceedings, you know, who goes first and who goes next. Who is objecting and when someone is not. I am not going to do that. If you want to come in you can come in. If you want to be out you are out. Tell me what your preference is now and it is not going to be in the middle, either you are in or you are out.
>
> MR. ETOCH: I have agreed to represent Randy Green and the Court knows that and the case has been severed. I do not see a conflict. I have talked with Randy about this and Randy does not see a conflict. As long as there is no conflict. I do not want to enter this case as ...
>
> THE COURT: I am not going to make a legal opinion for you as to whether or not there is any conflict. That is a decision for you all. I don't represent these people. I am the Judge. I have got to look out for this defendant's rights and the State's rights. The State has made an objection. I take it as an objection. Either you are in or out. It is your option.
>
> MR. ETOCH: May I confer with Mr. Abramson outside for a moment?
>
> THE COURT: Yes
>
> *(Whereupon after Mr. Etoch and Mr. Abramson absented themselves, they returned to chambers and the following was had.)*
>
> MR. ETOCH: Your Honor, after conferring with Mr. Abramson I am prepared to enter my appearance in this case and would like to do so as co-counsel in this trial.

Thus, Mr. Etoch became the attorney for co-defendants Randy Green and Jason Green, who had been charged with the same crimes, albeit by separate informations. Jason Green's trial ended in a mistrial on September 18, 1998.

Meanwhile, Randy Green's trial was docketed for the week of October 5, 1998. On September 28, 1998, Randy Green, through his attorney, Mr. Etoch, filed a motion for continuance. In the motion, Mr. Etoch argued that he needed more time to prepare for examination of witnesses. He specifically mentioned his need to effectively cross-examine and impeach witnesses who testified at the Jason Green trial regarding "false statements" that they had made. He further alleged that a copy of the testimony from the Jason Green trial would not be available by October 5, 1998. Furthermore, Mr. Etoch alleged in the motion that he had several scheduling conflicts for the week of October 5, 1998. Finally, Mr. Etoch argued that Randy Green would be unduly prejudiced if he was tried so close in time to the Jason Green trial, allegedly because "the atmosphere and/or belief in Monroe County is that Randy Green is guilty." These arguments were controverted by the State, and the trial court ultimately denied Mr. Green's motion for continuance.

Randy Green's trial was scheduled to start on October 6, 1998, with the jury being ordered to convene at 1:30 p.m., so as to allow time that morning for the trial court to consider various motions filed by the parties. During this pretrial hearing, Mr. Etoch and Mr. Halbert renewed their motion for continuance on behalf of Mr. Green, and the trial court once again denied the motion. The pretrial proceedings on October 6, 1998, were not concluded until late that evening, whereupon the trial court released the jury with instructions to reconvene on October 7, 1998, at 9:00 a.m.

The next morning, just before Randy Green's trial was about to begin, Mr. Etoch and Mr. Halbert advised the trial court that they were moving to withdraw as counsel for Mr. Green. According to Mr. Halbert, they were required to withdraw under Rule 1.7 of the Model Rules of Professional Conduct due to a conflict of interest that had arisen since Mr. Etoch entered his appearance in the Jason Green case. The trial court asked Mr. Halbert when the conflict arose, to which he responded:

> Your Honor, as I understand, the possibility of the conflict would arise occurred yesterday. I briefed the subject with the Court —

> you know, we knew it was possible that a conflict may arise but we thought that possibility was minimal when we entered his appearance. Yesterday, I asked for some guidance from the Court and it appears that that conflict has actually reared his head [*sic*] at this time. And it appears obvious to us late yesterday and through research last night.

The trial court then asked: "[w]hat is the conflict?" Mr. Halbert responded:

> Your Honor, because of my client's right to attorney — to privilege between he and his attorney, I am reluctant to state what actually the conflict is. But, I'm sure the Court can see the potential conflicts with the possibility that Jason Green may be needing to be called as a witness at this time because his former testimony will not be admitted and various other things, Judge.... And of course, Judge, if he was called as a witness, we would be required to impeach him regardless of who called him so that possibility is there... it has not occurred yet but it is reasonably likely to occur at this time where earlier we thought the risk that it would occur is minimal. Now, it appears that the risk is no longer minimal but is very substantial.

The trial court then asked: "[n]ow are you telling me that you now are of the opinion that the former testimony is not admissible?" Mr. Halbert responded:

> I believe that was — based on the Court's ruling yesterday I believe that to be the case. Even if the former testimony is admissible and comes in on its own as an exception to the hearsay rule Jason may now have to be called regardless. But there is no doubt that we believe that it should be admissible in the trial.

After hearing further argument on the issue, the trial court gave Mr. Etoch and Mr. Halbert an opportunity to talk with Randy Green to determine if he was willing to consent to their representation of him, despite their representation of Jason Green. Mr. Halbert spoke with Randy Green and then reported to the court that Mr. Green was not prepared to consent. The trial court granted the motion to withdraw and also granted a continuance. The trial court further stated that "I feel as if the defendant's attorneys are manipulating the judicial system...," and ordered Mr. Halbert and Mr. Etoch to reimburse Monroe County $1,770 for compensation paid to jurors who appeared for jury duty on October 6 and 7, 1998.

The trial court also imposed a fine of $230.00. Mr. Etoch and Mr. Halbert now appeal the imposition of the fine and the jury costs.

For their first point on appeal, the appellants argue that the trial court erred in imposing sanctions on them when he granted their motion to withdraw as counsel for Randy Green. Where fines are imposed, as here, and the punishment cannot be avoided by an affirmative act, the case is one of criminal contempt. *Etoch v. State*, 332 Ark. 83, 964 S.W.2d 798 (1998). 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. *Id.* We have consistently held that an act is contemptuous if it interferes with the order of the court's business or proceedings, or reflects upon the court's integrity. *Id.*; *Hodges v. Gray*, 321 Ark. 7, 901 S.W.2d 1 (1995); *Carle v. Burnett*, 311 Ark. 477, 845 S.W.2d 11 (1993).

The appellants argue that there is no basis for the trial court's criminal contempt order because they were professionally obligated to make the motion to withdraw under Rule 1.7 of the Model Rules of Professional Conduct. It is clear from the record, however, that the trial court was not offended by the mere fact that the appellants moved to withdraw as counsel for Randy Green. Rather, the trial court indicated that it was vexed by the inexpedient timing of the motion; that is, by the fact that the motion was not made until after the jury had been convened to try the case:

> Now, I'm going to require the defendant's lawyers to take care of the expenses of this trial. We've had a jury that's been here for two days sitting here in preparation for a trial. This could have been avoided if the defendant's lawyers were not attempting to manipulate the system. It should have been anticipated.... The Court tried to do what was fair and right. And the lawyers persisted that they wanted to — Mr. Etoch should be in that case and the court let him into that case. As a result of that, now we're here today, the jury has been here two days.

With regard to the timeliness of the appellants' motion to withdraw, the trial court asked Mr. Halbert when the conflict of interest first arose. He admitted that the appellants knew at the time Mr. Etoch entered his appearance in Jason Green's case on September 17, 1998, that a conflict of interest might arise due to their representation of both co-defendants. At that time, however, they

thought the possibility of a conflict of interest was minimal. Mr. Halbert contended that it was not until October 6, 1998, when the trial court purportedly ruled that Jason Green's former testimony would not be admissible in Randy Green's trial, that the possibility of a conflict of interest was "no longer minimal but very substantial."[2] According to Mr. Halbert, Jason Green might be called as a witness in the Randy Green trial. In that event, there would be a potential conflict of interest because Jason Green would be subject to cross-examination and impeachment by his own attorneys, the appellants.

The simultaneous representation of parties whose interests in litigation may conflict, such as co-defendants, is governed by Rule 1.7(b) of the Model Rules of Professional Conduct:

> (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
>
> (1) the lawyer reasonably believes the representation will not be adversely affected; and
>
> (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

With regard to the representation of multiple defendants in a criminal case, the commentary to Rule 1.7 specifically warns that the potential for a conflict of interest is "so grave that a lawyer should decline to represent more than one co-defendant." In *Chambers v. State*, 264 Ark. 279, 579 S.W.2d 79 (1978), we quoted a similar caveat from the ABA Standards Relating to the Defense Function, 3.5(b) (1971):

> Except for preliminary matters such as initial hearings or applications for bail, a lawyer or lawyers who are associated in practice should not undertake to defend more than one defendant in the same criminal case if the duty to one of the defendants may conflict with the duty to another. The potential for conflict of interest in representing multiple defendants is so grave that ordina-

[2] The record in this appeal does not include the transcript of the pretrial hearing on October 6, 1998, or the trial court's ruling on the admissibility of Jason Green's former testimony.

> rily a lawyer should decline to act for more than one of several co-defendants except in unusual situations when, after careful investigation, it is clear that no conflict is likely to develop and when the several defendants give an informed consent to such multiple representation.[3]

As early as February 23, 1998, the appellants contended in a pleading that the custodial statements given by the co-defendants and Lucinda Evans were "inconsistent with each other in material parts" and that the defenses were "likely to become antagonistic." This contention is in fact supported by the custodial statements given by all three co-defendants and Lucinda Evans. Each co-defendant related a substantially different version of the events which ultimately culminated in the death of Glen Dover.

During the early morning hours of April 5, 1997, Randy Green, Jason Green, and Damon Evans were drinking beer with the victim, Glen Dover, in a motel room when an argument erupted. According to Randy Green's custodial statement, he left the motel room with Damon's sister, Lucinda Evans, to wait inside his truck while Damon and Jason beat the victim and then dragged him outside and put him in the back of his own truck. Randy also stated that Damon left the motel driving the victim's truck, and Randy, Jason, and Lucinda followed in Randy's truck. At one point, Damon stopped, and Randy drove past him and stopped. A few minutes later, Damon took the lead again, and Randy followed

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[3] A more recent version of the standard is stated in the ABA Standards for Criminal Justice Prosecution Function and Defense Function, Third Edition, 4-3.5(c) (1993):

> (c) Except for preliminary matters such as initial hearings or applications for bail, a lawyer or lawyers who are associated in practice should not undertake to defend more than one defendant in the same criminal case if the duty to one of the defendants may conflict with the duty to another. The potential for conflict of interest in representing multiple defendants is so grave that ordinarily a lawyer should decline to act for more than one of several co-defendants except in unusual situations when, after careful investigation, it is clear either that no conflict is likely to develop at trial, sentencing, or at any other time in the proceeding or that common representation will be advantageous to each of the co-defendants represented and, in either case, that:
>
> (i) the several defendants give an informed consent to such multiple representation; and
>
> (ii) the consent of the defendants is made a matter of judicial record. In determining the presence of consent by the defendants, the trial judge should make appropriate inquiries respecting actual or potential conflicts of interest of counsel and whether the defendants fully comprehend the difficulties that defense counsel sometimes encounters in defending multiple clients.

Damon to Walnut Lake Bridge, where Damon parked the victim's truck, got into Randy's truck, and they went back to Brinkley.

In contrast, Jason Green said in his custodial statement that it was Damon and Randy who inflicted the beating at the motel and that Randy helped place the victim in the back of his own truck. Jason also stated that Randy rode in the victim's truck with Damon, while he and Lucinda followed in Randy's truck. At some point, they stopped on the side of the road and put the victim, who was "bleeding pretty bad," in the front of the truck. After they arrived at the Walnut Lake bridge, Randy got in his own truck with Jason and Lucinda, while Damon drove the victim's truck down a bank and jumped out before it hit some trees. The foursome then returned to Brinkley in Randy's truck. According to Jason, Damon gave him $200 of the $800 that was taken from the victim.

Damon's statement also implicated Randy Green in the beating and the placement of the victim in the back of his own truck. Damon admitted in his statement that he took the victim's wallet and gave the money to Randy. Damon also stated that Randy helped put the victim in the front of the truck after Damon stopped alongside the road and cut Mr. Dover's throat with a straight razor. Damon confirmed that he put the victim's truck in drive and let it roll down a hill, before he got into Randy's truck with the others and returned to Brinkley.

Finally, Lucinda Evans said in her custodial statement that all three men beat the victim and put him into the back of his truck. She also said that they stopped alongside the road and put the victim into the front of his truck. According to Lucinda, it was Randy and Damon who ran the truck into the water while she and Jason sat in Randy's truck.

As the appellants concluded at the outset of the case in February, 1998, it was clear from the materially inconsistent statements given by the co-defendants that their defenses were likely to be antagonistic. Likewise, when Mr. Etoch entered his appearance as co-counsel on September 17, 1998, and certainly no later than September 18, 1998, when Jason Green's trial ended in a mistrial, it was clear that a conflict of interest was likely to develop as a result of the appellants representing both co-defendants. In other words, their representation of Randy Green would be materially limited by their responsibilities to Jason Green. Nevertheless, the appellants did

not move to withdraw from Randy Green's case until October 7, 1998; that is, after the jury had already been convened to try Mr. Green's case. The trial court found this delay to be a manipulation of the judicial system and an interference with the court's business and, thus, contemptuous.

The appellants contend that their motion to withdraw was timely because the conflict did not arise until the trial court ruled on October 6, 1998, that Jason Green's former testimony would not be admissible at Randy Green's trial. This argument is without merit. It was apparent to the appellants even before Mr. Etoch undertook the representation of Jason Green that the defenses of the co-defendants were likely to be antagonistic. Moreover, as previously stated, the likelihood of a conflict arose at the time Mr. Etoch entered his appearance in Jason Green's case on September 17, 1998, but certainly no later than September 18, 1998, when Jason Green's case ended in a mistrial. Furthermore, Mr. Halbert's argument in support of the motion to withdraw included the following assertion: "Even if the former testimony is admissible and comes in on its own as an exception to the hearsay rule Jason may now have to be called regardless." Thus, even if Jason Green's former testimony was admissible, the appellants conceded that either party might still call Jason as a witness at Randy Green's trial and he would be subject to cross-examination and impeachment by his own attorneys, the appellants. Consequently, the likelihood of a conflict of interest did not arise in this case as a result of an evidentiary ruling by the trial court. Rather, such a likelihood first arose when Mr. Etoch entered his appearance in Jason Green's case on September 17, 1998.

The trial court further found that the appellants were manipulating the system because their motion to withdraw was made shortly after the trial court denied two separate motions for continuance. Specifically, the trial court stated:

> There was a motion for continuance [made on September 28, 1998]. That motion for continuance was denied. That motion was made again yesterday. That motion was again denied. This jury sat here from 1:30 yesterday to late yesterday evening. I released them with instructions to come back and we would start promptly on this case at 9 o'clock today. Everyone was here promptly. Counsel was here — all counsel was here, defendant was here. The jury was here. The Court was here. And then Mr. Halbert comes in chambers and says that he's got a motion to make. The motion that was

> with instructions to come back and we would start promptly on this case at 9 o'clock today. Everyone was here promptly. Counsel was here — all counsel was here, defendant was here. The jury was here. The Court was here. And then Mr. Halbert comes in chambers and says that he's got a motion to make. The motion that was required, the court granted a continuance in this case. It seems clear to me that's what the defense attorney wanted. It also appears clear to me that they would do whatever necessary to get it if it means manipulating the rules and manipulating the court or whatever. My problem with it is it appears Mr. Etoch is not going to stop until I make him stop. It's going to keep going on and on and on when Mr. Etoch wants to disrespect the Court, the whole system, and do what he wants to do it [*sic*] when he wants to do it and how he wants to do it, regardless of the consequences and the other parties involved.

Indeed, the appellants assert that they should have been allowed to withdraw from the Randy Green case and, if Jason Green were found not guilty and double jeopardy attached, then Jason Green and Randy Green could conceivably consent to their joint representation, and the appellants would be able to resume their representation of Randy Green. Under this scenario, nothing would have been achieved other than a postponement of Randy Green's trial so that it would not occur until after Jason Green's second trial setting. Clearly, the act of using a motion to withdraw for the sole purpose of securing a previously denied continuance would interfere with the order of the court's business or proceedings. Viewing the record in the light most favorable to the trial judge's decision, we conclude that there was substantial evidence to support the trial court's finding of criminal contempt.

For their second point on appeal, the appellants argue that the trial court erred by permanently disqualifying them from representing Randy Green in the capital murder case pending against him in Monroe County. Appellants contend that their disqualification in this case should not be permanent because circumstances might change in the future. We decline to address this argument because it is purely speculative and premature. *Watson v. City of Fayetteville*, 322 Ark. 324, 909 S.W.2d 637 (1995). *See also*, *Milholland v. State*, 319 Ark. 604, 893 S.W.2d 327 (1995).

Affirmed.

Brenda Lee Robinson SMITH *v.*
Dr. Erma S. WASHINGTON

98-649 10 S.W.3d 877

Supreme Court of Arkansas
Opinion delivered February 24, 2000

[redacted]

H. Edward Skinner & Associates, P.A., by: *H. Edward Skinner*, for appellant.

Humphries & Lewis, by: *J. Michael Lewis*, for appellee.

RAY THORNTON, Justice. Appellant Brenda Lee Robinson Smith brings this appeal of the Jefferson County Circuit Court's dismissal of her medical malpractice claim against appellee Dr. Erma S. Washington, for alleged medical negligence arising out of surgery performed on appellant while she was an inmate at the Arkansas Department of Correction. Because we have determined that the trial court erred in dismissing appellant's complaint pursuant to the two-dismissal rule of Ark. R. Civ. P. 41(a), we reverse the grant of appellee's Motion to Dismiss and return the action to the trial court for further proceedings consistent with this opinion.

Appellant filed a *pro se* complaint in federal court against appellee and the prison healthcare provider on March 12, 1993, alleging violations of the federal Civil Rights Act, 42 U.S.C. § 1983, arising from the total abdominal hysterectomy that appellee performed on appellant on June 10, 1992. Appellant alleged that her attempts to discuss her concerns with appellee had been fruitless and that she was given the "runaround" by prison officials when she complained about the uneven stitches and loss of feeling in her sagging abdomen following the surgery. Appellant sought damages for her physical and mental injuries as well as reconstructive surgery to be performed by an outside physician.

Counsel was appointed by the federal district court to represent appellant in this action, but the merits were not reached because appellant and appellee filed a joint stipulation of dismissal of the action on January 3, 1995. The document was executed by both parties pursuant to Fed. R. Civ. P. 41(a)(1) and stipulated to a dismissal without prejudice. The federal court order dismissing appellant's federal civil rights action was entered the same day.

Prior to the dismissal of her federal civil rights action, appellant had filed suit against appellee in Jefferson County Circuit Court, asserting a cause of action against the doctor for medical malpractice and failure to obtain informed consent to undergo the hysterectomy under state tort law. Specifically, appellant alleged that appellee negligently advised her that her pap smear indicated that she suffered from severe epithelial dysplasia which would develop into cancer unless she submitted to a total abdominal hysterectomy, a recommendation made notwithstanding appellant's stated desire to have more children. A second allegation charged that appellee negligently performed the hysterectomy, producing unnecessary and unsightly permanent scarring on appellant's abdomen. This complaint was filed on June 8, 1994. Although the parties conducted some discovery, this action was never set for trial. Instead, appellant filed a motion for voluntary nonsuit and an order of dismissal without prejudice was entered on June 21, 1996, dismissing appellant's complaint.

Appellant timely filed a second cause of action mirroring the allegations of medical malpractice and failure to obtain informed consent contained in her first state court action. On August 13, 1997, appellee filed a motion to dismiss on the basis of the two-

dismissal rule of Rule 41(a)(2) of the Arkansas Rules of Civil Procedure, contending that appellant's federal civil rights action under § 1983 and her first state court action against appellee for medical negligence were actions based on the same claim for purposes of the two-dismissal rule, and that, as a result, appellee's voluntary dismissal of her first state court action constituted an adjudication on the merits of her claim against appellee.

The trial court accepted appellee's contention that appellant's dismissal by stipulation of her federal court action coupled with her voluntary nonsuit of her first state court complaint triggered the two-dismissal rule, rendering her voluntary dismissal of her first state court action an adjudication on the merits, and dismissed appellant's complaint in her second state action with prejudice. Appellant brings this appeal of that decision, raising two points on appeal: that the stipulation of dismissal entered into by both parties in federal court did not constitute a dismissal by the plaintiff for purposes of the two-dismissal rule under Rule 41(a)(2); and, that appellant's federal action against appellee for violations of her civil rights under § 1983 and her state cause of action for medical negligence were not actions based upon or including the same claim for purposes of the two-dismissal rule.

The first issue presented by this appeal is the question whether a stipulation of dismissal executed by both the plaintiff and the defendant in a federal lawsuit, pursuant to Fed. R. Civ. P. 41(a)(1)(ii), should be treated as a dismissal by the plaintiff for purposes of applying the "adjudication on the merits" provision of the two-dismissal rule of Ark. R. Civ. P. 41(a)(2). The two-dismissal rule of Ark. R. Civ. P. 41(a)(2) provides that a voluntary dismissal under Rule 41(a)(1):

> operates as an adjudication on the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based upon or including the same claim, unless all parties agree by written stipulation that such dismissal is without prejudice.

Id. Here, the first dismissal stems from the parties' filing of a "stipulation of dismissal signed by all the parties who have appeared in the action," pursuant to Fed. R. Civ. P. 41(a)(1)(ii), and our analysis turns to whether the stipulation of dismissal in federal court

is a dismissal by the plaintiff for the purposes of triggering Arkansas's two-dismissal rule.

We recognize that the basic purpose behind the Rules of Civil Procedure is "to administer justice through fair trials, not through summary dismissals as necessary as they may be on occasion." *Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363 (1966). The two-dismissal rule is generally considered to be in derogation of a plaintiff's previously existing right to voluntarily dismiss an action and to initiate a new action based on the same cause of action. *Kuhn v. Williamson*, 122 F.R.D. 192 (E.D.N.C. 1988). The primary purpose of the two-dismissal rule is to prevent unreasonable use of the plaintiff's unilateral rights to dismiss an action prior to the filing of the defendant's responsive pleading, and it is an exception to the general principle that a voluntary dismissal of an action does not bar a new suit based upon the same claim. *See e.g. Sutton Place Dev. Co. v. Abacus Mortgage Inv. Co.*, 826 F.2d 637 (7th Cir. 1987);*Poloron Products, Inc. v. Lybrand Ross Bros. & Montgomery*, 534 F.2d 1012 (2d. Cir. 1975). The two-dismissal rule was unique at the time it was first adopted, and its intention was to prevent delays and harassment by plaintiffs securing numerous dismissals without prejudice. 9 Wright and Miller, *Federal Practice and Procedure Civ.* § 2368 (2d. ed. 1995). But where the purpose behind the two-dismissal exception would not appear to be served by its literal application, and where that application's effect would be to close the courthouse doors to an otherwise proper litigant, a court should be most careful not to construe or apply the exception too broadly. *Poloron, supra.*

Under the facts of this case, we are presented the question whether dismissal by stipulation is a voluntary or unilateral action by the plaintiff as required by our rule to trigger the two-dismissal rule. We find instructive the interpretations of federal courts regarding dismissals by stipulations in similar cases. Based upon the similarities of our rules with the Federal Rules of Civil Procedure, we consider the interpretation of these rules by federal courts to be of significant precedential value. *Bussey v. Bank of Malvern*, 270 Ark. 37, 603 S.W.2d 426 (Ark.App. 1980).

The stipulation of dismissal filed with the federal court on January 3, 1995, read: "Pursuant to Rule 41(a)(1) of Federal Rules of Civil Procedure, the undersigned, being all parties who have appeared in this action, do hereby stipulate to the dismissal without

prejudice of Plaintiff's action against Defendant Dr. Erma S. Washington." The filing is signed by the attorney for the plaintiff and counsel for the defendant.

In *Poloron, supra*, the Second Circuit Court of Appeals noted that, given the purpose of the two-dismissal rule, to prevent an unreasonable use of the plaintiff's unilateral right to dismiss an action prior to the filing of the defendant's responsive pleading, "the danger of such abuse diminished, however, where the first dismissal is by stipulation. A dismissal by stipulation is not a unilateral act on the part of the plaintiff but rather is a mutual agreement by all the parties ... The filing of a notice of dismissal preceded by a dismissal by stipulation knowingly consented to by all parties does not activate the two-dismissal bar against bringing an action based on or including the same claim." *Id.*

Similarly, in *Kuhn, supra*, the district court held that a stipulation of dismissal did not trigger the two-dismissal rule because the defendant could have declined to enter into the stipulation. Where the defendant has consented to the dismissal of the claim without prejudice, "it is inequitable to interpret the two-dismissal rule in a fashion that now bars their refiling." *Id.*

Notwithstanding the interpretation given the federal rules by federal courts, appellee urges that Ark. R. Civ. P. 41 does not require the dismissal by the plaintiff to be unilateral. However, we note that our own previous interpretation of Arkansas's Rule 41(a) is consistent with the federal courts' rulings. In *Carton v. Missouri Pac. R.R.*, 295 Ark. 126, 747 S.W.2d 93 (1988), we held that, in order for a second dismissal to work as an adjudication on the merits of a plaintiff's claim, both dismissals must be on the motion of the plaintiff or Rule 41(a) is inapplicable. Notwithstanding appellee's contention that appellant's first dismissal need only be "voluntarily" entered into, and that her counsel's signature on the stipulation of dismissal filed in the federal court action "was a matter of form and served in no way to make the appellant's dismissal of the federal action anything other than 'voluntary,' " we note that the Fed. R. Civ. P. 41(a)(1)(ii) explicitly requires the signature of all parties who have appeared in the action in order to effect a dismissal by stipulation. *See also Camacho v. Mancuso*, 53 F.3d 48 (4th Cir. 1995)(court declined to accept a written stipulation of dismissal because it was not signed by both parties, because a stipulation is

only valid if both parties sign a document or appear before the court to make an oral stipulation official).

In the circumstances before us, we note that appellant could not unilaterally effect a dismissal by stipulation under federal court procedural rules. Because appellee must have agreed to participate in the dismissal in order to achieve it, the dismissal by stipulation was not a dismissal taken only by appellant and thus does not trigger the consequences of the two-dismissal rule. Appellee was not required to enter into the stipulation, and she received a benefit in having the federal action dismissed, relieving her of the necessity of defending the action and eliminating the potential of a finding of liability on her part under Section 1983. Where a defendant has acted in combination with the plaintiff in obtaining a joint dismissal by stipulation of a claim, and received benefit from that action, that defendant cannot assert that the plaintiff should be barred as a result of the stipulated dismissal from filing a later claim.

Therefore, we hold that the dismissal by stipulation entered into by the parties to conclude appellee's section 1983 action was not a dismissal by the plaintiff under Ark. R. Civ. P. 41(a)(2), and that her second filing of her state law negligence claims in the Jefferson County Circuit Court is not barred by the two-dismissal rule. Because we have determined that the dismissal by stipulation in federal court was a joint action by both parties, the two-dismissal rule is not triggered by this fact pattern, and the trial court erred in dismissing appellant's state court action on that ground. Accordingly, we reverse the grant of appellee's motion to dismiss the case and remand this cause to the trial court for further proceedings consistent with this opinion. This ruling renders unnecessary any further consideration of appellant's second point on appeal.

Reversed and remanded.

BOOKS-A-MILLION, INC.;
United States Fidelity and Guaranty Company;
and Cockerham Construction Company *v.*
ARKANSAS PAINTING and SPECIALTIES COMPANY

99-1071 10 S.W.3d 857

Supreme Court of Arkansas
Opinion delivered February 24, 2000

Eichenbaum, Liles & Heister, P.A., by: *Peter B. Heister*; and *Slagle & Gist*, by: *Richard L. Slagle*, for appellants.

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

LAVENSKI R. SMITH, Justice. Appellants, Books-A-Million, Inc. ("Books"), United States Fidelity and Guaranty Company ("USF&G") and Robert P. Cockerham d/b/a Cockerham Construction Company ("Cockerham"), appeal a judgment of the White County Circuit Court awarding damages, prejudgment interest, costs, and attorney's fees to Arkansas Painting and Specialties Company ("Arkansas Painting"). The judgment followed the court's finding that Arkansas Painting had created a valid lien against the subject real property in compliance with Ark. Code Ann. §§ 18-44-101—18-44-508. The Circuit Court ordered the judgment paid from USF&G's lien release bond filed with the Clerk of the Court. Appellants contend that the trial court erred in enforcing the lien because the appellee did not comply with the statutory notice requirements under Ark. Code Ann. § 18-44-115 (Supp.1999). We agree and reverse.

Facts

In 1996, Books renovated its retail store in Searcy. Cockerham, apparently acting as general contractor, contracted with Arkansas Painting for painting, sheetrock, and wallpapering work. Books leased the premises from Stewart Development Company and S-P Properties, of Huntington Beach, California. On December 4, 1996, Arkansas Painting completed its last day of work on the Books job. Cockerham did not pay for the services and materials.

Arkansas Painting sent letters to Books and Cockerham on February 12, 1997, requesting payment and warning that if payment was not received in ten days that lien proceedings would commence. On March 14, 1997, Arkansas Painting sent Lien Notices to the owners and Cockerham, but not to Books. On March 28, 1997, Arkansas Painting filed the lien pursuant to Ark. Code Ann. § 18-44-101 (Supp. 1999), seeking payment of its contract price, fees, and costs. On April 3, 1997, Arkansas Painting sent Notice of Filing of Lien to the owners and to Cockerham, but not to Books. USF&G became involved by providing a bond to obtain release of the lien on behalf of Books, as provided under Ark. Code Ann. § 18-44-118, on June 9, 1997. On August 1, 1997, Arkansas Painting filed the instant action.

Following discovery, Books and USF&G filed a Motion for Summary Judgment on March 5, 1998, asserting one issue — failure to give adequate notice to perfect the lien. At the hearing on the motion, the trial court disposed of the case on agreed facts and determined that adequate notice was given. The court issued Findings of Law and Fact wherein it found the notice adequate and the lien therefore valid.

Standard for Review

The court tried the case below on agreed facts. When a case is tried by a circuit court sitting without a jury, our inquiry on appeal is not whether there is substantial evidence to support the factual findings of the court, but whether the findings are clearly erroneous, or clearly against the preponderance of the evidence. *Springdale Winnelson Co. v. Rakes*, 337 Ark. 154, 987 S.W.2d 690 (1999); *Arkansas Dep't of Human Servs. v. Spears*, 311 Ark. 96, 841 S.W.2d 624 (1992). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed. *Wade v. Arkansas Dep't Of Human Servs.*, 337 Ark. 353, 990 S.W.2d 509 (1999). In reviewing the findings of fact by a trial court, we consider the evidence and all reasonable inferences therefrom in a light most favorable to the appellee. *Jernigan v. Cash*, 298 Ark. 347, 767 S.W.2d 517 (1989); *Womack v. Foster*, 340 Ark. 124, 8 S.W.3d 854 (2000).

Statutes in Derogation of the Common Law

The crucial issue before us is the construction to be given Arkansas lien statutes. In particular, whether the notice provisions of Ark. Code Ann. § 18-44-115 are to be strictly construed, thus requiring strict compliance, or whether they can be satisfied by substantial compliance. We hold that strict compliance is necessary. Any statute in derogation of the common law will be strictly construed. Although the General Assembly has the power to alter the common law, a legislative act will not be construed as overruling a principle of common law unless it is made plain by the act that such a change in the established law is intended. *Hartford Ins. Co. v. Mullinax*, 336 Ark. 335, 984 S.W.2d 812 (1999).

It has long been held that mechanic's liens are in derogation of the common law. The materialmen's lien and the construction money mortgage lien are in derogation of common law. Both are creatures of the legislature. The legislature is presumed to know the decisions of the supreme court, and it will not be presumed in construing a statute that the legislature intended to require the court to pass again upon a subject where its intent is not expressed in unmistakable language. *Rhodes v. Cannon*, 112 Ark. 6, 164 S.W. 752 (1914); *Spickes Bros. Paint Cont. v. Worthen Bank & Trust Co.*, 299 Ark. 79, 771 S.W.2d 258 (1989). In *Valley Metal Works, Inc. v. A.O. Smith-Inland*, 264 Ark. 341, 572 S.W.2d 138 (1978), we stated, "Our lien statutes are in derogation of the common law and we construe them strictly since they provide an extraordinary remedy that is not available to every merchant or worker." *See also, Christy v. Nabholz Supply Co.*, 261 Ark. 127, 546 S.W.2d 425 (1977); *Dews v. Halliburton Indus., Inc.*, 288 Ark. 532, 708 S.W.2d 67(1986); *National Lumber Co. v. Advance Development Corp.*, 293 Ark. 1, 732 S.W.2d 840 (1987); *Gray v. Nations*, 1 Ark. 557 (1839).

The notice requirements are for the benefit and protection of the owner. *Bell v. Apache Supply Co.*, 300 Ark. 494, 780 S.W.2d 529 (1989); *Ellis v. Fayettville Lumber & Cement Co.*, 195 Ark. 385, 112 S.W.2d 613 (1938). Specifically, Ark. Code Ann. § 18-44-114 and § 18-44-115 provide two separate notice provisions. Section 18-44-114 provides:

> 18-44-114. Notice and service generally.

> (a)(1)(A) Every person, except the original contractor, who may wish to avail himself of the benefit of the provisions of this subchapter shall give ten (10) days' notice before the filing of the lien, as required in § 18-44-117(a), to the owner, owners, or agent, or either of them, that he holds a claim against the building or improvement, setting forth the amount and from whom it is due.

This section requires that notice be given within at least ten days of an intention to file a lien. However, before the lien is actually filed, the next section, Ark. Code Ann. § 18-44-115, requires an additional, more specific notice be sent to the owner of the property prior to filing not more than seventy-five days after the completion of the work. It provides in pertinent part:

> 18-44-115. Notice to owner by contractor.
>
> ****
>
> (e)(1)(A) The General Assembly hereby finds that owners and developers of commercial real estate are generally knowledgeable and sophisticated in construction law, are aware that unpaid suppliers of labor and material are entitled to assert liens against the real estate if unpaid, and know how to protect themselves against the imposition of mechanics' and material suppliers' liens.
>
> (B) The General Assembly further finds that consumers who construct or improve residential real estate containing four (4) or fewer units generally do not possess the same level of knowledge and awareness and need to be informed of their rights and responsibilities.
>
> (C) Because supplying the notice specified in subsection (c) of this section imposes a substantial burden on material suppliers, the notice requirement mandated under subsection (b) of this section as a condition precedent to the imposition of a material supplier's lien shall only apply to construction of or improvement to residential real estate containing four (4) or fewer units.
>
> (2)(A) No material supplier or laborer shall be entitled to a lien unless the material supplier or laborer notifies the owner of the commercial real estate being improved, in writing, that such material supplier or laborer is currently entitled to payment, but has not been paid.
>
> (B) This notice shall be sent to the owner and to the contractor by registered mail, return receipt requested, before seventy-five

(75) days have elapsed from the time that the labor was supplied or the material furnished.

(C) Such notice shall contain the following information:

(i) A general description of the labor, service, or material furnished, and the amount due and unpaid;

(ii) The name and address of the person furnishing the labor, service, or materials;

(iii) The name of the person who contracted for purchase of the labor, service, or materials;

(iv) A description of the job site sufficient for identification; and

(v) The following statement set out in boldface type:

"NOTICE TO PROPERTY OWNER

IF BILLS FOR LABOR, SERVICES, OR MATERIALS USED TO CONSTRUCT AN IMPROVEMENT TO REAL ESTATE ARE NOT PAID IN FULL, A CONSTRUCTION LIEN MAY BE PLACED AGAINST THE PROPERTY. THIS COULD RESULT IN THE LOSS, THROUGH FORECLOSURE PROCEEDINGS, OF ALL OR PART OF YOUR REAL ESTATE BEING IMPROVED. THIS MAY OCCUR EVEN THOUGH YOU HAVE PAID YOUR CONTRACTOR IN FULL. YOU MAY WISH TO PROTECT YOURSELF AGAINST THIS CONSEQUENCE BY PAYING THE ABOVE NAMED PROVIDER OF LABOR, SERVICES, OR MATERIALS DIRECTLY, OR MAKING YOUR CHECK PAYABLE TO THE ABOVE NAMED PROVIDER AND CONTRACTOR JOINTLY."

(3) Any contractor who fails to give the notice required by this subsection shall be guilty of a misdemeanor and shall be punished by a fine not exceeding one thousand dollars ($1,000).

The notice provisions contained in these statutes must be complied with strictly. *National Lumber Co., supra.* Applying these provisions to the facts of the instant case, we hold that Arkansas Painting did not send the notice required by § 18-44-115 within the time and in the manner specified by the statute. The facts reflect that Arkansas Painting sent letters on February 12, 1997, which, although they referenced the obligation, did not meet the statutory

requirements. On March 14, 1997, Arkansas Painting sent notices containing the statutory language but the notice was sent beyond the seventy-fifth day following completion of the work.

Attorneys' Fees and Costs

Because we hold the lien to not have been validly created, there is no need to address the appellee's entitlement to fees and costs under Ark. Code Ann.§ 18-44-128.

Reversed and remanded.

Jimmy EASLEY; Vickey Wagner Easley *v.*
STATE of Arkansas

CR 00-144 10 S.W.3d 462

Supreme Court of Arkansas
Opinion delivered February 24, 2000

Mathis & DeJanes, by: *Winston C. Mathis*, for appellants.

No response.

PER CURIAM. Jimmy Easley and Vickey Wagner Easley, by their attorney, have filed a motion for rule on the clerk.

The motion admits that the Easleys' record for appeal was not timely filed and asserts that this was due to a mistake on the part of the attorney, Winston C. Mathis, and the court reporter in failing to request an extension of time to file the record.

This court has held that we will grant a motion for rule on the clerk when the attorney admits that the record 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.

If the appellant's attorney files, 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 transcript, the motion for rule on the clerk will be granted and a copy of the opinion will be forwarded to the Committee on Professional Conduct.

The present motion for rule on the clerk is denied.

WAL-MART STORES, INC. *v.* Doris CONNELL

99-727 10 S.W.3d 882

Supreme Court of Arkansas
Opinion delivered March 2, 2000

Bassett Law Firm, by: *Angela M. Doss*, for appellant.

Walker, Shock, Harp, & Hill, P.L.L.C., by: *Eddie H. Walker, Jr.*, for appellee.

W. H. "DUB" ARNOLD, Chief Justice. Appellant, Wal-Mart Stores, Inc., brings the instant appeal challenging a decision of the Workers' Compensation Commission awarding appellee, Doris Connell, permanent partial-disability benefits and wage-loss benefits in the absence of a percentage rating for permanent physical impairment. In an unpublished decision dated June 9, 1999, the Arkansas Court of Appeals affirmed the Commission's decision. *See Wal-Mart Stores, Inc. v. Doris Connell*, CA 98-1451, slip op. at 4, 5-6 (Ark. App. June 9, 1999). Pursuant to Ark. Sup. Ct. R. 2-4 (1999), we granted review of the appellate court's decision. Viewed in the light most favorable to the Commission's decision, we hold that substantial evidence does not support the award of permanent partial-disability benefits and wage-loss disability benefits. Accordingly, we reverse the Commission's decision because we agree with appellant that these disability benefits may not be awarded absent a finding of a specific percentage of permanent physical impairment.

Background

The parties agree that on July 22, 1994, Connell sustained a compensable injury to her right knee consisting of a tear of the medial meniscus in the area of the anterior horn. Dr. John Mertz performed arthroscopic surgery in January 1995 and assigned an eight percent permanent impairment rating to Connell's lower-

right extremity. Subsequently, Connell was diagnosed with Reflex Sympathetic Dystrophy (RSD), a type of chronic pain syndrome. After reviewing Connell's claim for permanent disability benefits at a hearing on December 5, 1997, the Administrative Law Judge found that she was entitled to temporary total-disability benefits. The ALJ also awarded Connell (1) permanent disability benefits attributable to the eight percent permanent physical-impairment rating to the leg, between the hip and the knee, and (2) permanent partial-disability benefits attributable to her RSD, in the amount of thirty percent to the body, as a whole. Wal-Mart appealed the ALJ's decision.

After conducting a *de novo* review of the entire record, the Full Workers' Compensation Commission affirmed the ALJ's findings with one modification. Namely, the Commission reduced Connell's permanent partial-disability benefit attributable to RSD to fifteen percent to the body, as a whole. In support of its decision, the Commission cited appellee's lack of motivation to return to work in light of her prior experience in light sales and as a beautician. Subsequent to the Commission's determination, Wal-Mart appealed the award of permanent partial-disability benefits to the Arkansas Court of Appeals.

In particular, appellant argued that the Commission's decision to award permanent disability benefits for the RSD was not supported by substantial evidence. Also, appellant challenged the award of wage-loss benefits in the absence of a permanent anatomical-impairment rating. Connell cross-appealed, contending that the Commission erred by reducing the permanent partial-disability-benefit award. Affirming the Commission's decision, the Court of Appeals reasoned that the Commission did not err by awarding Connell wage-loss disability in light of her age, education, and physical condition, and because there was a finding of "some" degree of permanent physical impairment.

From the appellate court's decision affirming the Commission, comes the instant appeal. Notably, when we grant a petition to review a case decided by the Court of Appeals, we review it as if it was filed originally in this court. *See Williams v. State*, 328 Ark. 487, 944 S.W.2d 822 (1997) (citing *Allen v. State*, 326 Ark. 541, 932 S.W.2d 764 (1996)). On appeal, this court will view the evidence in the light most favorable to the Commission's decision

and affirm when that decision is supported by substantial evidence. *Ester v. National Home Ctrs., Inc.*, 335 Ark. 356, 361, 981 S.W.2d 91 (1998) (citing *Golden v. Westark Community College*, 333 Ark. 41, 969 S.W.2d 154 (1998); *Olsten Kimberly Quality Care v. Pettey*, 328 Ark. 381, 944 S.W.2d 524 (1997)). Substantial evidence exists if reasonable minds could reach the same conclusion. *Id.* Moreover, we will not reverse the Commission's decision unless fair-minded persons could not have reached the same conclusion when considering the same facts. *Id.*

Section 11-9-522(b)(1)

The sole point before us questions whether the Commission erred by awarding Connell permanent partial-disability benefits and wage-loss disability benefits, related to her RSD, in the absence of a permanent anatomical-impairment rating. The wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. *Sapp v. Phelphs Trucking, Inc.*, 64 Ark. App. 221, 984 S.W.2d 817 (1998). To be entitled to any wage-loss disability benefit in excess of permanent physical impairment, a claimant must first prove, by a preponderance of the evidence, that she sustained permanent physical impairment as a result of a compensable injury. *Smith v. Gerber Prods.*, 54 Ark. App. 57, 922 S.W.2d 365 (1996).

In the instant case, the Commission found that Connell had presented "objective and measurable physical findings" and had proven, based upon the greater weight of the credible evidence presented, the existence of "*some* degree of permanent physical impairment or loss of body function as a result of the effects of the compensable consequence or complication of RSD." However, the Commission conceded that the "actual extent or degree" of the permanent physical impairment could not be calculated in accordance with Arkansas statutory requirements. Accordingly, it found that "no award of permanent benefits be made for a permanent physical impairment attributable to the claimant's compensable complication of RSD."

In conflict with its finding that "no award of permanent benefits" could be made, the Commission proceeded to award Connell permanent partial disability in the amount of fifteen per-

cent to the body as a whole. The Commission reasoned that Connell was entitled to permanent benefits pursuant to Ark. Code Ann. section 11-9-522(b) for her permanent partial disability or loss of wage-earning capacity. In response to the Commission's contradictory findings, appellant argues that the failure to assign a *specific percentage* of permanent physical impairment precluded an award of permanent partial-disability benefits and wage-loss benefits. We agree.

The statute at issue, Ark. Code Ann. section 11-9-522(b)(1) (Supp. 1999), provides:

> In considering claims for permanent partial disability benefits *in excess of the employee's percentage of permanent physical impairment*, the commission may take into account, in addition to the percentage of permanent physical impairment, such factors as the employee's age, education, work experience, and other matters reasonably expected to affect his future earning capacity.

(Emphasis added.) The Commission's interpretation implies that a specific percentage rating is inconsequential when there is "some" evidence of physical impairment. Further, the Commission's decision suggests that some evidence of Connell's impairment, standing alone, invites consideration of the remaining factors, such as her age, education, and work experience. However, pursuant to the plain language of section 11-9-522(b)(1), "the percentage" of permanent physical impairment *must* be established before the Commission can consider a claim for permanent partial-disability benefits "in excess of the employee's percentage" of permanent physical impairment. Similarly, any consideration of "the employee's age, education, work experience, and other matters reasonably expected to affect his earning capacity" may not occur until the Commission has first determined "the percentage" of permanent physical impairment.

Here, the Commission never determined Connell's percentage of permanent physical impairment attributable to her RSD, acknowledged that it lacked a statutory basis to make a specific impairment rating in this case, and yet made an award for permanent partial-disability benefits and wage-loss benefits. Viewed in the light most favorable to the Commission's decision, we cannot say that fair-minded persons could have reached the same conclusion when considering the same facts. We find that the statutory barriers

that prevented the Commission from assigning a specific impairment rating and foreclosed an award of permanent benefits were nothing less than fatal to Connell's claim for wage-loss disability benefits. Accordingly, we reverse the Commission's award of permanent partial-disability benefits and wage-loss disability benefits.

CORBIN, J., not participating.

Owen D. OATES *v.* Maria Teresa OATES

99-1210 10 S.W.3d 891

Supreme Court of Arkansas
Opinion delivered March 2, 2000

H. Oscar Hirby, for appellant.

Herby Branscum, Jr., for appellee.

DONALD L. CORBIN, Justice. Appellant Owen D. Oates appeals an order of the Perry County Chancery Court granting Appellee Maria Teresa Oates a divorce and establishing the parties' rights in both real and personal property. Appellant sets forth four points for reversal that involve property-settlement issues and an award of attorney's fees. A related opinion was previously handed down in *Oates v. Oates*, 340 Ark. ___, ___ S.W.3d ___ (Feb. 24, 2000). In that opinion, we reversed the trial court's order granting Appellee a divorce because Appellee failed to provide

corroboration of her grounds for divorce. As a result of our decision in that case, Appellant's points for reversal in the present matter are moot. Accordingly, this appeal is dismissed.

LAKE VIEW SCHOOL DISTRICT No. 25
of Phillips County, Arkansas, *et al.* *v.*
Mike HUCKABEE, Governor
of the State of Arkansas, *et al.*

99-28 10 S.W.3d 892

Supreme Court of Arkansas
Opinion delivered March 2, 2000
[Petitions for rehearing denied April 13, 2000. *]

* IMBER, J., not participating.

Wilson & Valley, by: *J.L. Wilson*; *Lewellen & Associates*; *Don Trimble*; and *Jack, Lyon & Jones, P.A.*, by special attorney *Eugene G. Sayre*, for appellants.

Mark Pryor, Att'y Gen., by: *Tim Humphries*, Senior Ass't Att'y Gen.; and *Thompson and Llewellyn, P.A.*, by: *William P. Thompson and James M. Llewellyn, Jr.*, for appellees.

Lavey & Burnett, by: *John L. Burnett*, for *amicus curiae* American Civil Liberties Union.

ROBERT L. BROWN, Justice. The original plaintiffs in this case, now appellants, are Lake View School District No. 25 of Phillips County, Arkansas and School District board members and officials, and certain individuals residing in Phillips County (hereafter Lake View). The defendants, now appellees, are the Governor of the State of Arkansas, the Treasurer of the State of Arkansas, the Speaker of the House of Representatives and President Pro Tempore of the Senate of the Arkansas General Assembly, officers of the Arkansas Department of Education, and members of the Arkansas Board of Education (hereinafter State of Arkansas). In this appeal, Lake View raises multiple substantive issues relating to the final order of the chancery court, which dismissed the Lake View complaint, and its petition to show cause for contempt on grounds of mootness and failure to state a claim under Ark. R. Civ. P. 12(b)(6). Lake View further appeals the chancery court's denial of attorneys' fees. We hold that two bases for the Lake View appeal have merit. The trial court erred in dismissing Lake View's complaint and show-cause petition for mootness and for failure to state a claim. It also erred in denying attorneys' fees.

I. Procedural History

The history of this case is long and tortured, but reviewing the history is critical to the resolution of the matter. On August 19, 1992, Lake View filed suit against the State of Arkansas, in which it contested the constitutionality of the public school funding system under both the U.S. Constitution and the Arkansas Constitution. Lake View requested that the chancery court declare the school funding system unconstitutional and that the court enjoin implementation of the unconstitutional system. This complaint subsequently was amended five times. The second amended complaint was tried before the chancery court for five days in September 1994. Following trial, the chancery court entered its order on November 9, 1994. The order was fifty-two pages long, and it contained one hundred and forty-seven findings of fact and eighteen conclusions of law.

What was at issue in the Lake View case was the disparity in funds available for education in school districts across the state under the school funding system. In 1994, school districts received approximately thirty percent of their revenue from local funds, sixty percent from state aid, and ten percent from federal funds. Local funds were tied to the local tax base which was tied to property values within the districts. School districts with higher property values necessarily generated higher local taxes and more money available for education. This resulted in significant disparities. As an example, disparities in per pupil expenditures in the 1992/93 school year ranged from $4,064 spent per pupil in the Little Rock School District to $2,270 spent per pupil in the Mountain View School District. One of the purposes of state aid was to equalize per pupil expenditures regardless of the wealth of the school district and to make available equal educational opportunities for all students. *See Dupree v. Alma School District No. 30*, 279 Ark. 340, 651 S.W.2d 90 (1983).

In its November 9, 1994 order, the chancery court concluded that the equal protection provisions of the Arkansas Constitution (Article 2, §§ 2, 3, 18) applied to Arkansas school funding and that there was no rational basis for the disparity in available school funds among poor and wealthy school districts under Arkansas's school funding system. The court further concluded that the school funding system violated Article 14, § 1, of the Arkansas Constitution by

failing to provide a "general, suitable and efficient system of free public schools." Two problems were pointed out by the 1994 Order: (1) school districts were allowed to keep excess tax revenues raised locally, thereby producing funding variances; and (2) state aid under Act 1 of 1994 did not cure the disparities in per pupil expenditures.

The chancery court stayed the effect of its decision for two years to give the Arkansas General Assembly time to implement a constitutional system "in conformity with this opinion." On December 21, 1994, the chancery court modified its first order slightly with two additional orders and repeated the two-year stay to give the General Assembly an opportunity to enact a constitutional system "in conformity with this opinion." The court also cited authority from other states as support for its stay.[1] The three orders will be referred to in this opinion as the 1994 Order.

On March 6, 1995, the chancery court refused to award Lake View attorneys' fees, because no common fund had been established as a result of counsels' efforts. Also, in 1995, the General Assembly passed three acts in an attempt to comply with the 1994 Order:

- Act 916 — Levied an income tax surcharge of ten percent against residents in a school district which failed to pass the base millage for school funding.[2]
- Act 917 — Repealed the old funding system; required the Board of Education to review minimum standards of accreditation and develop a definition for what constitutes an adequate education; and required that all school districts levy the base millage and that the State Treasurer supplement school district revenues to meet the base millage level.
- Act 1194 — Appropriated funds for grants and aids to local school districts, special programs, and vocational technical education for the biennium.

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[1] The chancery court cited *Carollton-Farmers v. Edgewood Indep. School Dist.*, 862 S.W.2d 489 (Tex.1992); *Helena Elementary School Dist. 1 v. State*, 784 P.2d 412 (Mont. 1990); *Edgewood Indepen. School Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989).

[2] This court subsequently found Act 916 of 1995 unconstitutional on other grounds. *See Barclay v. Melton*, 339 Ark. 362, 5 S.W.3d 457 (1999).

Hereinafter in this opinion, the three acts will be referred to as the "1995 legislative acts."

On March 11, 1996, this court dismissed an appeal by the State of Arkansas, which had contested the constitutional bases of the 1994 Order and its statistical analysis of equity. *See Tucker v. Lake View Sch. Dist. No. 25*, 323 Ark. 693, 917 S.W.2d 530 (1996). In that case, we held that because the chancery court stayed the effect of its order for two years to give the General Assembly an opportunity to act in conformity with the 1994 Order, this constituted a deferral by the chancery court in granting relief. We concluded that there was no final order for our review:

> By the terms of the [1994 Order], Lake View could request further hearings at the end of two years to determine if the new funding system conforms to the chancellor's ruling, or had the State failed to take any action at all. Lake View's rights in this matter have not been concluded and they have no way to put the chancellor's directive into execution without further proceedings before the trial court; the requirements for finality are thus not met.

Tucker, 323 Ark. at 697, 917 S.W.2d at 533.

In 1996, Lake View filed its third and fourth amended complaints. In the third amended complaint, Lake View asked for a declaration that Act 917 of 1995 was unconstitutional under the Arkansas Constitution's equal protection article (Article 2) and its general education article (Article 14). The fourth amended complaint repeated allegations that Acts 916 and 917 of 1995 were unconstitutional and requested class certification of all generally affected persons in the state. On August 22, 1996, the chancery court certified the class of affected persons as all school districts in the state, students and parents of students in all school districts, school board members of all school districts, and school district taxpayers who have paid taxes to support the public school system.

On August 13, 1996, the chancery court entered a scheduling order which included the setting of a trial "on compliance with this Court's previous orders" to be held over seven days in November 1996.

On November 5, 1996, Amendment 74 to the Arkansas Constitution was passed by a vote of the people. This amendment

amended Article 14, § 1, of the Arkansas Constitution and provided a base millage rate of twenty-five mills for all school districts. It further specifically allowed variances in funding among the school districts and authorized school districts to levy additional taxes above the base millage rate for maintenance and operation.

On November 18, 1996, the chancery court entered three orders in which (1) the judge of the chancery court who heard the case in 1994 and entered the 1994 Order recused; and (2) the court postponed the compliance trial because the seven days allotted would not be sufficient time to conduct the trial.[3] In a third order, the chancery court found:

> 2. The Arkansas Assembly enacted Acts 916 and 917 in 1995 to establish a new school funding system. A presumption exists that Acts 916 and 917 are constitutional.
>
> 3. Plaintiffs have the burden of going forward with the evidence and the burden of proving that the newly enacted school funding system is unconstitutional.
>
> 4. The enactment of a new school funding system and new statistical data constitute new facts. Therefore, the doctrine of *the law of the case* is not applicable, and the scope of the trial will not be limited to those issues raised at the previous trial of this cause. Nor will the trial be limited to compliance with this Court's previous order.
>
> 5. The scope of the trial will be affected and controlled by the pleadings file (sic) by the parties in this cause.

The case was then reassigned to a new judge of the chancery court.

On December 2, 1996, Lake View petitioned the chancery court for a writ of mandamus directing that this matter be set down for a full hearing on whether the State of Arkansas had complied with the 1994 Order and for a declaratory judgment. No immediate action was taken on that motion.

In April of 1997, Act 1307 of 1997 and Act 1361 of 1997 (hereinafter the "1997 legislative acts") became law. Act 1307

[3] Judge Annabelle Clinton Imber assumed a position on the Arkansas Supreme Court in January 1997.

amended or repealed the former school funding system. It further set out the calculations of what millages may be used to meet the base millage rate of twenty-five mills and set out a system for public school revenues and expenditures, including what a general, suitable, and efficient system of education should include. Act 1361 appropriated funds for grants and aids to local school districts and for special programs for the next biennium.

On May 29, 1997, Lake View filed a fifth amended complaint in which it contested the constitutionality of the 1995 and 1997 legislative acts under Article 2 (equal protection) and Article 14 (general education) of the Arkansas Constitution and the Fourteenth Amendment of the U.S. Constitution and prayed that the chancery court declare that the State of Arkansas is violating the 1994 Order. On June 6, 1997, the State of Arkansas moved for a dismissal of the *fourth* amended complaint under Rules 8(a) and 12(b)(6) of the Arkansas Rules of Civil Procedure.[4] On June 12, 1997, the chancery court entered a scheduling order in which it set a deadline of August 14, 1997, for Lake View to file further amendments to the complaint. On August 20, 1997, Lake View filed a motion to extend the filing time for a new complaint, and on September 5, 1997, the chancery court denied the motion as untimely. On September 8, 1997, Lake View filed a sixth amended complaint praying that the 1995 and 1997 legislative acts be declared unconstitutional "under federal and state standards." The State of Arkansas moved to strike the sixth amended complaint as untimely.

On October 30, 1997, the chancery court struck the sixth amended complaint and noted that there had been no "substantive strides" in the case since the order denying attorneys' fees on March 3, 1995. The court set a trial for January 27, 1998, through February 8, 1998. It also allowed Lake View ten days to cure conclusory allegations in its fifth amended complaint. On November 3, 1997, the chancery court allowed Lake View until November 21, 1997, to comply with the October 30, 1997 order or to file "some other pleading under which the plaintiffs wish to proceed." On November 21, 1997, Lake View filed an eighteen-page petition to show cause why the State of Arkansas should not be held in contempt of

[4] The motion was later amended to reference the fifth amended complaint.

court for failure to comply with the 1994 Order. In that petition, Lake View measured the 1995 and 1997 legislative acts and Amendment 74 against the yardstick of the 1994 Order and asked the chancery court to order the State to provide it with financial information regarding public school funding, after which the court should hold the State in contempt for noncompliance. On December 5, 1997, the State of Arkansas moved to dismiss Lake View's petition to show cause under Rule 8(a) and 12(b)(6) of the Arkansas Rules of Civil Procedure.

On January 29, 1998, counsel for the State of Arkansas and Lake View presented the chancery court with an Agreed Order approved by all counsel, including the Office of the Arkansas Attorney General. The salient parts of the Agreed Order were:

- A pool of money has been created by the efforts of Lake View. Since the 1994 Order, there has been an increase in funding of at least $65 million in each of the fiscal years 1996-97 and 1997-98, totaling approximately $130 million.
- The parties agree that upon application of Lake View the chancery court may order reasonable attorneys' fees and costs to be paid.
- Upon resolution of the attorneys' fees and cost issue, Lake View shall dismiss this case with prejudice.
- Dismissal of the case with prejudice shall act as a bar to all claims by the Lake View class and interveners that the 1995 and 1997 legislative acts violate the federal or state constitutions or federal or state statutes.

On February 2, 1998, Lake View filed a petition for attorneys' fees in which it requested a fee award of $10.25 million or, alternatively, fifteen percent of $130 million.

On February 5, 1998, an order approving notice to class members was signed by the chancery court, calling for a fairness hearing on the proposed Agreed Order. Depositions of two practicing attorneys, Carrold E. Ray and Richard F. Hatfield, who favored payment of the requested attorneys' fees, were taken and filed with the court.

On February 20, 1998, the American Civil Liberties Union filed an objection to the Agreed Order based on the brevity of the

comment period and the dismissal by class representatives of all claims regarding the constitutionality of the 1995 and 1997 legislative acts. According to the ACLU, class members were receiving nothing substantive from the settlement. The Little Rock School District and the Pulaski County Special School District also objected to payment of attorneys' fees from funds allocated to their respective districts. Dr. Winston Simpson of the Bryant School District disagreed that $130 million resulted from Lake View's efforts. On March 25, 1998, the State of Arkansas responded to the various objections and urged the chancery court to sign the Agreed Order. The State pointed out that what was before the court was an Agreed Order by the parties and not a settlement agreement.

The State of Arkansas also filed a prehearing brief which included an argument that the State of Arkansas had complied with the 1994 Order by enacting the 1995 and 1997 legislative acts. Amendment 74 had also passed as well. The State's brief advised the chancery court that support for the Agreed Order was almost universal among class members, and a transcript of a Legislative Council meeting held on January 29, 1998, was attached in which the full Legislative Council approved the Agreed Order. During the Legislative Council's meeting, Tim Humphries of the Attorney General's office stated that the Governor directed the Attorney General to "pursue with the settlement."

On March 20, 1998, and April 1, 1998, hearings were held before the chancery court on matters relating to the Agreed Order. At the March 20, 1998 hearing, the court noted that it had "great concern" about barring future litigation under the Agreed Order. At the April 1, 1998 hearing, the chancery court found that the ACLU had standing. The chancery court then refused to approve the Agreed Order. In doing so, the court alluded to its concern about barring future litigation. With respect to Lake View's counsel, the court stated that they had performed a "historic service"and need to be "paid handsomely." It was their efforts, according to the court, that led to the State's "getting a fair school funding formula in place." The court urged the parties to settle the attorneys' fees issue. It concluded that if the court could award fees, it would, though it bothered the court that school districts that did not benefit from the lawsuit might have to pay part of the fees. After the ruling, counsel for the State of Arkansas announced that the State stood by the Agreed Order and that the case involved whether the

State had complied with the 1994 Order by enacting the 1995 and 1997 legislative acts and with the passage of Amendment 74.

On April 3, 1998, Lake View requested the chancery court to determine reasonable attorneys' fees and "adjudicate the matter in its finality." On April 6, 1998, a hearing on attorneys' fees occurred before the chancery court in which the court repeated that Lake View's counsel "need to be rewarded." Counsel for the State of Arkansas contended that the 1994 Order was moot but affirmed the Agreed Order recitation that a $130 million fund was created by Lake View's efforts. Counsel for the Little Rock School District argued that the 1994 Order was moot owing solely to the fact that a new school funding system was now in place. The chancery court announced the figure of $7 million as attorneys' fees for purposes of notifying the class members of a settlement.

On April 9, 1998, the Attorney General's office for the State of Arkansas raised objections to attorneys' fees for Lake View. At an April 10, 1998 hearing, the trial court referred to an "immunity argument" that the Attorney General had raised. Also on that date, the chancery court approved an order of notice to the class of an award of attorneys' fees in the amount of $7 million. The notice provided that after payment of the fees, the case would be dismissed as moot. Numerous comments from class members were received, both opposed to and in favor of the settlement, though the majority of comments opposed the proposed fee for attorneys.

On May 22, 1998, a hearing was held on Lake View's request for attorneys' fees. Bill Goodman, assistant director for tax and fiscal research of the Legislative Council, testified that Act 917 of 1995 was enacted in response to the 1994 Order and that general revenue surpluses were realized in fiscal years 1994-95, 1995-96, and 1996-97. Michael Stormes, Administrator of the Office of Budget of the Department of Finance and Administration, also testified about surpluses for the last three fiscal years and stated that the State of Arkansas had a $20 million fund for payment of unanticipated claims against the State. Dr. Charles Venus, a consulting economist and member of the Governor's Council of Economic Advisors, testified that over the last five fiscal years, underfunded school districts had received considerable funds as a result of Lake View's efforts and the 1994 Order. Dr. Venus took issue with the position of Tristen Green, systems coordination analyst for the Department

of Education, that any benefit derived from the Lake View lawsuit was minimal. According to Dr. Venus, the increased funds received by the poorer school districts since 1994 was considerable.

On June 8, 1998, the State of Arkansas responded to Lake View's letter briefs on attorneys' fees, urged that both the American Rule and sovereign immunity prevented payment of any fees, and asked the chancery court to cut off further argument on the matter. On June 12, 1998, Lake View tendered its reply to the State's assertion of sovereign immunity.

On August 17, 1998, the chancery court entered its final order on the matter. It found that Lake View's fourth amended complaint and show-cause petition were moot because Amendment 74 had changed the standard for the school funding system and allowed funding variances among the school districts. The court stated that the same analysis applies to the legislation passed by the General Assembly in 1995 and 1997. The court added that the complaint and show-cause petition should be dismissed for failure to state a claim, because the 1995 and 1997 legislative acts are presumed constitutional and no facts were alleged supporting lack of a rational basis for those acts.[5] In this regard, the chancery court noted that Lake View's show-cause petition did assert that findings made in the 1994 Order were violated, but concluded that those findings "*[m]ay* necessarily have changed and *may not be*applicable today." (Emphasis ours.)

With respect to burden of proof, the chancery court stated that the State of Arkansas had the burden of proving that it had complied with the 1994 Order, but that the 1995 and 1997 legislative acts were presumed constitutional. According to the court, this meant that Lake View had the burden of proving that "there is no rational basis for the current legislation." The chancery court added: "Because the new statutes and constitutional amendment could be construed by the Court as a response to the 1994 Orders, the Orders themselves provide a rational response for the new funding formula."

[5] The chancery court specifically found that Lake View's show-cause petition was a "pleading" as contemplated by its previous order.

Regarding attorneys' fees, the chancery court rejected Lake View's legal theories for paying fees (1) under the Arkansas Civil Rights Act, (2) under a theory of illegal exaction, and (3) under the common-fund or common-benefit theories. It further concluded that sovereign immunity under Article 5, § 20, of the Arkansas Constitution barred recovery of fees against the State. Finally, the court refused to entertain Lake View's waiver or estoppel arguments relating to sovereign immunity on the basis that the brief raising these points must be struck as untimely.

As previously indicated in this opinion, Lake View posits multiple bases for reversing the final order of the chancery court. We believe that two of those points have merit. We do not agree with Lake View, however, that the chancery court was required to sign the Agreed Order. Approval of the court is required for a class-action compromise. *See* Ark. R. Civ. P. 23(e). We do not view court approval as a rubber stamp but rather as action entailing discretion by the trial court. *Cf. Reynolds v. National Football League*, 584 F.2d 280 (8th Cir. 1978). There was no abuse of discretion by the trial court in connection with this point.

II. Compliance Trial

Lake View contends that without a trial on the constitutionality of state initiatives since 1994, there is no basis for the chancery court's finding of mootness and failure to state a claim. We agree.

We begin with the observation that all parties and the chancery court apparently agree that the 1994 Order is still viable. No one contends that the 1994 Order has lapsed due to the failure to have a compliance trial after the first legislative acts were enacted in April 1995. Rather, the issue is whether the 1994 Order has any relevancy in light of the fact that the State's school funding formula has changed since 1994. The chancery court concluded that the mere fact of these legislative and constitutional changes rendered the 1994 findings obsolete.

We cannot subscribe to that conclusion. It would take an extraordinary leap of faith to assume that the mere passage of a new school funding formula resolves all issues relating to disparities in the school funding system set out in the 1994 Order. Surely, Amendment 74, which allows funding variances among school

districts due to local taxes, does not by itself resolve disparities in per pupil expenditures and opportunities under the State Constitution's equal protection clauses. Correcting such disparities lay at the heart of the 1994 Order. *See also DuPree v. Alma School Dist. No. 30, supra.*

Even assuming that Lake View has the burden of proving that the subsequent acts and Amendment 74 do not correct the disparities in treatment set out in the 1994 Order, it should be afforded an opportunity to make its case. As best we can determine, Lake View assiduously amended its pleadings after each set of legislative enactments and pushed for the matter to be scheduled for trial.

This brings us to the Agreed Order. There is no doubt that Lake View agreed to dismiss the case and forego future litigation if its attorneys' fees and costs were paid. But the chancery court refused to sign the order because it barred future contests on the unconstitutionality of the school funding system. The court also refused to approve attorneys' fees of $7 million, following Lake View's agreement that the case was moot. At that point, the agreement among the parties had fallen through, and the parties were back to square one on the compliance issue. Under these circumstances, Lake View was entitled to move on with its cause of action and press for a compliance trial.

There is another facet of the chancery court's decision that bears mention. Were this court to affirm that court's decision on grounds of mootness and failure to state a claim, our decision could be viewed as binding precedent on the issue of whether the 1995 and 1997 legislative acts and Amendment 74 corrected the disparities in pupil expenditures and pupil opportunities. Thus, any future contest to the constitutionality of the state funding system based on these changes would be barred. The State of Arkansas suggests that this might be an issue best left for another day. But this case cries for finality and resolution. We believe that a compliance trial and decision by the chancery court on whether the disparities in treatment noted in the 1994 order have been corrected so as to pass constitutional muster is the best way to achieve those goals. Without a compliance trial and the chancery court's analysis and decision, we are loathe to conclude that mere changes in the school funding system warrant a dismissal.

We reverse and remand for a trial to take place as soon as is practicable.

III. Attorneys' Fees

We next agree with Lake View that the chancery court erred in denying attorneys' fees in this case. As a starting point, we conclude that the chancery court was correct that Arkansas follows the American Rule that attorneys' fees are not chargeable as costs in litigation unless permitted by statute. *See, e.g., Love v. Smackover Sch. Dist.*, 329 Ark. 4, 946 S.W.2d 676 (1997); *Millsap v. Lane*, 288 Ark. 439, 706 S.W.2d 378 (1986); *City of Hot Springs v. Creviston*, 288 Ark. 286, 705 S.W.2d 415 (1986).

This state, nevertheless, has recognized exceptions to that rule. One of those exceptions occurs when substantial benefits are afforded a business corporation, even when the benefit is not pecuniary and no fund has been created. *See Millsap v. Lane, supra.* In *Millsap*, the issue of the appropriate award of attorneys' fees centered on the economic benefit received by Millsap Processed Foods (MPF). At issue was the correct value of MPF land, building, and assets. This court decided that Millsap's derivative suit on behalf of MPF preserved a value of over $540,000 in corporate assets. We, therefore, increased the attorneys' fees based on the economic benefit to MPF resulting from counsels' efforts.

The concept employed in *Millsap* is analogous to what is at issue in the instant case. Here, there is no question but that a substantial economic benefit has accrued not only to the poorer school districts as a direct result of Lake View's efforts but to the state as a whole. With the gradual elimination of disparities in funding and opportunities for students and with the passage of Amendment 74, education in the State unquestionably has benefitted. The chancery court acknowledged that through Lake View's efforts, the State was getting a fair school funding formula. And Tim Humphries of the Attorney General's Office told the chancery court that the State of Arkansas stood by the language in the Agreed Order even after the court refused to sign it. Also, at the April 6, 1998 hearing, James M. Llewellyn, Jr., on behalf of the State advised the chancery court that "at least One Hundred Million and probably more" was created by the effects of Amendment 74 alone

and that "all of us still stand on the Agreed Order recitation that there was [a] One Hundred and Thirty Million Dollar fund created." Mr. Llewellyn further advised the chancery court that the court should reconsider the Agreed Order because "we all believe that you're the proper person to say what is a reasonable attorneys' fee." In addition to counsels' statements, there was testimony from state officials and a consulting economist at the May 22, 1998 hearing that revenues for the public school fund had increased dramatically since 1994, following the passage of the 1995 and 1997 legislative acts and Amendment 74. That the State derived a substantial benefit from the efforts of Lake View's counsel is beyond dispute.

The State of Arkansas now urges this court to conclude that regardless of that benefit and the representations by counsel for the State, the sovereign-immunity clause of the State Constitution (Article 5, § 20) bars any recovery for attorneys' fees. The State is correct that Article 5, § 20, provides that the State shall never be a defendant in any of her courts. Moreover, this court has said that tapping the State's treasury for payment of damages will render the State a defendant. *See, e.g., Newton v. Etoch*, 332 Ark. 325, 965 S.W.2d 96 (1998). Here, it is the State's treasury that would pay either on a pro rata basis from revenues allocated to those school districts that benefitted from the Lake View litigation or from the State coffers. Thus, the State's treasury would ultimately be liable for legal fees. We hold that the sovereign-immunity doctrine applies to this case.

We turn then to the question of waiver or consent. It is axiomatic that the State of Arkansas can voluntarily waive a sovereign-immunity defense. *See, e.g., Newton v. Etoch, supra; State of Arkansas Office of Child Support Enfcm't v. Mitchell*, 330 Ark. 338, 954 S.W.2d 907 (1997); *State v. Tedder*, 326 Ark. 495, 932 S.W.2d 755 (1996). In addition, the State can consent to being sued. *Ozark Unlimited Rehab. Coop., Inc. v. Daniels*, 333 Ark. 214, 969 S.W.2d 169 (1998). We conclude that when the State of Arkansas signed off in two published notices to the class members advocating that attorneys' fees be paid and continued to push for payment of attorneys' fees even after the chancery court refused to sign the Agreed Order, it waived its sovereign-immunity defense to payment of those fees. We do understand that the State was seeking resolution of this litigation by supporting payment of those fees, but we

are hard pressed to reconcile published notices to class members supporting fees and representations to the chancery court to the same effect with a later claim of immunity.

We recognize that the trial court refused to consider the waiver issue on grounds that it was raised too late by Lake View. Letter briefs had been submitted by Lake View on attorneys' fees, and the State of Arkansas then filed its brief in response. In its brief, the State argued the sovereign-immunity defense and prayed that no more briefs be filed. Lake View responded four days later and countered the sovereign-immunity defense. It is that reply brief that the chancery court refused to consider. We conclude that the chancery court erred in this regard. Lake View should have been allowed to counter the sovereign-immunity defense. To hold otherwise would allow the State to argue a defense and then effectively foreclose a response from the other side. Furthermore, based on the State's motion to strike, *both* the State's brief in response and Lake View's reply were untimely.

We emphasize that this is a unique case with a unique set of circumstances. By upholding an eventual award of attorneys' fees today, as we do, we are not sanctioning attorneys' fees in all public-interest litigation or endorsing a new exception to the American Rule. Nor are we advancing a particular method for paying those attorneys' fees, such as a contingent fee based on the economic benefit or the lodestar method. We further emphasize that we are wedded to no figure for attorneys' fees. All of that is for the chancery court to decide. We are simply holding that in this case, an economic benefit did accrue to the State of Arkansas due to Lake View's efforts and attorneys' fees should be awarded. Accordingly, we reverse the chancery court's decision denying attorneys' fees and remand for a determination of reasonable fees, after the compliance trial is completed. We leave it to the chancery court to determine what are reasonable fees, after taking into consideration all of the circumstances of this case. *See Chrisco v. Sun Indus., Inc.*, 304 Ark. 227, 800 S.W.2d 717 (1990). Because the State has benefitted, we hold that the State should pay the fees awarded.

Reversed and remanded.

SPECIAL ASSOCIATE JUSTICE CAROL DALBY concurs.

SMITH, J., concurs in part; dissents in part.

GLAZE, J., dissents.

IMBER, J., not participating.

CAROL DALBY, Special Justice, concurring. I agree with the majority that the chancery court erred in failing to hold a compliance trial and in failing to award attorneys' fees. I concur because I believe additional clarification on the issue of attorneys' fees needs to be addressed.

Under the American Rule (which Arkansas follows) a litigating party, whether successful or not, must pay its own attorney's fee, unless a statute, contract, or judicial exceptions provide otherwise. Arkansas has recognized exceptions to this rule as noted in the majority opinion. Two of those exceptions under which an award of attorneys' fees in this case could be granted are the common-fund and the common-benefit exceptions. For the reasons set forth below, I believe the common-benefit exception should be applied to award attorneys' fees calculated by the lodestar method.

The common-fund exception permits the granting of attorneys' fees and other costs of litigation when a plaintiff is successful in creating, increasing, or preserving a fund which benefits an ascertainable class. The court, in exercising its equity jurisdiction may grant fees and costs by directing payment from the fund. *Newberg on Class Action*, Sec. 13.52 (3rd ed. 1992). In the case now before us, the evidence (despite the assertions of counsel in argument before the chancery court) is clear that the existing fund for school funding was increased, but no new fund was created nor preserved. It follows that any award of attorney's fees based on the common-fund exception should be based on the increase in that fund and should be taxed against those specific districts that received an increase in state funding. This, of course, would tax those who could least afford it (i.e. 'the poorer school districts'), which makes its application contrary to the purpose of the fee-shifting exception.

If, however, the chancery court does determine that an award of fees is warranted under the common-fund exception, I urge it to calculate the amount of fees based on the agreement made by the attorneys when they agreed to take the case. It appears that plaintiffs' attorneys were at one point satisfied to be paid a contingent of any settlement or judgment that Lake View received as per the employment contract entered into by the parties on September 3,

1998, some six years after the initial filing of this lawsuit. There certainly was nothing in the record to indicate a fee agreement prior to that time. Now, they are urging upon this Court, as they did in the chancery court, that they are entitled to a contingent fee from all monies now available to all school districts because of the legislative acts and Amendment 74. Their position is contrary to their own agreement. If they are to receive attorneys' fees at all under the common-fund exception, then they should be limited to that amount the Lake View School District recovered as per the fee agreement filed in the trial record at page 1239. Alternatively, I would urge the chancery court to apply the lodestar method to calculate attorneys' fees. This method would be particularly appropriate in this case since the first contingency-fee agreement was not entered into until September 3, 1998. How did plaintiffs' counsel expect to be paid during the first six years of litigation? It could not have been on a contingent basis since there was no writing stating such. *See* Model Rules of Professional Conduct, Rule 1.5.

The common-benefit exception is often used interchangeably with the common-fund exception, but there are subtle differences and it is those differences that determine who becomes responsible for payment of attorneys' fees. Under this exception the court is permitted to award attorney's fees from a defendant if the plaintiff's action results is a substantial benefit to the class but does not create a monetary fund from which fees might be awarded. *Newberg on Class Actions*, Sec. 13.52 (3rd ed. 1992). There is no doubt that the State of Arkansas has benefited and will continue to benefit by providing equality in education for all of its citizens and not just for those who reap the benefits of education by virtue of where they reside. The majority eludes to a "substantial economic benefit" accruing to the State as a whole. As noble as this statement is and in reality how true it may be, the record is devoid of any evidence as to the "substantial economic benefit" the State has received and no evidence has been offered upon which a percentage fee could be calculated. The only type of measurable economic benefit has inured to the poorer school districts, the effect of which is discussed above. I believe that the State has and will benefit as a result of plaintiffs' efforts by having better-educated citizens. It is under this exception I would grant attorneys' fees against the State. For the reasons set forth below, I am convinced that the proper calculation

of attorneys' fees under this exception and under the unique facts of this case should be by the lodestar method.

The lodestar method of fee calculation relies on the time and services that an attorney spends on a lawsuit, rather than the granting of a fee based on a percentage of the recovery. *Lindy Brothers Builders v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161 (3rd Cir. 1973), *aff'd* in part and vacated, 540 F.2d 102 (3rd Cir. 1976). In *Lindy*, the court stated the purpose of a fee award in common-fund cases is "to compensate the attorney for the reasonable value of services benefiting the underrepresented claimant." 487 F.2nd at 167. The court must look to the hours reasonably expended multiplied by a reasonable hourly rate. *Id.* This Court recognizes that time spent on a case is "an important element to be considered in determining the reasonable value of an attorney's services." *Powell v. Henry*, 267 Ark. 484, 487, 592 S.W.2d 107 (1980); *Millsap v. Lane*, 288 Ark. 439, 443, 706 S.W.2d 378 (1986). This application is particularly appealing here since the attorneys cannot be paid a percentage of the true benefit to the citizens of this State — better education.

I am hard pressed to find any basis upon which the plaintiffs' attorneys should be compensated in the millions of dollars for their efforts. Plaintiffs' attorneys should be required to account to the chancery court and the citizens and taxpayers of this State (the class) as to what they expended in time and services in this lawsuit before the chancery court can determine a reasonable fee, as required by the Model Rules of Professional Conduct.

LAVENSKI R. SMITH, Justice, concurring in part; dissenting in part. I write separately to dissent in part and concur in part. I join the dissent as to the mootness of the instant appeal. I, too, find no authority in Arkansas law for a compliance trial. The statutory and constitutional scheme upon which the plaintiffs based their suit no longer exists. Plaintiffs may well have a valid complaint based upon the subsequently enacted laws but that should be a different case.

However, I join the majority and the concurrence on the issue of entitlement to attorneys' fees. As the prevailing party in an action that resulted in a substantial benefit to the class they represented, the

plaintiffs should be entitled to attorneys' fees. I join the concurrence in preferring the lodestar method for calculation of those fees.

TOM GLAZE, Justice, dissenting. This case has taken on a life of its own. It began in 1992, and with this court unnecessarily continuing further trial and review of the matter, it will predictably continue at least another two or more years.

In my opinion, the trial court should be affirmed for the reasons it found and others. The trial court recognized its predecessor court in 1994 entered orders holding the Arkansas school funding formula unconstitutional. However, since those orders, Amendment 74 to the Arkansas Constitution was adopted in 1996 and five legislative acts were passed in 1995 and 1997, which altered the school formula. In short, Arkansas's school funding system, as it exists today, is indisputably different from the one found unconstitutional in 1994. Amendment 74 and the acts passed in 1995 and 1997 are presumed constitutional and render this appeal moot.

The majority court seems to agree with Lake View School District that the district is entitled to a "compliance trial" — which apparently is for the purpose of determining the constitutionality of the laws enacted since 1994, and whether those acts have cured the unconstitutional disparities the chancellor found earlier. Neither the trial court, nor our court, has the authority or jurisdiction to hold "compliance trials." It is telling that the majority mentions no citation of authority that provides for such trials. In fact, our court defined its limited role in such matters in *Dupree v. Alma Sch. Dist. No. 30*, 279 Ark. 340, 651 S.W.2d 90 (1983). Similar to the case here, school districts brought suit in *Dupree*, charging that the state's financing system of its schools was unconstitutional because its financing of the state's educational needs was inadequate to rectify the inequalities based on widely varying local tax bases. The districts further contended that the state's system actually widened the gap between the property-poor and property-wealthy districts. The trial court agreed with the districts, found the system unconstitutional, and the *Dupree* court affirmed; but in doing so, our court delineated its limit of judicial interpretation when addressing such constitutional issues. The court stated as follows:

> The dispositive answer is simply that *this court is not now engaged in — nor is it about to undertake — the "search for tax equity" which*

> *defendants prefigure.* As defendants themselves recognize, *it is the Legislature which by virtue of institutional competency as well as constitutional function is assigned that difficult and perilous quest. Our task is much more narrowly defined: it is to determine whether the trial court committed prejudicial legal error in determining whether the state school financing system at issue before it was violative of our state constitutional provisions guaranteeing equal protection of the laws* insofar as it denies equal educational opportunity to the public school students of this state. *If we determine that no such error occurred, we must affirm the trial court's judgment, leaving the matter of achieving a constitutional system to the body equipped and designed to perform that function.* (Emphasis added.)

In the present case, the chancellor, by her November 9, 1994, order, performed her judicial duty by entering her 1994 orders, declaring the funding system violative of the Arkansas Constitution. She further correctly recognized that it was the duty of the General Assembly to provide for a system of free public schools, *and that the trial court should not dictate the elements of that system.* Our court has never sanctioned a procedure whereby a trial court, after ruling a statute unconstitutional, could retain jurisdiction of the case until the General Assembly enacts a new measure the trial court believes meets constitutional muster. Here, when the chancellor interpreted existing law and rendered an opinion that the school funding formula was unconstitutional, her duty ended. As for the changes made by the 1995 and 1997 laws, those laws will require new legal arguments and proof which may be tested in new and separate actions.[1]

In rendering her decision, the chancellor also denied Lake View School District the injunctive relief it requested, and instead stayed her decision for two years in order to give the General Assembly time to implement a funding system in conformity with her opinion. The chancellor exceeded her authority and jurisdiction with these directives. Certainly, the chancellor could issue a stay order while the case was pending on appeal, but that is all that Arkansas law allows. *See* Ark. R. Civ. P. 62(d) and Ark. R. App. P.—Civ. 8; *see also Ryder Truck Rental, Inc. v. Sutton,* 305 Ark. 374,

[1] Obviously districts or taxpayers may file suit later questioning the constitutionality of any or all of the General Assembly's enactments if they are satisfied those new acts fail to end the unconstitutional disparities in the state's school funding formula.

807 S.W.2d 909 (1991).[2]

Lake View School District's remedy was to cross appeal the chancellor's refusal to grant the district the injunctive relief it sought, so the district could enforce the orders it had obtained. Nor did Lake View question on cross appeal the chancellor's authority or jurisdiction to stay the 1994 orders entered in Lake View School District's favor. My alluding to this jurisdiction issue should be of no surprise to the litigants in this appeal, since this court in *Tucker v. Lake View Sch. Dist. No. 25*, 323 Ark. 693, 917 S.W.2d 530 (1996), pointed out that "the matter of jurisdiction may again arise if further proceedings before the trial court result in another appeal of this case."

In my opinion, this case ended when (1) the chancellor entered her opinions in 1994, (2) the Lake View School District failed to cross appeal, and (3) the direct appeal was dismissed. If Lake View School District had appealed the 1994 orders and pursued the injunctive relief to which it was likely entitled, the Lake View School's counsel then could have sought any attorneys' fees which they believed were due them.

As to the attorneys' fees issue, I am doubtful that counsel for Lake View School District are in a position to prove their entitlement at this stage of the litigation because they failed to establish the required class action or a common fund prior to the chancellor's decision in 1994. Again, if counsel had been unjustifiably denied such class action by the chancellor by her 1994 decision, that decision should have been challenged on cross appeal by the Lake View School district. Regardless, I respectfully, but strongly, disagree with the majority opinion wherein the court stretches the *Millsap* holding whereby this court allowed attorneys' fees to the plaintiffs in an action involving private shareholders and their busi-

[2] I note that the chancellor cited to a Montana case, *Helena Elementary Sch. Dist. 1 v. State*, 784 P.2d 412 (Mont. 1990) (supplementing and amending *Helena Elementary Sch. Dist. 1 v. State*, 769 P.2d 684 (Mont. 1989)), where that state's supreme court held it had equitable power to postpone the effect of its earlier opinion which held that state's funding of public schools unconstitutional. However, that court offered no actual authority to support the "equitable power" proposition. Even if the Montana decision had been based on a sound legal footing, the Montana court did not empower a trial court to withhold the effectiveness of its constitutional ruling. Clearly, if trial courts can be said to be empowered to postpone the effectiveness of their decisions, such authority could play havoc with appeals as has been the situation in this case.

ness corporation and the corporation received some economic benefit as a result of the litigation. *See Millsap v. Lane*, 288 Ark. 439, 706 S.W.2d 378 (1986). Even if the *Millsap* case involving private parties and a private entity should be extended to an action against governmental entities (an extension with which I disagree), the Lake View School District, to qualify under such a common-benefit theory, was required to show that a common fund or benefit was created for an identifiable class of beneficiaries. Here, the chancellor correctly held that there was no such pool of money; but even if there had been a pool, it was impossible to determine which of the class members benefitted and which did not. In short, Lake View School District made no attempt to delineate which school districts, taxpayers, and students benefitted, and which did not do so.

For the above reasons, I would affirm.

Jamie Darnell LEE *v.* STATE of Arkansas

CR 98-485 11 S.W.3d 553

Supreme Court of Arkansas
Opinion delivered March 2, 2000

[redacted]

[redacted]

Mickey Buchanan, for appellant.

Mark Pryor, Att'y Gen., by: *Brad Newman*, Ass't Att'y Gen., for appellee.

ROBERT L. BROWN, Justice. Appellant Jamie Darnell Lee appeals his judgment of conviction for capital murder and for four counts of first-degree battery, all stemming from shootings that took place at a Texarkana nightclub. He was sentenced to life imprisonment without the possibility of parole for capital murder and for twenty years on each of the first-degree battery charges, to run consecutively. He raises four issues on appeal: (1) the trial court erred in refusing to grant him a new trial

based on the State's failure to disclose exculpatory impeaching information; (2) the trial court erred in foreclosing the defense from introducing evidence of gang affiliation and from cross-examining witnesses on the same matter; (3) the trial court abused its discretion in dismissing the sole black from the jury rather than declaring a mistrial; and (4) remarks made by the prosecutor in closing argument mandate reversal. We find no reversible error, and we affirm.

The events leading up to the criminal charges and convictions all occurred at the Ace of Clubs nightclub in Texarkana in the early morning hours of October 6, 1996. According to witnesses for the State, at about 3:00 a.m. that morning, the rap song "Bow Down" was playing in the nightclub for a crowd of patrons who were young men and women. The rap song deals with two rival gangs — one on the west side and one on the east side. The song depicts the west side gang as having more power. Some of the male patrons at the nightclub were members of rival gangs in Texarkana, Arkansas and Texarkana, Texas. Jamie Lee was a member of a Texarkana, Texas gang.

During the playing of "Bow Down," State witnesses testified that Lee stood on a chair and began acting out the rap song, while making gestures that some considered gang signs. His actions were taken by Texarkana, Arkansas gang members as being a taunt and a challenge, because he identified himself with a west side gang. Fighting broke out, and at some point Lee was handed a gun. According to several State witnesses, the gun was given to him by Demetric Williams, and Lee opened fire. Danyon Green was shot and killed, while Kinthun Arnold, Johnny Hardy, Charvez Williams, and Trolaurice Walker were wounded. Lee then ran out of the nightclub. According to one State witness, on his way out, Lee stopped and "clicked" his gun at the head of Fred Bradley, who was under a table. Lee's defense, on the other hand, was that he never had a gun in his possession. Several defense witnesses disputed the testimony of the State witnesses and testified that they never saw Lee with a gun, although other people in the nightclub did have guns.

Lee was found guilty of all five charges and sentenced as previously noted. He moved for a new trial, claiming multiple errors by the trial court, and the motion was denied.

I. Disclosure of Exculpatory Impeaching Information

For his first point, Lee contends that the State failed to disclose the criminal histories of Johnny Hardy, Kinthun Arnold, and Fred Bradley, though discovery motions for those histories and for any impeachment information had been filed. The specific information that Lee claims he was not privy to was that Hardy was a twice-convicted felon; that Arnold was arrested for theft and breaking and entering during Lee's trial and later charged, although the charged acts had occurred in 1994; and that Bradley had been charged with third-degree battery enhanced by gang-related activity into a Class B felony before Lee's trial, and the charge was pending at the time of the trial. In short, Lee claims he was hampered by this lack of information in impeaching the State witnesses. He further maintains that the trial was largely a swearing match between State and defense witnesses regarding what happened, and, as a consequence, impeachment of State witnesses was critical to his case.

The operative rule of procedure for disclosure of a witness's criminal history is Rule 17.1, which reads in pertinent part:

> (a) Subject to the provisions of Rules 17.5 and 19.4, the prosecuting attorney shall disclose to defense counsel, upon timely request, the following material and information which is or may come within the possession, control, or knowledge of the prosecuting attorney:
>
> ....
>
> (vi) any record of prior criminal convictions of persons whom the prosecuting attorney intends to call as witnesses at any hearing or at trial, if the prosecuting attorney has such information.

Ark. R. Crim. P. 17.1(a)(vi). This court has held that it is reversible error when a prosecutor fails to comply with a defendant's timely request for disclosure of information, when that failure results in prejudice to that defendant. *Hall v. State*, 306 Ark. 329, 812 S.W.2d 688 (1991). The information must be disclosed by the prosecutor in sufficient time to permit the defense to make beneficial use of it. *Henry v. State*, 337 Ark. 310, 989 S.W.2d 894 (1999). When the prosecutor fails to provide information, the burden is on the defendant/appellant to show that the omission was sufficient to

undermine confidence in the outcome of the trial. *White v. State*, 330 Ark. 813, 958 S.W.2d 519 (1997).

In the instant case, Lee concedes that the prosecutor provided him with information about the prior convictions of Arnold and Bradley, leaving only a question about the prosecutor's failure to disclose the prior convictions of Johnny Hardy. At the hearing on the motion for a new trial, the prosecutor admitted that he had no documentary proof that he had disclosed Hardy's prior convictions, but he said that he remembered discussing the matter with one of Lee's attorneys. Lee's attorneys stated that they were not given the information prior to trial.

Hardy, however, testified at Lee's trial dressed in prison garb and stated on direct examination that he was currently awaiting transfer to the state penitentiary for a parole violation resulting from a conviction in 1985 on charges of burglary and theft of property. He stated that he was already serving a sentence for breaking and entering and theft. He further testified that he pled guilty to other instances of theft in 1984. On cross-examination, Lee's attorney asked him about his parole violation several times.

This court has emphasized in its decisions that the crucial issue in such matters is whether Lee was prejudiced by the prosecutor's failure to disclose the information about Hardy's convictions. *See Rychtarik v. State*, 334 Ark. 492, 976 S.W.2d 374 (1998); *Johnson v. State*, 333 Ark. 673, 972 S.W.2d 935 (1998); *McNeese v. State*, 326 Ark. 787, 935 S.W.2d 246 (1996). Here, it is difficult to see how Lee was prejudiced. Even assuming that the prosecutor did not fully disclose Hardy's background, the prosecutor did question Hardy about his prior convictions when he was testifying before the jury, and it was obvious from his prison clothes that he was currently incarcerated. Further, Lee's attorney questioned Hardy about his parole violations on cross-examination. In *Nelson v. State*, 324 Ark. 404, 921 S.W.2d 593 (1996), we concluded that in light of the fact that the witness admitted in testimony that he had a prior record of six felony convictions, his credibility was impeached, and the appellant could not show prejudice resulting from the asserted discovery violation. The same principle holds true in the case before us.

The corollary issue under this point is whether the prosecution was required to disclose any criminal information regarding

Bradley, Arnold, and Hardy, even if that information did not solely relate to criminal convictions. Under Ark. R. Crim. P. 17.1(d), the prosecution is required to disclose any information which "tends to negate the guilt" of the defendant. Moreover, in *Harrell v. State*, 331 Ark. 232, 962 S.W.2d 325 (1998), we discussed the holdings of the United States Supreme Court in *Brady v. Maryland*, 373 U.S. 83 (1963) and *United States v. Bagley*, 473 U.S. 667 (1985). We noted that in *Brady*, the Court held that the prosecution's suppression of evidence favorable to an accused violates the defendant's due process rights, where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. The Court extended this rule to include impeachment evidence, as well as exculpatory evidence, in *United States v. Bagley, supra*. This court adopted the same reasoning and said:

> In order for the appellants to prevail on this issue, they must demonstrate a reasonable probability that the result would have been different had they had the information concerning Davis's prior possession of cocaine. The court in *United States v. Bagley, supra*, held that "reasonable probability" is a probability sufficient to undermine confidence in the outcome. *See Pennsylvania v. Ritchie*, 480 U.S. 39 (1987); *Yates v. State*, 303 Ark. 79, 794 S.W.2d 133 (1990).

Harrell, 331 Ark. at 238, 962 S.W.2d at 328.

[redacted] In the case at hand, the State argues that the evidence of the witnesses' prior criminal activity was not material, and, therefore, *Brady* and *Bagley* are not applicable. We disagree because the undisclosed information appears to have been material, because it went to the credibility of the State's witnesses. We cannot say, however, that there is a reasonable probability that the results of this trial would have been different even were we to exclude the testimony of Arnold, Bradley, and Hardy altogether. There still would have been three witnesses for the State who identified Lee as the shooter. Furthermore, Lee presented no evidence that any charges were dropped against State witnesses as part of an agreement to obtain their testimony. *See Haire v. State*, 340 Ark. 11, 8 S.W.3d 468 (2000). We hold that the failure to fully disclose the criminal histories of the three State witnesses does not constitute reversible error.

II. Evidence of Gang Affiliation

For his second point, Lee urges that evidence of gang or group affiliation was vital to this trial, because the credibility of the witnesses for both sides was a major issue. In this regard, he notes that Officer Ronald Hudson of the Texarkana Police Department testified that he obtained an arrest warrant for Lee based upon the statements of Brian Grady, James Jamison, and Fred Bradley. Lee then states that he attempted to get the police officer to testify about the Department's gang activities unit to show that Grady, Jamison, and Bradley had gang affiliations. He concedes that this same information had come in during the testimony of Officer James Ewing of the Texarkana Police Department during the State's case-in-chief, but he argues that because the trial court refused to let Officer Hudson testify of his knowledge of the witnesses' gang-related activities, it prevented him from developing evidence of bias in the State's witnesses. This evidence of gang affiliation was relevant, he urges, to show the motive of these witnesses to lie and their state of mind. Because the witnesses denied that they were members of a gang, he contends that he should have been allowed to contradict that testimony. Additionally, he points out that he attempted to question several witnesses about gang graffiti written on a wall after the shootings, but the trial court refused to let him to do this.[1]

[redacted] The trial court has wide discretion on rulings concerning the admissibility of evidence, and this court will not reverse such a ruling absent an abuse of discretion. *Weaver v. State*, 324 Ark. 290, 920 S.W.2d 491 (1996); *Miller v. State*, 280 Ark. 551, 660 S.W.2d 163 (1983). Evidence is relevant if it has any tendency to make the existence of a fact more or less probable. Ark. R. Evid. 401; *see also Weaver v. State, supra*. This court has held that evidence of gang membership is relevant to show motive for murder. *Scott v. State*, 325 Ark. 267, 924 S.W.2d 248 (1996). In the instant case, the trial court excluded the gang-related evidence in question after finding that it was not relevant. The court based this lack of relevancy on the fact that Lee's defense was not self-defense against a rival gang but rather that he never had a gun that night.

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[1] The graffiti read "Tad, pimp some hoes for the pack." The nickname of the decedent, Danyon Green, was "Tat."

We first examine Officer Hudson's excluded testimony and the sequence of events. Officer Ewing had testified as part of the State's case that State witnesses Fred Bradley, Brian Grady, and James Jamison were all members of a gang. On cross-examination by the defense, the three witnesses had denied it. Lee's defense counsel sought to rebut the denials by Officer Hudson's testimony. We find no fault in the trial court's exclusion of Officer Hudson's testimony. Rule 608(b) of the Rules of Evidence provides that specific instances of the conduct of a witness may not be proved by extrinsic evidence to attack that witness's credibility. This appears to be precisely what the defense was attempting to do. The defense was trying to attack the credibility of State witnesses concerning gang membership by extrinsic evidence, that is, by Officer Hudson's testimony. Furthermore, there was abundant evidence in addition to the testimony of Officer Ewing that Bradley, Grady, and Jamison had a gang affiliation, and, thus, Officer Hudson's testimony would have been cumulative. *See Windsor v. State*, 338 Ark. 649, 1 S.W.3d 20 (1999).

We further question the validity of Lee's argument that he was attempting to show bias on the part of these witnesses by Officer Hudson's testimony. The whole tenor of Lee's defense is that he did not do the shootings and never had a gun. Thus, whether gang rivalry precipitated the shootings has a diminished significance, as does Lee's contention that these three witnesses lied because of gang rivalry when they pinpointed him as the culprit. We conclude that there was no reversible error in the trial court's disallowance of Officer Hudson's testimony.

With regard to the gang graffiti, it appears that Lee was attempting to show that the graffiti was related to the shooting because it contained the word "Tad," which was close to the nickname of the decedent, Danyon Green. We find no error in the trial court's ruling on this point. Lee offered no proof on who wrote the graffiti, when it was written, or how it related to his case. The graffiti is also cumulative, because there was abundant evidence otherwise showing that the shootings were motivated by gang relationships. There was no abuse of discretion by the trial court in this regard.

III. Juror Paxton

Lee next contends that the trial court erred because it took the word of jail trusty, Sandy Davis, over the word of a juror, Joe Paxton. On the third day of the trial, the trial court excused Paxton, who is black, as a juror because he was discussing the trial with third parties, contrary to the court's instructions. He was replaced by an alternate juror who was white. Lee is black. Lee also points out that the jail trusty reported that two or three other jurors were talking about the case and that those jurors should have been removed as well. He argues that if Paxton was tainted, the others were too, and the trial court had no choice but to declare a mistrial.

The record reflects a number of problems concerning Juror Paxton. Early on in the trial, defense counsel informed the court that Paxton had approached him and told him that he was a famous singer. The trial judge responded that he would watch Paxton and "see how things go." Then, during the trial, the jail trusty told a deputy sheriff that Paxton had discussed the trial with him, in violation of the court's admonition that jurors were not to discuss the case. When questioned by the judge, Paxton answered that he may have talked to the trusty but did not discuss the trial with him. The judge then alluded to Paxton's erratic behavior and decided to excuse Paxton and to seat the remaining alternate in his place.

[redacted] We have held in the past that an appellant must show prejudice, when the trial court removes a juror and seats an alternate in the juror's place. *Heinze v. State*, 309 Ark. 162, 827 S.W.2d 658 (1992). We review such matters under an abuse of discretion standard. *Latham v. State*, 318 Ark. 19, 883 S.W.2d 461 (1994). Here, the trial court conducted an investigation of all twelve jurors and determined, contrary to Lee's assertion, that Paxton was the only one who talked to the jail trusty, though Paxton denied that he discussed the case. One of the other jurors also told the court that Paxton tried to speak to her, but that she refused and left. She did not state that he attempted to talk to her about the case. This juror also said that she saw Paxton talking to someone else, but she did not know who it was. She added that it might have been one of the victims in this case. In view of all of this, the trial court determined that it was in the best interest of both parties that Paxton be excused. Lee's counsel argued that the trial court was

taking the trusty's word over Paxton's. The trial court answered that the trusty's account was corroborated by that of another juror.

The issue on this point is whether the trial court abused its discretion in removing the juror, and whether Lee was prejudiced in any regard by the seating of the alternate. *Latham v. State, supra.* We conclude that the trial court did not abuse its discretion in removing Paxton from the jury. It is true that this matter was decided largely as one of credibility, but this court has consistently held that the trial court is in the best position to judge the credibility of the witnesses and to resolve any conflicts in that testimony. *See, e.g., Wright v. State*, 335 Ark. 395, 983 S.W.2d 387 (1998); *Johninson v. State*, 330 Ark. 381, 953 S.W.2d 883 (1997). The trial court found that Paxton was the only juror who discussed the case with the jail trusty, and we have no reason to disagree with that conclusion other than the fact that Lee disputes it. Further, the State correctly observes that Lee has failed to show that he was prejudiced in any respect by the seating of the alternate. *See Heinze v. State, supra.* Because no prejudice has been shown, we affirm the trial court's decision.

IV. Closing Argument

For his final point, Lee claims that the trial court's refusal to sustain his objections to the prosecutor's closing argument is reversible error. He argues that this court has held that trial counsel are given leeway in closing argument but emphasizes that the remarks in this case invited the jurors to discard their objectivity and to take matters into their own hands as part of law enforcement to stop gang-related violence. He further argues that to allow the prosecutor to sound a "send-a-message" theme in closing argument is reversible error. Specifically, he requests this court to reverse cases such as *Muldrew v. State*, 331 Ark. 519, 963 S.W.2d 580 (1998), where we have affirmed a ruling to allow a "send-a-message" argument. The parts of the prosecutor's argument that Lee objected to follow:

> You can use your common knowledge, ladies and gentlemen, in evaluating the evidence in this case. I submit to you it's common knowledge that there is just simply just too much violence going on in this town. And I'm asking you to help us enforce the law and to stop this violence.

....

> And, ladies and gentlemen, we've got to stop it on both sides of town. All we can do about it is stop here on this side of town. And on behalf of law enforcement on both sides of town I'm asking you to help us stop it to the extent that we can right now.
>
> ....
>
> Help us enforce the law, ladies and gentlemen, since he continually interrupts me I want to repeat that. Help us enforce the law to the extent we can. And the only way, or best way, to do it is convict this defendant of capital murder and four counts of battery in the first degree as charged. And this will hopefully enforce the law by deterring or stopping this guy forever from coming over here and shooting people in the back and at the same time send a message to like minded people that if you want to pursue the life of a criminal you better get away from here.
>
> ....
>
> We've got to stop people from acting like this guy did in this case. And the only way to do that is to send a message to him and send a message to people that think like him that if they do it and they come over on this side of town and they do it they're going to get convicted for doing it. And they're going to be dealt with severely.

[redacted] We decline to reverse our previous cases on this point. The trial court clearly has broad discretion in controlling trial counsel in closing arguments, and we will not disturb a trial court's ruling regarding an objection during closing argument absent a manifest abuse of discretion. *Muldrew v. State, supra*; *Lee v. State*, 326 Ark. 529, 932 S.W.2d 756 (1996). In *Muldrew*, the prosecutor, among other things, argued in a crack cocaine case: "Let's send a message to people in this community that we don't really want these kind of folks around here." We noted in *Muldrew* that a mistrial is an extreme remedy and one that should not be used unless there has been an error so prejudicial that justice cannot be served by continuing the trial or when the fundamental fairness of the trial itself has been obviously affected. We also noted in *Muldrew* that remarks requiring reversal are rare and require an appeal to the jurors' passions. The appellant in *Muldrew* argued to this court that the remarks were improper because they went beyond the evidence and were a manifest appeal to the jury's emotions. We held that the appellant's argument was without merit.

There are other cases where we have allowed comparable "send-a-message" arguments. In *Love v. State*, 324 Ark. 526, 922 S.W.2d 701 (1996), we held that "send-a-message" themes from the prosecutor during closing argument were not improper:

> Granted, the trial court commented that he hoped to send a message to people who might be inclined to engage in criminal activity. However, Love cites no authority for his argument that such a consideration is improper. *Stevens v. State*, 319 Ark. 640, 893 S.W.2d 773 (1995). Further, Ark. Code Ann. § 16-90-801(a)(5)(Supp. 1995) provides that a primary purpose of sentencing a person convicted of a crime is to "deter criminal behavior and foster respect for the law."

Id. at 532, 922 S.W.2d at 704.

The trial court did not err in rejecting the motion to declare a mistrial. Closing arguments are not evidence, and the jury was instructed to that effect. Moreover, this was not a "golden rule" argument as Lee suggests. A golden rule argument is one where the jury is implored to put themselves in the position of the victim. *Puckett v. State*, 324 Ark. 81, 918 S.W.2d 707 (1996). That is not what the prosecutor argued here. There was no abuse of discretion by the trial court in declining to declare a mistrial.

In his conclusion, Lee makes a cumulative error argument. However, no such argument was made to the trial court, and no ruling was obtained. Lee admits this. Our caselaw is clear that we will not entertain a cumulative error argument unless first made to the trial court. *Munson v. State*, 331 Ark. 41, 959 S.W.2d 391 (1998); *Noel v. State*, 331 Ark. 79, 960 S.W.2d 439 (1998).

The record has been examined in accordance with Ark. Sup. Ct. R. 4-3(h), and no reversible error has been found.

Affirmed.

Lavern MANS *v.* PEOPLES BANK of IMBODEN

99-773 10 S.W.3d 885

Supreme Court of Arkansas
Opinion delivered March 2, 2000

[redacted]

Walmsley & Weaver, by: *Tim Weaver*, for appellant.

Dick Jarboe, for appellee.

ROBERT L. BROWN, Justice. The appellant, Lavern Mans, appeals the grant of a directed verdict in favor of the appellee, Peoples Bank of Imboden, on her negligence action. We hold that there was no legal duty established based on trust to support Mans's cause of action for negligence, and we affirm the grant of the directed verdict.

The facts are that on June 21, 1993, Lavern Mans and her husband, Jimmie Mans, executed a promissory note made payable to Peoples Bank in the amount of $25,949.55. The proceeds of the note were to be used for home improvements. At the same time, the Manses took out a joint credit life insurance policy on both of their lives to cover the amount due on the promissory note. Peoples Bank acted as the agent for the credit life company, American Pioneer Life Insurance Company, and were paid part of the premium for this service. The term of both the promissory note and the credit life policy was twenty-four months. The annual premium for the credit life policy was $1,054.55. The Manses agreed to finance payment of this premium in addition to the money borrowed under the promissory note based on a ten-year amortization

schedule. With the addition of the credit life premium, monthly payments on the promissory note were $351.70.

On June 21, 1995, the promissory note became due, and the Manses and the bank agreed to an extension of the note. The credit life insurance policy, however, lapsed at the end of the two-year term. After the note was extended by agreement, the monthly payments under the note remained the same.

On July 23, 1997, Jimmie Mans died, and Lavern Mans requested Peoples Bank to make a claim to the carrier under the credit life policy to pay off the home improvement loan. She was informed by Peoples Bank that the policy lapsed on June 21, 1995, and that American Pioneer Life would not pay her claim.

On July 2, 1998, Lavern Mans sued Peoples Bank for negligence in failing to notify her that the credit life policy had lapsed. Had she been notified, she alleged, the Manses would have extended the joint coverage on both of their lives. She prayed for judgment over against Peoples Bank for the amount due on the promissory note.

A jury trial ensued, and at the close of Lavern Mans's case, Peoples Bank moved for a directed verdict on the basis that the relationship between the bank and the Manses was one of debtor-creditor and that there had been no proof of a special relationship beyond that of debtor-creditor. Peoples Bank further argued, in the alternative, that there had been no proof that the bank did not tell her husband, Jimmie Mans, that the credit life policy had lapsed at the end of the two-year period.

Lavern Mans responded to the directed-verdict motion and argued that she and her husband continued to pay the same note payment after the note was extended on June 21, 1995. She argued that because of this, she assumed the credit life insurance had been extended, even though she knew the term of the policy was only for two years. Also, she claimed that no one at Peoples Bank advised her to the contrary, and she trusted the bank to tell her if there was a lapse.

The trial court found that there was no duty owed by the bank under a negligence theory to notify Lavern Mans that the credit life

policy had lapsed, and the court granted the motion for directed verdict in favor of Peoples Bank.

Lavern Mans's sole argument on appeal is that the trial court erred in finding that Peoples Bank had no legal duty to notify her that the credit life policy had expired. She first acknowledges in her brief that the issue of duty is always one for the trial court and never one for the jury, and, thus, is decided as a matter of law. She then goes forward, in seeming contradiction, and cites us to a court of appeals case, *Home Federal Sav. & Loan Ass'n v. Bass*, 1 Ark. App. 146, 613 S.W.2d 604 (1981), for the proposition that a jury may decide whether a duty exists. The crucial questions in our analysis, therefore, are (1) what duty did the bank owe to her based on the relationship that existed between the parties, and (2) did the trial court err in refusing to find a duty based on trust in this negligence claim?

According to Lavern Mans's complaint, her cause of action is solely one of negligence based on a failure to notify. During her direct examination at trial, however, this questioning took place:

> MR. WEAVER [*for Lavern Mans*]: Now, during this period of time that you had been with the bank for some twenty-three years, did you trust the bank?
>
> MANS: Yes
>
> WEAVER: And would you ...
>
> MANS: Completely.

At that point, counsel for Peoples Bank objected, resulting in the following sidebar conference between counsel and the trial court:

> BY MR. JARBOE [*for Peoples Bank*]: I'm going to object to this line of testimony because fiduciary relationship or confidential relationship was not pled and to establish anything other than just ordinary debtor-creditor relationship, those allegations have to be pled.
>
> BY MR. WEAVER [*for Lavern Mans*]: I don't have, I'm not claiming that there was a fiduciary relationship. I'm just claiming what the duty was and what the bank did or did not do because there's going to be testimony from Mr. Clark that he knows that

unsophisticated customers relied upon the bank. She's going to testify that she both trusted the bank and relied upon the bank.

BY MR. JARBOE: Still hadn't been pled, Judge.

BY THE COURT: Yeah, I agree. You're getting into something much further than negligence.

BY MR. WEAVER: But the, the negligence you have to prove a duty.

BY THE COURT: Yeah, but trusting?

BY MR. WEAVER: That's the duty. The bank, they get paid for it, Judge. The testimony's going to be that they got thirty to forty per cent of this woman's credit life premium and the bank had a duty, they were getting interest from this lady, they were getting thirty to forty per cent of her premium.

BY THE COURT: This is an arm's length transaction. This is not trusting and this and that and the other.

BY MR. WEAVER: Sure it is.

BY THE COURT: No, it isn't. I don't agree with that. If you, if you have to trust, you have a fiduciary relationship. Now you're close on the fact that he's an agent, but that doesn't have anything to do with the type of insurance so, no, I don't think this is correct.

BY MR. WEAVER: But I'm not, I'm not asking about, all I'm asking her is what her relationship had been with this bank. And that course, that course of relationship...

BY THE COURT: The relationship with that bank is an arm's length, debtor-creditor relationship.

BY MR. WEAVER: But it's going to be also what, it's going to be what it is if she testifies, "I always trusted the bank and relied upon the bank."

BY THE COURT: That's not fair to the bank.

BY MR. WEAVER: Well, I'm not...

BY THE COURT: You're on negligence. You're trying to have your cake and eat it, too.

BY MR. WEAVER: But there has to be a duty and we have to establish what the duty is.

BY THE COURT: The duty is not trust. The duty is what a ordinary, reasonable person would do under the circumstances. Not trust. You're throwing in your best ace which is your, which is your fact that she's a widow, but it doesn't have anything to do with fault or comparative fault in a negligence case. I agree with him on that.

BY MR. WEAVER: But I, Judge, I think if they acknowledge that they know that these people rely on them, that puts them in that, that gives them the duty to at least have noticed her up.

BY THE COURT: It's a debtor-creditor relationship, Tim. How do you have trust in — no, huh-uh, not under the law.

BY MR. JARBOE: I've got a case I'll show the Court.

BY THE COURT: No, you don't need to show it.

BY MR. WEAVER: Well, I'm going, I'm going to proffer that her testimony about this would be that she trusted this bank over a period of twenty three years, that she counted on the bank to do the right thing and that is tell her. The bank has testified via Preston Clark that, yes, these unsophisticated customers...

BY THE COURT: There's your problem.

BY MR. WEAVER: What's the problem?

BY THE COURT: The law does not recognize sophisticated and unsophisticated in a debtor-creditor relationship on a note.

BY MR. WEAVER: But it's a fact. This is just a fact.

BY THE COURT: I've ruled, let's go. I'm not going to allow it.

We glean from this extended colloquy that counsel for Lavern Mans attempted to prove a legal duty of trust in a negligence case without first establishing a fiduciary relationship. In fact, counsel for Lavern Mans clearly stated that he was not claiming that a fiduciary relationship existed. Part of the problem in this case is an inherent conflict in Mans's position regarding the bank's legal duty. On the one hand, she does not claim that her relationship with the bank was fiduciary in nature. On the other hand, she contends that her

relationship was one of trust based on twenty-three years of business dealings.

There are certain blackletter principles that bear mention in connection with Mans's argument. First, this court has recognized that a policyholder has a duty to educate herself concerning her insurance. *See Scott-Huff Ins. Agency v. Sandusky*, 318 Ark. 613, 887 S.W.2d 516 (1994); *Continental Cas. Co. v. Didier*, 301 Ark. 159, 783 S.W.2d 29 (1990); *Howell v. Bullock*, 297 Ark. 552, 764 S.W.2d 422 (1989); *Stokes v. Harrell*, 289 Ark. 179, 711 S.W.2d 755 (1986). In those cases where an established relationship between the insured and the insurance agent has developed over a period of time with the agent being actively involved in the insured's business affairs and in the maintenance of her insurance coverage, a special relationship may be found to exist. *See Stokes v. Harrell, supra.* In such cases, some jurisdictions have found that a duty to keep the insured informed exists on the part of the agent. *Id.* In *Stokes*, this court concluded that there was only minor contact between the insurance agent and the insured regarding the initial fire insurance on his business and when he increased the amount of insurance three years later. Under those circumstances, we held that the trial court was correct in granting a directed verdict in favor of the carrier.

The question of the duty owed to the plaintiff alleging negligence is always one of law and never one for the jury. *D.B. Griffen Warehouse, Inc. v. Sanders*, 336 Ark. 456, 986 S.W.2d 836 (1999); *DeHart v. Wal-Mart Stores*, 328 Ark. 579, 946 S.W.2d 647 (1997); *Lawhon Farm Supply, Inc. v. Hayes*, 316 Ark. 69, 870 S.W.2d 729 (1994); *Catlett v. Stewart*, 304 Ark. 637, 804 S.W.2d 699 (1991); *Keck v. American Employment Agency, Inc.*, 279 Ark. 294, 652 S.W.2d 2 (1983). If the court finds that no duty of care is owed, the negligence count is decided as a matter of law. *D.B. Griffen Warehouse, Inc. v. Sanders, supra*; *Dunn v. Westbrook*, 334 Ark. 83, 971 S.W.2d 252 (1998); *Smith v. Hansen*, 323 Ark. 188, 914 S.W.2d 285 (1996). Duty is a concept which arises out of the recognition that relations between individuals may impose upon one a legal obligation for another. *Shannon v. Wilson*, 329 Ark. 143, 947 S.W.2d 349 (1997), *citing* W. PROSSER, *Handbook on the Law of Torts*, § 42 at 244 (1971).

For a fiduciary relationship to exist, this court has emphasized the necessity of factual underpinnings to establish a relationship of trust between a bank and its customers, which is more than a debtor-creditor relationship. *See Country Corner Food & Drug, Inc. v. First State Bank*, 332 Ark. 645, 966 S.W.2d 894 (1998); *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). In *Country Corner Food & Drug, Inc.*, for example, we affirmed a summary judgment in favor of the bank on the basis that lack of sophistication of the customer and the bank's alleged advice not to seek independent counsel did not create a fiduciary relationship. In *J.W. Reynolds Lumber Co.*, we said:

> Here there were no facts to indicate that Reynolds and the Bank had any relationship beyond that of debtor/creditor. That being so, there was no fiduciary relationship and the chancellor did not err in dismissing the claim based on implied trust.

310 Ark. at 347, 836 S.W.2d at 855.

In assessing Lavern Mans's legal arguments, both before the trial court and on appeal, we conclude that the whole thrust of her case is that a relationship had developed with the bank beyond that of debtor-creditor and that she was entitled to rely on the bank to keep her informed. What she is claiming, without saying so, is that a special relationship had evolved leading to this reliance or trust that the bank would advise her on matters such as insurance lapses. Yet, she does not describe this relationship as one that was fiduciary in nature. She is content to argue that the bank owed her a legal duty based on her trust that the bank would tell her if her credit life insurance had lapsed. She admits that this is an issue of first impression for this court and then relies on the court of appeals decision, *Home Federal Sav. & Loan v. Bass, supra*, which concerned the failure of a savings and loan association to procure credit life insurance after the customers requested that it do so. Failure to procure insurance upon request is categorically different from what we have before us in the instant case.

We conclude that Lavern Mans is off the mark in arguing that the bank owed her a legal duty to keep her advised of insurance matters simply because she trusted the bank. Ordinarily, the relationship between a bank and its customer is one of debtor and creditor. *See J.W. Reynolds Lumber Co. v. Smackover State Bank,*

supra. And the duty owed for simple negligence is one of ordinary care. For the relationship to be more than one of debtor and creditor, factual underpinnings for that special relationship must be proved by the customer. *Id.* In the instant case, Mans makes no effort to prove a fiduciary relationship, and her counsel specifically stated to the trial court that he would not do so. Without any effort to establish such a relationship, which would justify a fiduciary duty, we are unable to agree that the trial court erred in determining that no legal duty based on her trust was owed by the bank.

Even were we to treat Mans's argument as one of implied trust grounded on a fiduciary relationship or a special relationship based on course of dealing, her proof falls short of substantial evidence, which is necessary to ward off a directed verdict. *See Barnes, Quinn, Flake & Anderson v. Rankins,* 312 Ark. 240, 848 S.W.2d 924 (1993). Substantial evidence must be sufficient to compel a conclusion one way or the other and must go beyond suspicion or conjecture. *Id.* First, Lavern Mans's counsel sought to prove a trusting relationship merely by showing that his client was unsophisticated and had done business with the bank with her husband for twenty-three years. The trial court recognized that lack of sophistication does not equate to a fiduciary relationship, even if one had been asserted. *See Country Corner Food & Drug, Inc. v. First State Bank, supra.* Moreover, there was no proof that the bank, as insurance agent, was intimately involved in the Manses' business affairs so as to give rise to any obligation on the bank's part. *See Stokes v. Harrell, supra.* In fact, the proof showed to the contrary in that it was the Manses who decided when to take out credit life insurance. Sometimes they took out coverage on their loans and sometimes they did not. Because of their age, they decided to do so on the home improvement loan in question. But no proof was offered that this was at the bank's direction or based on the bank's advice.

The Peoples Bank's CEO, Preston Clark, did testify to an unwritten bank policy of informing customers when their credit life coverage expired. Yet, Lavern Mans did not testify that she knew about this policy. Thus, she could not have relied on it. She did testify that she knew the term of her credit life policy was only for two years. She simply assumed the coverage continued beyond that date because her note payment remained the same. She made this assumption even though she knew the credit life premium

payments were being amortized over ten years. Furthermore, she did not testify to any course of dealing with the bank where notice of insurance lapses was given to her or to her husband. It was made clear at the trial that Jimmie Mans took the lead in banking affairs for the family and had the bulk of the contacts with the bank. He was the one who went to the bank to extend the loan beyond June 21, 1995. We have no way of knowing what he knew about the status of the credit life policy after that date.

Our caselaw supports the notion that more must be shown to establish a fiduciary relationship and give rise to a fiduciary duty than was done in this case. *See County Corner Food & Drug, Inc. v. First State Bank, supra*; *Milam v. Bank of Cabot, supra; J.W. Reynolds Lumber Co. v. Smackover State Bank, supra.* Had this been a case where the bank had previously advised the Manses of when a credit life policy lapsed, or where the Manses were unaware of the duration of the policy's term and the amortization schedule for paying the policy's premium, or where the Manses were aware of the bank's policy to inform about lapses, this would be a different matter. *See Lowery v. Guaranty Bank & Trust Co.*, 592 S.2d 79 (Miss. 1991). But those facts are not before us.

In sum, this case seems analogous to the facts in *Country Corner Food & Drug, Inc. v. First State Bank, supra*, where we affirmed a summary judgment in favor of the bank even though the bank customer was unsophisticated and even though the bank, allegedly, had misled its customer about whether to seek independent advice. Here, the appellant would have us impose an obligation of implied trust based solely on a twenty-three year banking relationship and what she assumed, even though she knew the term of her credit life policy was only two years. This disregards our caselaw that an insured has some obligation to educate herself, if she had some question about the amount of the note payment and continuation of the insurance. Without substantial evidence that the banking relationship was fiduciary in nature or that the course of dealing warranted her repose of trust regarding notification, we are unable to conclude that the trial court erred in directing the verdict.

Affirmed.

GLAZE, J., dissents.

TOM GLAZE, Justice, dissenting. I dissent. Arkansas law is clear that once one undertakes a duty, "even though gratuitously, [he] may thereby become subject to the duty of acting carefully, if he acts at all." *Haralson v. Jones Truck Lines*, 223 Ark. 813, 270 S.W.2d 892 (1954) (citing *Glanzer v. Shepard*, 233 N.Y. 236, 135 N.E. 275 (1922)).

In *Haralson*, a truck driver named Fulfer gave a truck traveling behind him a signal that it was safe to pass. The following truck, acting on Fulfer's signal, pulled out into the left-hand lane in order to pass, but in passing, ran over Carl Charles, who was walking down the left side of the road with his back to the trucks. The question presented was that of Fulfer's negligence in giving the signal. This court noted that, although Fulfer's truck did not itself come into contact with Charles, Fulfer signaled the trailing vehicle to pass him. It was the fact of that signal — even though Fulfer was under no legal duty to signal at all — that gave rise to Fulfer's duty to act with ordinary care. *Haralson*, 223 Ark. at 816-17, 270 S.W.2d at 894-95.

Although there remains a gulf between cases involving misfeasance and those in which the defendant is guilty of nonfeasance (or failing to act when one owes a duty to do so), Prosser and Keeton note that liability for nonfeasance has been increasingly recognized over the last century, finding such liability

> [i]n . . . relationships [in which] the plaintiff is typically in some respect particularly vulnerable and dependent upon the defendant who, correspondingly, holds considerable power over the plaintiff's welfare. In addition, such relations have often involved some existing or potential economic advantage to the defendant. Fairness in such cases thus may require the defendant to use his power to help the plaintiff, based upon the plaintiff's expectation of protection, which itself may be based upon the defendant's expectation of financial gain.

W. Page Keeton *et al.*, *Prosser and Keeton on the Law of Torts*, § 56, at 374 (5th ed. 1984).

In the instant case, the bank acted as an agent of the insurance company which offered the credit life policy, receiving thirty percent to forty percent of the premiums paid to American Pioneer Life. Although the bank would ordinarily owe no duty to its customers to inform that their insurance policies were about to lapse, it

nonetheless assumed such a duty when it adopted its policy of conveying such information to its customers. The establishment of this policy may have been a gratuitous assumption of a duty, but it was a duty nonetheless, and it carries with it the responsibility of acting with care.

In addition, the majority says that Ms. Mans's lack of knowledge of the bank's policy of informing customers prevents her reliance on that policy. However, her lack of knowledge is irrelevant. The plaintiff in *Haralson*, with his back to the traffic, was unaware that one truck driver had just signaled another that it was safe to pass, yet this court found a duty existed. Thus, in the circumstances now before us, it did not matter that Ms. Mans may have had no knowledge of the bank's policy.

Because I am of the opinion that the bank undertook a duty toward Ms. Mans, I would reverse the trial court's granting of a directed verdict and remand for a new trial.

Michael Wayne HINKSTON *v.* STATE of Arkansas

CR 99-565 10 S.W.3d 906

Supreme Court of Arkansas
Opinion delivered March 2, 2000

[redacted]

Robert C. Marquette, for appellant.

Mark Pryor, Att'y Gen., by: *Kelly S. Terry*, Ass't Att'y Gen., for appellee.

ANNABELLE CLINTON IMBER, Justice. Appellant Michael Hinkston was convicted of capital murder and theft of property and sentenced to life imprisonment without parole and twenty years' imprisonment, respectively. He raises four points for reversal. We find no error and affirm.

Mr. Hinkston's conviction arose out of certain events that occurred on June 24, 1997. At trial and in a custodial statement given to police, Mr. Hinkston claimed he went with Tony Ray to the home of the victim, Lisa Lewis, because Mr. Ray had told him that Ms. Lewis was his aunt and that she had given him permission to borrow her car. Once they arrived at the victim's home, Mr. Ray broke into the house while Mr. Hinkston waited in some nearby woods. Mr. Hinkston subsequently joined Mr. Ray inside the house, and the two men stayed there until Ms. Lewis returned home several hours later. Mr. Hinkston testified that shortly after

the victim entered the house, Mr. Ray forced him to hold her at gunpoint in the back bedroom. Mr. Ray then told him to leave the bedroom and go to the living room. According to Mr. Hinkston, he was in the living room "staring at the wall," when he heard screaming and begging coming from the back bedroom, followed by three shots. Soon afterward, Mr. Ray came running out of the bedroom, assured Mr. Hinkston that he had not shot Ms. Lewis, and both men fled from the scene in Ms. Lewis's car. Meanwhile, Ms. Lewis managed to place a 911 call and told the dispatcher that she had been shot. Van Buren police officers and paramedics responded to the call and, upon arriving at the scene, found Ms. Lewis in the living room dying of gunshot wounds. She told a police officer that two white men had shot her. As a result of the 911 call, Mr. Hinkston and Mr. Ray were apprehended and arrested within a short time after they left the scene. Ms. Lewis was transported to the hospital where she died later that same day. An autopsy revealed that Ms. Lewis died of gunshot wounds to the hand, neck, and abdomen.

I. Admissibility of Expert Testimony

For his first point on appeal, Mr. Hinkston argues that the trial court erred when it granted the State's motion in limine to exclude the testimony of Dr. Patricia Walz, a clinical psychologist who examined Mr. Hinkston prior to the trial. Mr. Hinkston asserts that the trial court's ruling violated his right under the Sixth Amendment to the United States Constitution and the Arkansas Constitution to call witnesses on his behalf at trial. We have reiterated many times that arguments not raised at trial will not be addressed for the first time on appeal. *Harris v. State*, 320 Ark. 677, 899 S.W.2d 459 (1995). Furthermore, parties cannot change the grounds for an objection on appeal, but are bound on appeal by the scope and nature of their objections as presented at trial. *Id.* At trial, Mr. Hinkston never made an argument that the exclusion of Dr. Walz's testimony would violate any of his constitutional rights, much less his constitutional right under the Sixth Amendment and the Arkansas Constitution to call witnesses on his behalf. We do not consider arguments, even constitutional ones, raised for the first time on appeal. *Moore v. State*, 323 Ark. 529, 915 S.W.2d 284 (1996); *Martin v. State*, 316 Ark. 715, 875 S.W.2d 81 (1994); *Hamm v. State*, 301 Ark. 154, 782 S.W.2d 577 (1990). Because Mr. Hink-

ston's Sixth Amendment argument is not preserved for appellate review, we are precluded from addressing that issue on appeal.

Mr. Hinkston also makes a nonconstitutional argument that the exclusion of Dr. Walz's testimony violated the rules of evidence. That argument was raised below and is, therefore, preserved for appellate review. Specifically, Mr. Hinkston contends that this court's decision in *Stewart v. State*, 316 Ark. 153, 870 S.W.2d 752 (1994), does not prevent an expert, such as Dr. Walz, from giving testimony concerning a defendant's inability to conform his conduct to the requirements of the law due to mental disease or defect or from giving an explanation of the defendant's mental disease or defect and how it affected his statement to law enforcement officers.

In *Stewart v. State*, we held that expert testimony on the ability of a defendant to form specific intent to murder is not admissible. *Stewart v. State, supra*. In so holding, we drew a distinction between psychiatric testimony concerning whether a defendant has the ability to conform his conduct to the requirements of law at the time of the killing as part of an insanity defense and testimony on whether the defendant had or did not have the required specific intent to commit murder at a precise time:

> A general inability to conform one's conduct to the requirements of the law due to mental defect or illness is the gauge for insanity. It is different from whether the defendant had the specific intent to kill another individual at a particular time. Whether Stewart was insane certainly is a matter for expert opinion. Whether he had the required intent to murder Ragland at that particular time was for the jury to decide.... While expert testimony on whether a defendant lacked the capacity to form intent is probative, we question whether opinion evidence on whether the defendant actually formed the necessary intent at the time of the murder is.

State v. Stewart, 316 Ark at 159, 870 S.W.2d at 755. (Citations omitted.) We reiterated again in *DeGracia v. State*, 321 Ark. 530, 906 S.W.2d 278 (1995), that:

> The basis of our holding [in *Stewart v. State*] was that Rule 704 requires that expert opinion of the sort that "embraces an ultimate issue" must be "otherwise admissible." To be otherwise admissible the evidence, according to Ark. R. Evid. 403, must be helpful to the jury and not tend to be confusing. We said in the *Stewart* case

> that the testimony in question was potentially misleading and confusing to the jury.

Id. at 532, 906 S.W.2d at 279.

In this case, Mr. Hinkston conceded at trial that he was not asserting the insanity defense. In light of his decision not to raise that defense, any testimony that Dr. Walz could have given about Mr. Hinkston's inability to conform his conduct to the requirements of the law because of mental disease or defect was not relevant. *See* Ark. R. Evid. 402 (1999); *Daniels v. State*, 277 Ark. 23, 638 S.W.2d 676 (1982).

Likewise, there is no merit to Mr. Hinkston's contention that Dr. Walz's testimony was admissible to explain the inconsistencies in his statement to police officers. Mr. Hinkston testified at trial in his own defense. The State then cross-examined him extensively concerning inconsistencies in his statement to police officers. Mr. Hinkston's attorney sought to bolster his client's credibility by attempting to call Dr. Walz as a witness to show that the inconsistencies were attributable to Mr. Hinkston's mental deficits. Where the introduction of expert testimony would invade the function of the jury or where it does not help the jury, it is not admissible. *Utley v. State*, 308 Ark. 622, 826 S.W.2d 268 (1992). One of the functions of the jury is to determine the credibility of witnesses. *Johninson v. State*, 317 Ark. 431, 878 S.W.2d 727 (1994). Expert testimony on the credibility of witnesses is an invasion of the jury's province. *Id.* The trial court properly found that Dr. Walz's testimony would have invaded the province of the jury.

The standard of review for a trial court's ruling on the admissibility of expert testimony is abuse of discretion. *Utley v. State, supra.* In light of the purposes for which Mr. Hinkston offered Dr. Walz's testimony, we conclude that the trial court did not abuse its discretion when it granted the State's motion in limine to exclude the expert testimony. We affirm the trial court's ruling on this point.

II. Discovery Violation

For his second point on appeal Mr. Hinkston contends that the trial court erred in when it denied his motion to strike the testi-

mony of Officer Perry or, alternatively, when it overruled his motion for mistrial. On March 17, 1998, Mr. Hinkston filed a motion for discovery and requested that the prosecutor disclose and permit the inspection and copying of "any police reports made in connection with this case that relate to potential testimony of any police officers or other witnesses." The prosecutor filed a response to that motion on August 3, 1998, which stated that he intended to call Officer Daniel Perry of the Van Buren Police Department as a witness, and that he would permit the inspection and copying of any relevant material, including police reports, made in connection with the case.

Officer Perry was the first officer to arrive at the victim's home. He was called by the State to testify at trial about his investigation at the crime scene. During his testimony, Officer Perry referred to a police report that he had written on the day of the crime. Following an inquiry by Mr. Hinkston's attorney about the nature of the document, the trial court ruled that it would allow the witness to use the report to refresh his memory. Officer Perry proceeded to testify that the victim was still alive when he found her at the crime scene and that she told him that two white men had shot her. Mr. Hinkston's attorney immediately interposed a hearsay objection that was promptly overruled by the trial court based upon the excited utterance exception to the hearsay rule. During cross-examination, Mr. Hinkston's attorney asked to see Officer Perry's report and questioned him about it and the victim's statement. Following Officer Perry's testimony, two other witnesses, Brian Perez and Mark Spellman, testified on behalf of the State. Just as the State was about to call its next witness, George Cabinass, Mr. Hinkston's attorney claimed for the first time that the State had failed to provide a copy of Officer Perry's police report to the defense in its response to the defendant's discovery motion. Based on that claim, defense counsel requested that Officer Perry's testimony be stricken because the defense had no idea that the officer would testify about the victim telling him that two people shot her. Defense counsel further alleged that the State had committed prosecutorial misconduct by failing to provide the police report during discovery. The trial court denied the defendant's motion to strike Officer Perry's testimony. Later, following Mr. Cabinass's testimony, Mr. Hinkston's attorney made a motion for mistrial based on the State's failure to provide Officer Perry's police

report, which motion was also denied by the trial court. Finally, Mr. Hinkston's attorney renewed the motion to strike Officer Perry's testimony at the conclusion of the State's case-in-chief, and the trial court once again denied the motion.

On appeal, Mr. Hinkston asserts that the trial court erred when it denied his motion to strike Officer Perry's testimony and his motion for mistrial. A party who does not object to the introduction of evidence at the first opportunity waives such an argument on appeal. *Marts v. State*, 322 Ark. 628, 968 S.W.2d 41 (1998). Similarly, objections to discovery violations must be made at the first opportunity in order to preserve them for appeal. *Id.* In *Clark v. State*, 323 Ark. 211, 913 S.W.2d 297 (1996), the appellant argued that a witness should not have been allowed to testify because the State failed to include her name on its witness list, in violation of its discovery obligations. The appellant, however, did not object to the testimony until the witness had already taken the stand and answered twenty-four questions. *Id.* We held that the issue was not preserved for appellate review because the appellant did not object at the earliest opportunity. *Id.* During Officer Perry's testimony, Mr. Hinkston's counsel objected solely on the basis of hearsay. At no time during the officer's testimony did defense counsel assert that a discovery violation had occurred. In fact, defense counsel did not object to Officer Perry's testimony on the basis of an alleged discovery violation until after Officer Perry had left the stand and two other witnesses had testified. The motion for mistrial was made even later, after yet a third witness had testified. On this record, we are constrained to conclude that Mr. Hinkston's objection to the alleged discovery violation is not preserved for appellate review because it was not made at the first opportunity.

III. Batson Challenge

For his third point on appeal, Mr. Hinkston argues that the trial court erred in allowing the State to use a peremptory challenge to strike the only African-American member of the jury panel in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986). We have delineated a three-step process to be used in the case of *Batson* challenges. *MacKintrush v. State*, 334 Ark. 390, 978 S.W.2d 293 (1998). First, the strike's opponent must present facts to raise an inference of purposeful discrimination; that is, the opponent must

present a *prima facie* case of racial discrimination. *Id.* Second, once the strike's opponent has made a *prima facie* case, the burden shifts to the proponent of the strike to present a race-neutral explanation for the strike. *Id.* If a race-neutral explanation is given, the inquiry proceeds to the third step, wherein the trial court must decide whether the strike's opponent has proven purposeful discrimination. *Id.* Here, the strike's opponent must persuade the trial court that the expressed motive of the striking party is not genuine but, rather, is the product of discriminatory intent. *Id.*

During *voir dire*, the State exercised a peremptory strike against Patrick Releford, the only African-American member on the jury panel, and Mr. Hinkston challenged the use of the strike. After the challenge was made, the trial judge asked the proponent of the strike for a race-neutral explanation, and the prosecutor gave the following explanation:

> Your Honor, I have personal knowledge of that potential juror from about five years ago, an experience with him with possibility of methamphetamine problems.... And I also talked with Alan Calard, and he's also aware of the problems and also officers of the Van Buren Police Office are aware of the problems with the potential methamphetamine with that potential juror.... No formal charges were ever filed against him. He's been looked into, he's been ... a potential suspect and investigated.... That's why he was excluded, Your Honor.

The trial judge then stated that he thought that was a "good reason" and denied Mr. Hinkston's challenge to the strike. At the end of *voir dire*, Mr. Hinkston renewed his *Batson* challenge, and the trial judge responded that he had already ruled on the issue and he believed that "the State has a good cause for striking him other than race, and that's why the Court is overruling your motion."

We will reverse a trial court's ruling on a *Batson* challenge only when its findings are clearly against the preponderance of the evidence. *Williams v. State*, 338 Ark. 97, 991 S.W.2d 565 (1999). Also, we accord some measure of deference to the trial court in that it is in a superior position to make these determinations because it has the opportunity to observe the parties and determine their credibility. *Id.* After Mr. Hinkston made his *prima facie* case of discrimination, the prosecutor explained his reason for the strike, indicating that Mr. Releford had been struck because he

had been investigated for problems with methamphetamine. In light of the United States Supreme Court's decision in *Purkett v. Elem*, 514 U.S. 765 (1995), we have held that the State's explanation must be more than a mere denial of racial discrimination, but need not be persuasive or even plausible, and, indeed, may even be silly or superstitious. *MacKintrush v. State, supra.* We have previously concluded that explanations similar to those given here were racially neutral. For example, in *Jackson v. State*, 330 Ark. 126, 954 S.W.2d 894 (1997), we held that the State had provided a race-neutral explanation for striking two jurors, one of whom had been in the prosecutor's office "in connection with serious crimes" and had an ex-husband who had been charged with past crimes by the same prosecutor. Similar explanations have been upheld as being race neutral by the federal courts. *See United States v. James*, 113 F.3d 721 (7th Cir. 1997) (finding peremptory strikes to be racially neutral based on information that potential jurors had relatives who had been involved with drugs); *United States v. Johnson*, 54 F.3d 1150 (4th Cir. 1997) (holding the peremptory strike to be racially neutral based on the fact that the potential juror's husband had been involved in criminal activity); *United States v. Lewis*, 40 F.3d 1325 (1st Cir. 1994) (upholding as race neutral a peremptory strike based on the fact that the potential juror's employer was under investigation by the federal government for possible firearms offenses). Thus, the reasons articulated by the State for exercising a peremptory challenge against Mr. Releford were racially neutral.

After the prosecutor gave his reason for striking Mr. Releford, Mr. Hinkston offered no evidence or argument to rebut the prosecutor's explanation. "If the strike's opponent chooses to present no additional argument or proof but simply to rely on the *prima facie* case presented, then the trial court has no alternative but to make its decision based on what has been presented to it, including an assessment of credibility." *MacKintrush v. State* 334 Ark. at 399, 978 S.W.2d at 297. After *voir dire* ended and the trial judge had already issued his ruling, Mr. Hinkston finally came forward with an argument that the State's expressed reason for the strike was not genuine because the only African-American member of the jury panel was struck before the State even asked him any questions. He cites no authority for the proposition that the challenged juror must furnish the information on which a party bases a strike. We have previously held to the contrary: "[I]t is accepted practice for the

prosecution as well as the defense to undertake a pretrial investigation of prospective jurors." *Jackson v. State,* 330 Ark. at 130, 954 S.W.2d at 896. Based on this record, we cannot say that the trial court's ruling on the *Batson* challenge was against the preponderance of the evidence.

IV. Custodial Statements

For his final point on appeal, Mr. Hinkston argues that the trial court erred when it allowed Deputy Glenda Westover to testify for the State regarding statements made by Mr. Hinkston while he was in custody. At trial, Deputy Westover testified that she worked at the Crawford County Detention Center where Mr. Hinkston was incarcerated prior to trial. She testified that one her duties was to monitor prisoners' activities for security. She accomplished that task by visually checking the cells every hour and by listening to a monitor that allowed her to hear the sounds in the cell blocks. Deputy Westover became familiar with and recognized Mr. Hinkston's voice because he did a lot of talking. She testified that she overheard Mr. Hinkston say "that he had shot her, that they didn't have as much fun as they had intended to have..." and he "[t]alked of plans that he had of doing this again."[1]

On appeal, Mr. Hinkston raises three separate challenges to the admission of Deputy Westover's testimony. First, he argues that his Fourth Amendment rights were violated when Deputy Westover listened to his jail cell conversations by means of an electronic monitor. Mr. Hinkston's attorney briefly mentioned "electronic eavesdropping" at the pretrial hearing on his motion to suppress the testimony, but did not argue to the trial court, as he does here, that Mr. Hinkston had a reasonable expectation of privacy in his jail cell that was protected by the Fourth Amendment or that the statements overheard by Deputy Westover were inadmissible because they were the result of an illegal search. Arguments not

[1] Mr. Hinkston's attorney elicited testimony from Deputy Westover on cross-examination about other statements that Mr. Hinkston had made while in his cell, such as "how he enjoyed killing the bitch," "he was also looking forward to killing again, but next time raping the subject," "[h]ow much fun it was to see her saying the Lord's prayer and shooting her," and how it "[a]ll was over too fast. Would be more fun next time." Under the doctrine of invited error, Mr. Hinkston cannot base a claim of reversible error upon these statements which he himself chose to introduce. *Kaestal v. State*, 274 Ark. 550, 636 S.W.2d 940 (1982).

raised below will not be addressed for the first time on appeal, and parties are bound on appeal by the scope and nature of the objections and arguments they presented below. *State v. Donahue*, 334 Ark. 429, 978 S.W.2d 748 (1998). We are thus precluded from reaching this argument on appeal.

Mr. Hinkston next argues that Deputy Westover's testimony regarding his jail-cell statements should not have been admitted by the trial court because, under Ark. R. Evid. 403, the statements were so inflammatory that their probative value was substantially outweighed by the danger of unfair prejudice. Ark. R. Evid. 403 states:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Ark. R. Evid. 403. Determining the relevancy of evidence and gauging the probative value of that evidence against the danger of unfair prejudice pursuant to Rule 403 is within the trial court's discretion, and we will not reverse the trial court on appeal absent a manifest abuse of that discretion. *McLennan v. State*, 337 Ark. 83, 987 S.W.2d 668 (1999). Mr. Hinkston asserts that the statements he made while incarcerated had only a nominal probative value. We disagree. In fact, those statements were highly probative because they constituted admissions of his involvement in the murder and provided evidence of the circumstances surrounding the crime and his intent to kill the victim. Furthermore, the mere fact that his statements were incriminating does not render them unfairly prejudicial under Rule 403 because "any evidence that tends to establish the guilt of the defendant is inherently prejudicial." *Baker v. State*, 334 Ark. 330, 337, 974 S.W.2d 474, 478 (1998). We conclude, therefore, that the trial court did not abuse its discretion in admitting the testimony under Rule 403.

Finally, Mr. Hinkston claims that the statements should have been excluded under Ark. R. Evid. 901, which governs the authentication and identification of evidence. He contends that the circumstances under which Deputy Westover heard the statements, i.e., that she did not physically see Mr. Hinkston make the statements and that she did not memorialize them immediately,

render the statements' authenticity and integrity suspect. In essence, Mr. Hinkston questions the reliability of Deputy Westover's testimony. In *State v. Sheppard*, 337 Ark. 1, 987 S.W.2d 677 (1999), we held that a witness's competency and capacity for truthfulness in recounting a defendant's statements are matters that may be explored during cross-examination. Here, Deputy Westover was cross-examined fully about her inability to remember the exact date on which Mr. Hinkston made the statements and about inconsistencies in her testimony regarding the statements. Furthermore, Deputy Westover properly authenticated Mr. Hinkston's statements under Ark. R. Evid. 901(b)(5)(1999), which provides for voice identification "by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker." That requirement was satisfied by Deputy Westover's testimony that she became familiar with and was also able to recognize Mr. Hinkston's voice because he talked a lot while incarcerated at the Detention Center. We conclude that the trial court did not abuse its discretion by admitting her testimony regarding statements made by Mr. Hinkston while he was in custody.[2]

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

The transcript of the record in this case has been reviewed in accordance with our Rule 4-3(h) which requires, in cases in which there is a sentence to life imprisonment or death, that we review all prejudicial errors in accordance with Ark. Code Ann. § 16-91-113(a). None have been found.

[2] Mr. Hinkston also makes a conclusory claim that the admission of his statements might have violated his Sixth Amendment right to confront witnesses. This argument is not preserved for appellate review because it was not raised below. As we have already stated, this court does not consider arguments, even constitutional ones, raised for the first time on appeal. *Martin v. State, supra.*

Harold RIGSBY *v.* Brett RIGSBY

99-1126 11 S.W.3d 551

Supreme Court of Arkansas
Opinion delivered March 2, 2000

Eddie N. Christian Law Office, by: *Joe D. Byars, Jr.*, for appellant.

Davis & Cox, by: *James O. Cox*, for appellee.

ANNABELLE CLINTON IMBER, Justice. This case involves a motion for rule on the clerk. In support of a request that the clerk of this court be ordered to file the record in this case, appellant Harold Rigsby asserts that his notice of appeal from an amended decree was timely because the second notice of appeal should relate back to the filing date of a first notice of appeal from the original decree. Alternatively, appellant asserts that his appeal should be dismissed without prejudice for lack of a final order. Because we agree that there is neither a final order under Ark. R.

App. P.—Civil 2, nor proper certification by the trial court under Ark. R. Civ. P. 54(b), we dismiss the appeal without prejudice for lack of finality.

Brett Rigsby filed a complaint in the Chancery Court of Logan County on October 27, 1997, against his father, Harold Rigsby, which alleged that he was entitled to an equitable one-half interest in certain real property owned by Harold Rigsby. Specifically, the complaint stated that Brett Rigsby had jointly entered into a debt on the property, thereafter making all payments due on the debt, and that he had constructed substantial improvements on the property which increased its value. Brett Rigsby asserted that he had thereby acquired a one-half interest in the property. His complaint also requested an order directing partition of the real property and a division of proceeds between the plaintiff and defendant, inasmuch as the property could not be divided in kind. Brett Rigsby further prayed that a constructive trust be placed on one-half of the proceeds from any sale of the property by Harold Rigsby, and asked for one-half of the proceeds from the sale of cattle belonging to Harold Rigsby. Appellant Harold Rigsby filed an answer denying the allegations contained in Brett Rigsby's complaint, and also filed a counterclaim for ejectment that sought an award of a judgment in favor of Harold Rigsby for sole possession of the property and dismissal of Brett Rigsby's claims against him.

On April 28, 1999, the trial court entered a decree finding that the real property was the property of the partnership between Brett and Harold Rigsby. The trial court also found that Harold Rigsby was entitled to a credit in the amount of $12,606.25 "should the property ever be sold" to compensate him for his down payment on the property and the reduction in principal on an earlier note prior to its satisfaction. The trial court awarded the proceeds from the sale of the cattle exclusively to Harold Rigsby in paragraph nine (9) of the decree, but in the final paragraph of the decree ordered that the proceeds from the sale of the cattle be divided equally between Brett and Harold Rigsby. In an amended decree filed on May 11, 1999, the final paragraph was changed to award the proceeds of the sale of the cattle to Harold Rigsby.

Harold Rigsby appealed the trial court's April 28, 1999 decree by a notice of appeal filed on June 10, 1999. This first notice of appeal was untimely with regard to the April 28, 1999 decree.

However, Harold Rigsby filed a second notice of appeal on July 28, 1999, in which he asserted that he was appealing from the May 11, 1999 amended decree rather than the April 28, 1999 decree, and that his first notice of appeal was intended to reflect the same. Because the June 10, 1999 notice of appeal would have been timely as to the May 11, 1999 amended decree if that decree had been designated in the first notice of appeal, Harold Rigsby argues that his second notice of appeal should relate back to the filing date of the first notice of appeal. When the Supreme Court Clerk refused to accept the record in this case, Mr. Rigsby filed a motion for rule on the clerk. That motion was submitted as a case in order for this court to decide whether the later notice of appeal from the amended decree could relate back to the filing date of the first notice of appeal that erroneously designated the original decree. On further review, we agree with Mr. Rigsby's alternative argument that his appeal should be dismissed without prejudice because no final judgment has been entered in this case.

A final judgment is one that dismisses the parties, discharges them from the action, or concludes their rights to the subject matter in controversy. Ark. R. App. P.—Civil 2(a); *Looney v. Looney*, 336 Ark. 542, 986 S.W.2d 858 (1999); *Haase v. Starnes*, 337 Ark. 193, 987 S.W.2d 704 (1999). In the instant case, the trial court's order awarded Brett Rigsby an equitable interest in the property, but failed to grant or deny the requested relief of partition. We have consistently concluded that a failure to comply with the statutory requirements for partition deprives an order of finality, and precludes this court from properly reviewing the case on appeal. Ark. Code Ann. §§ 18-60-412 *et seq.* (1987); *Looney v. Looney, supra; see also Bell v. Wilson*, 298 Ark. 415, 768 S.W.2d 23 (1989); *Dorazio v. Davis*, 283 Ark. 65, 671 S.W.2d 173 (1984)(declaring that an initial order of partition is not a final order from which an appeal may be taken). Further, there was no attempt to comply with Ark. R. Civ. P. 54(b), which allows entry of a final judgment as to one or more of the parties or claims but fewer than all of them and permits an appeal upon a determination by the trial court that there is no just reason for delay. The failure to comply with this rule, or to adjudicate all of the claims against all of the parties, is jurisdictional and renders the matter not final for purposes of appeal. *Corbit v. State*, 334 Ark. 592, 976 S.W.2d 927 (1998).

Because there has been no final determination on the propriety of partition, we cannot proceed to decide the current appeal.

Appeal dismissed without prejudice.

Tulsi BHARODIA and Amratben Patel *v.*
Norman and Linda PLEDGER

99-681 11 S.W.3d 540

Supreme Court of Arkansas
Opinion delivered March 2, 2000
[Petition for rehearing denied April 20, 2000. *]

* GLAZE and IMBER, JJ., would grant. CORBIN, J., not participating.

[redacted]

Hilburn, Calhoon, Harper, Pruniski & Calhoon, Ltd., by: *Susan Gordon Gunter*, for appellants.

Morgan Welch & Associates, for appellees.

RAY THORNTON, Justice. Appellants, Tulsi Bharodia and Amratben Patel (the buyers), and appellees, Norman and

Linda Pledger (the sellers) entered into a contract for the purchase of appellees' home. Eleven days later, the buyers sought to terminate the contract. Although the buyers had several grounds for termination, including inability to obtain financing and the failure of the sellers to provide a "sellers' disclosure statement" as required by the contract, the buyers gave notice of the existence of a number of defects including structural problems, and, rather than requesting repairs, sought to terminate the contract. When the sellers did not return the escrow account, the buyers formally notified the sellers of the breach, by letter, declaring the contract null and void based on the sellers' failure to provide the required disclosure statement, inability to obtain financing, and structural defects. Seven months later the sellers filed suit seeking specific performance of the contract and thereafter the trial court granted the sellers' request, finding that by giving the sellers notice of structural defects the buyers had waived their other grounds for terminating the contract. The court of appeals affirmed the trial court by a three-to-three decision, and we granted review of the case.[1] We review the decision of the trial court and conclude that the trial court erred and must be reversed.

On August 3, 1994, the McKay Realty Company showed the buyers the home belonging to the sellers. On that same day the buyers executed an offer of $425,000 for the purchase of the home. This offer was made using a form provided by McKay and contained numerous conditions which the parties were to perform to fulfill the terms of the agreement. Pursuant to the terms of the contract, the buyers also gave the sellers' agent, Real Estate Central, $5000 in earnest money.

On August 4, 1994, the sellers accepted the buyers' offer. The following day, the buyers sought financing from Worthen Bank for the purchase. On August 9, 1994, the buyers had the sellers' home inspected. On August 12, 1994, the buyers received their inspection report. The report noted many defects in the home including structural problems.

On August 15, 1994, the buyers went to the McKay Company and executed two documents. The first document was titled "addendum to offer and acceptance," and after noting the results of

[1] *See Bharodia v. Pledger*, 66 Ark. App. 349, 990 S.W.2d 581 (1999).

the inspection report, stated that "as a result of this report and minor and structural repairs needed, buyer requests to be released from the offer and acceptance." The second document was titled "termination of contract-handling of earnest money"and requested that the buyers' earnest money be returned. This was timely notice under the terms of the offer and acceptance provision that such notice be given "within ten business days after acceptance of the contract."

On August 17, 1994, the sellers had an engineer inspect the home and prepare a report of defects. No disclosure statement by the sellers was provided to the buyers as required by the contract. On September 9, 1994, the buyers, through their attorney, wrote a letter to the sellers' agent stating that the contract was null and void for three reasons: (1) failure to receive financing; (2) damages to the home of more than $2000; and (3) the sellers' failure to deliver a "sellers' disclosure statement." The buyers further requested that their earnest money be returned.

On December 2, 1994, Real Estate Central interpled the buyers' earnest money into the registry of the Sherwood Municipal Court and the court transferred the matter to the Pulaski Country Chancery Court. On April 13, 1995, the sellers filed a suit in chancery court for specific performance of the contract. On May 5, 1995, the buyers filed an amended answer to the sellers' complaint and a counterclaim. In their counter claim, the buyers argued that the contract was null and void because of the inability to obtain financing, the defects in the structure, and the sellers' failure to provide a disclosure statement. For those reasons the buyers once again argued that specific performance was not warranted and requested the return of their earnest money.

Both parties moved for summary judgment and the chancellor denied their requests. A trial on the matter was held in April 1997. On July 14, 1997, the chancellor granted the sellers' request for specific performance. The chancellor found that the sellers had failed to give the buyers "a sellers' disclosure statement." However, he also found that the buyers could not rely on the sellers' failure to deliver this document as a support for termination of the contract because they had waived such a defense. On January 7, 1998, the chancellor awarded the sellers $5000 in attorneys' fees pursuant to Ark. Code Ann. § 16-22-308 (Repl. 1999).

The buyers appealed this matter to the court of appeals. On May 26, 1999, in a three-to-three decision, the court affirmed the trial court. We accepted review of this case on July 15, 1999, and now reverse the trial court.

On appeal, we consider chancery cases *de novo* on the record, but we do not reverse a finding of fact by the chancellor unless it is clearly erroneous. A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed. *Campbell v. Campbell*, 336 Ark. 379, 985 S.W.2d 724 (1999).

In their first point on appeal, the buyers contend that the chancellor erred when he denied their motion for summary judgment. We are unable to address this point on review. We have repeatedly held that the denial of a motion for summary judgment is not subject to review or appeal. *Daniels v. Colonial Ins. Co.*, 314 Ark. 49, 857 S.W.2d 162 (1993). *See also, Hastings v. Planters & Stockmen Bank*, 307 Ark. 34, 818 S.W.2d 239 (1991); *McElroy v. Grisham*, 306 Ark. 4, 810 S.W.2d 933 (1991).

In their second point on appeal, the buyers argue that the chancellor's granting of specific performance was erroneous because by keeping the buyers' earnest money, the sellers had elected to take liquidated damages instead of specific performance as their remedy. The buyers' argument is not subject to our review. We have held that the doctrine of election of remedies is an affirmative defense and must be raised in an answer. *See Southern Farmers Assoc., Inc. v. Wyatt*, 234 Ark. 649, 353 S.W.2d 531 (1962). The issue of the sellers' election of remedies was not raised in this case until the buyers filed a motion for summary judgment on January 16, 1996. Thus, because the buyers failed to raise this defense in their answer, they were precluded from arguing it at any other stage in the case as a defense to the sellers' request for specific performance.

In their third point on appeal, the buyers urge that we should rule as a matter of law that sellers of real estate contracts are not entitled to specific performance. First, it should be noted that the buyers are asking us to deviate from our prior case law. We have held that there is a strong presumption of the validity of prior decisions. *Independence Fed. Bank v. Webber*, 302 Ark. 324, 789

S.W.2d 725 (1990). Although we do have the power to overrule previous decisions, it is necessary as a matter of public policy to uphold prior decisions unless great injury or injustice would result. *Id.* In *Arkansas Office of Child Support Enfcm't v. Mitchell*, 330 Ark. 338, 954 S.W.2d 907 (1997), we explained the public policy behind such a doctrine. We stated:

> [T]he policy behind stare decisis is to lend predictability and stability to the law. *Paris v. Pitts*, 244 Ark. 1239, 429 S.W.2d 45 (1968)(superseded by statute on other grounds). In matters of practice, "adherence by a court to its own decisions is necessary and proper for the regularity and uniformity of practice, and that litigants may know with certainty the rules by which they must be governed in the conducting of their cases." *Brickhouse v. Hill*, 167 Ark. 513, 523, 268 S.W. 865, 868 (1925) (quoting 7 R.C.L. 1008 (1915)). In *Parish*, this court held that "[p]recedent governs until it gives a result so patently wrong, so manifestly unjust, that a break becomes unavoidable." *Parish*, 244 Ark. at 1252, 429 S.W.2d at 52.

Mitchell, supra.

Remaining mindful of these principles, it should also be noted that we have repeatedly held that specific performance is an appropriate remedy for sellers of real estate. In a 1939 case we held that:

> [I]n the case of real estate specific performance is decreed almost as a matter of course when the contract has been properly established and is unobjectionable in any of its features which address themselves to the chancellor's discretion. Under such circumstances the vendee is entitled to have the contract specifically enforced irrespective of his right to recover damages for its breach. In other words, where the land is the subject-matter of the agreement, the jurisdiction of equity does not depend upon the existence of special facts showing the inadequacy of a legal remedy in the particular case, but the presumption arises that damages will not constitute an adequate remedy. Damages are not regarded as the equivalent of the specific relief because the exact counterpart of any particular piece of real estate does not exist anywhere else in the world.

Dickinson v. Mckenzie, 197 Ark. 746, 126 S.W.2d 95 (1939). *See also, Loveless v. Diehl*, 236 Ark. 129, 364 S.W.2d 317 (1962); *Dollar v. Knight*, 145 Ark. 522, 224 S.W.983 (1920). Thus, because the buyers have given us no reason to overturn our previous decisions and because we have allowed both the buyers and the sellers of land to seek specific performance on real estate contracts throughout our case law we do not chose to overrule precedent.

We turn now to the two points urged by the buyers that the trial court erred in finding that the buyers waived their right to declare the contract null and void for the breach by the sellers of the provision requiring a "sellers' disclosure statement." There is no challenge to the chancellor's finding that the disclosure statement was not provided as required in the contract. The buyers contend that the chancellor erred when he found that this provision was waived because they failed to specifically articulate it in their August 15, 1994, notice to the sellers. We agree with the buyers that this provision was not waived. The contract in relevant part states:

> [S]eller will provide to buyer a disclosure about the condition of the property which will contain information that it is true and correct to the best of the seller's knowledge. The disclosure will be presented to buyer within three business days of acceptance of this offer. Buyer has three business days after receipt of disclosure to accept or reject said disclosure. *If seller fails to provide the disclosure in a timely manner, or if buyer finds the disclosure unacceptable within three business days after receipt, this contract may be declared null and void* by the buyer, with buyer to receive a refund of the earnest money.[2] (Emphasis added.)

The chancellor found on this issue that:

> [The buyers] in terminating the contract on August 15, 1994, did not list as one of their reasons the failure to receive the sellers' disclosure statement . . . . The court finds that [the sellers] have the burden of proof to show that [the buyers] received the sellers' disclosure statement. There is no signed receipt by [the buyers] of receiving the disclosure statement and no corroborating evidence that [they] actually received the document. Since the burden of

[2] It should be noted that the buyers were not required to act until after receipt of the "sellers' disclosure statement."

> proof is on [the sellers] to prove that [the buyers] received the document, the Court finds that [the sellers] failed in their burden of proof. Therefore, the Court finds that [the buyers] did not receive the sellers' disclosure statement.
>
> [The buyers] terminated the contract with [the sellers] by stating that there were alleged structural defects in the home. [The buyers] did not give as one of the reasons for termination the failure to receive the disclosure statement. Even though [the buyers] had a right to terminate the contract for not receiving the disclosure statement, the Court finds [the buyers] waived their right to terminate the contract using that as a reason....

Waiver is the voluntary abandonment or surrender by a capable person of a right known by him to exist, with the intent that he shall forever be deprived of its benefits. *Pearson v. Henrickson*, 336 Ark. 12, 983 S.W.2d 419 (1999). It may occur when one, with full knowledge of material facts, does something which is inconsistent with the right or his intention to rely upon that right. The relinquishment of the right must be intentional. *Id.*

In this case, we find no showing that the buyers knowingly and intentionally waived any provisions of the contract or that they made a voluntary abandonment of a right known to them, with the intent that they would forever be deprived of its benefits. Rather than waiving their right to nullify the contract for seller's failure to provide them with a "sellers' disclosure statement," the buyers continuously argued this right to terminate the contract at every stage of the litigation. On September 9, 1994, merely three weeks after the August 15, 1994, notice was sent to the sellers, and seven months prior to the filing of any litigation in the matter, the buyers' attorney argued this breach as reason for terminating the contract in his letter to Real Estate Central. This argument was again made by the buyers in their answer and counterclaim to the sellers' specific performance suit. Throughout the trial the buyers never abandoned their right to terminate the contract based on the sellers' breach.

The facts in the present case can be contrasted with the facts in *Grayson-McLeod Lumber Co. v. Slack Kress Tie & Stave, Co.*, 102 Ark. 79, 143 S.W.2d 79 (1912) where we held that the buyers had waived their right to terminate the contract based on the sellers' breaches. Specifically, we held that appellant could not rely on the sellers' breach when the breaches were made "a considerable

length of time before appellant decided to terminate the contract" and appellant had made no objections to the breaches but instead allowed the sellers to continue with the terms of the contract. *Id.* We conclude that in the case now on review there was no knowing and intentional waiver of the buyers' right to terminate the contract.

In the absence of a knowing and intentional waiver, a party may claim a waiver by estoppel has occurred. Arthur Corbin, in his treatise on contracts, explained:

> It is sometimes said that a promisor who states an insufficient reason for refusing to perform his promise can not afterwards defend by showing that another and justifying reason existed. That is not correct. If a condition of his duty to perform did not in fact exist or occur, he was privileged not to perform. That he did not refer to this condition and that he gave bad reasons is not material as long as there has been no change of position in reasonable reliance upon the promisor's disregard of the unperformed condition. An estoppel may arise, preventing the promisor from setting up his otherwise good defense; but his mere omission to mention that defense and his statement of bad reasons are not sufficient to raise an estoppel... Mere omission to claim the defense and giving other reasons for refusal to perform are not themselves a waiver... There is no estoppel in the absence of a change of position in reasonable reliance.

3A Arthur Corbin, *Corbin on Contracts; A Comprehensive Treatise on the Rules of Contract Law* § 762, (1960).

Here, although the buyers did not list the sellers' failure to deliver the "sellers' disclosure statement" as a reason for terminating the contract in their August 15, 1994, notice, they were not estopped from raising the sellers' breach of contract at a later time. There is no showing that the buyers encouraged the sellers to engage in any repairs to their home, nor was there any evidence showing that the buyers induced the sellers to take other actions. Specifically, on August 15, 1994, the buyers sent the sellers notice that they were terminating the contract because the structure needed minor and structural repairs. The notice did not request the sellers to take any action other than returning the money in the escrow account. However, the sellers hired an engineer to inspect the home following the buyers' notice, but they did not complete

the repairs described in the buyers' inspection report nor did they repair the defects detailed in their engineer's report. Under these circumstances we find no estoppel should have been imposed to prevent the buyers from exercising the right to terminate the agreement due to the sellers' breach of the conditions of the contract requiring the delivery of a "sellers' disclosure statement" and hold that the chancellor's findings were clearly erroneous.

In their final point on appeal, the buyers contend that the chancellor erred when he granted the sellers' request for attorneys' fees. The chancellor's order found that "plaintiffs are entitled to attorneys' fees as authorized by Ark. Code Ann. §16-22-308 and *Childs v. Adams*, 322 Ark. 424, 909 S.W.2d 641 (1995)." Arkansas Code Annotated Section 16-22-308 states:

> In any civil action to recover on an open account, statement of account, account stated, promissory note, bill, negotiable instrument, or contract relating to the purchase or sale of goods, wares, or merchandise, or for labor or services, or breach of contract, unless otherwise provided by law or the contract which is the subject matter of the action, the prevailing party may be allowed a reasonable attorney fee to be assessed by the court and collected as costs.

Id. The award of an attorney's fee is a matter which is addressed to the sound discretion of the court and, in the absence of abuse, its judgment will be sustained on appeal. *New Hampshire Ins. Co. v. Quilantan,* 269 Ark. 359, 601 S.W.2d 836 (1980).

In the present case, the sellers requested $35,845.50 in attorneys' fees and the chancellor awarded the sellers $5000 in attorneys' fees. Because we have held that the chancellor erred in granting specific performance, we must also hold that the granting of the sellers' request for attorneys' fees was erroneous.

Reversed and remanded.

CORBIN, J., not participating.

GLAZE and IMBER, JJ., dissent.

TOM GLAZE, Justice, dissenting. The parties' "Offer and Acceptance" form contract provided the buyers several potential grounds for terminating the contract. These provisions are

fully set out in the excerpts from the Offer and Acceptance, Plaintiff's Exhibit 4, attached to this opinion.

Under paragraph 16(B) of the Offer and Acceptance, the buyers had a right to inspect the property within ten business days after acceptance of the contract. Upon inspection, if the buyers discovered items needing repair, and provided timely written notice of that fact to the sellers, the seller agreed to repair those items up to a repair limit of $2,000.00. If sellers refused to make repairs beyond the repair limit, one of the buyers' options would be to declare the contract null and void.

Under paragraph 17(C), the sellers agreed to provide the buyers with a statement disclosing the condition of the property within three business days of acceptance of the offer. Under this provision, the buyers could declare the contract null and void, "[i]f Seller fails to provide the disclosure in a timely manner, or if Buyer finds the disclosure unacceptable within three (3) business days after receipt...." Under the above provisions, the buyers could recover their earnest money if the sellers breached either of the provisions, 16(B) or 17(C).

The buyers executed their Offer and Acceptance on August 4, 1994. The sellers accepted the offer on the same day. The court below found that the sellers failed to provide a disclosure statement. Instead of exercising their rights under paragraph 17(C), the disclosure statement provision, the buyers hired a home inspector who performed an inspection on August 9, 1994. After reviewing the resulting inspection report, on August 15, 1994, the buyers faxed two contract addenda to the sellers. The first addendum, marked Plaintiff's Exhibit 6, is attached for the reader's convenience.

In Plaintiff's Exhibit 6, captioned Inspection and Repairs, *the buyers expressly invoked their rights under paragraph 16(B).* That paragraph reads, "Buyer chose ... to perform the inspection ... allowed in Paragraph 16(B) [of] the Offer and Acceptance and to provide ... a list of repairs needed." Additionally, Exhibit 6 notes that the buyers have inspected the property, attached relevant portions of the inspection report, and reserved their right to reinspect the property prior to closing. Exhibit 6 further reflects that the buyers requested release from the offer and acceptance. The sellers, pursuant to the terms in 16(B), had their engineer inspect the structural

integrity of the house and the engineer stated that the suggested corrections could be made. The sellers said that they would make any repairs required in order to sell the property, and in fact, the sellers commenced work to do so. The buyers, however, refused to proceed to give the sellers the opportunity to perform the contract. The buyers' second addendum merely requested that the sellers return the buyers' earnest money through an agreed termination of the contract. Neither addendum invoked, or even mentioned, the buyers' rights under paragraph 17(C), the disclosure statement provision.

By knowingly and intentionally invoking their rights to inspect the property, demand repairs and reserve their right to reinspect under 16(B), the buyers triggered a provision which allowed the sellers an opportunity to make repairs to the home consistent with the buyers' inspection. The closing date on the contract was set for August 31, 1994. The record reveals that, by August 24, 1994, the sellers had hired a structural engineer and received his report on the needed structural repairs, which he concluded could be corrected. The sellers then expressed a willingness and in fact acted to complete all necessary repairs, as was their right under the inspection and repair provisions of paragraph 16(B) of the contract. Nevertheless, the buyers refused to close on the house.

On September 9, 1994, in a letter from the buyers' attorney to the sellers, the buyers for the first time attempted to assert their rights under disclosure statement provision 17(C). In other words, almost a month had passed since the buyers had invoked the inspection and repair clause, causing the sellers to commence repairs to the property. The buyers breached the contract through their adamant refusal to close on the deal.[1]

In conclusion, the most puzzling aspect of the majority opinion is its statement that, "although the buyers did not list the 'sellers' failure to deliver the sellers' disclosure statement' as a reason for terminating the contract in their August 15, 1994 notice, they

[1] The seller Bharodia denied being a sophisticated buyer of real estate, but the proof clearly established that he had purchased motels such as a Holiday Inn, a Comfort Inn, and a Ramada Inn. He also admitted to purchasing residential property and having been involved in litigation on prior occasions. In short, the buyers cannot take refuge as a new or unknowledgeable purchaser in the real estate market.

were not estopped from raising the sellers' breach of contract at a later time." The majority merely rewrites the parties' contract. Once again, the sellers had the right (and the buyers acknowledged that right) under Subsection 16(B) to cure any defects. The Pledgers cannot be estopped from doing what the parties' contract authorized them to do.

Because the record supports the chancellor's finding that the buyers chose to proceed under provision 16(B) and thereby waived their rights under provision 17(C), I cannot say the chancellor was clearly erroneous.

IMBER, J., joins this dissent.

[redacted]

Offer and Acceptance

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14. FIXTURES AND ATTACHED EQUIPMENT: Unless specifically excluded herein, all fixtures and attached equipment, if any, are included in the Purchase Price. Such fixtures and attached equipment shall include but not be limited to the following: dishwasher, disposal, trash compactor, ranges, exhaust fans, heating and air conditioning systems, plumbing system, electrical system, intercom system, all ceiling fans, _____ window air conditioners, carpeting, indoor and outdoor light fixtures, window and door coverings and related hardware, gas or electric grills, awnings, mail boxes, garage door openers and _____ remote controls, antennas, fireplace inserts, all built in furniture built in refrig, freezer, ice maker, _____, and any other items bolted, nailed, screwed, buned or otherwise attached to the Property in a permanent manner. Also, television satellite receiver equipment, water softeners, and propane and butane tanks remain, if owned by Seller. The Buyer is aware the following items are not owned by Seller _____

15. BUYER'S DISCLAIMER OF RELIANCE: BUYER CERTIFIES THAT BUYER HAS PERSONALLY INSPECTED, OR HAD A REPRESENTATIVE INSPECT, THE PROPERTY AS FULLY AS BUYER DESIRES AND IS NOT RELYING AND SHALL NOT HEREAFTER RELY UPON ANY WARRANTIES, REPRESENTATIONS OR STATEMENTS OF THE LISTING AGENT FIRM, THE SELLING AGENT FIRM, OR ANY AGENT, INDEPENDENT CONTRACTOR, OR EMPLOYEE ASSOCIATED WITH THOSE ENTITIES, REGARDING THE AGE, SIZE, QUALITY, VALUE OR CONDITION OF THE PROPERTY, INCLUDING WITHOUT LIMITATION ALL IMPROVEMENTS, ELECTRICAL OR MECHANICAL SYSTEMS, PLUMBING OR APPLIANCES, OTHER THAN THOSE SPECIFIED HEREIN, IF ANY, WHETHER OR NOT ANY EXISTING DEFECTS IN ANY SUCH REAL OR PERSONAL PROPERTY MAY BE REASONABLY DISCOVERABLE BY BUYER OR A REPRESENTATIVE HIRED BY BUYER.

16. INSPECTION AND REPAIRS:

☐ A Buyer agrees to accept the Property "as is," subject only to the following: _____.
The benefits of an inspection have been explained to the Buyer and the Buyer is declining to inspect the Property as offered in paragraph 16(B). The Buyer further agrees to hold the Listing Agent Firm and the Selling Agent Firm involved in this contract harmless of any problems relative to the mechanical or structural defect or failure in any of the components of the Property that may exist or be discovered in the future.

☑ B Buyer agrees to accept the Property "as is," in its present condition, provided that the following items, if in or on the Property, shall be in normal working order at closing: electrical, plumbing, heating and air conditioning systems, dishwashers, disposals, trash compactors, ranges, exhaust and ceiling fans, water heaters, garage door openers, remote controls, and _____

Buyer shall have the right, at Buyer's expense, to inspect further the above items, and all improvements and structures, and components thereof, on or about the Property ("collectively, the "Inspection Items") within ten (10) business days after acceptance of this contract. Seller, the Listing Agent Firm and the Selling Agent Firm recommend that Buyer use any representative chosen by Buyer, to inspect the Inspection Items within this time period. Buyer shall give written notice so that it is actually received within the stipulated ten (10) day period by Seller or the Listing Agent Firm, stating that the inspection has been performed and listing all items which need repair, except repairs required by FHA, VA, the lender, or the termite control company ("Third Party Requirements"), which may be supplied promptly upon receipt.

The Third Party Requirements shall be delivered to Seller or the Listing Agent Firm promptly upon receipt by Buyer. IF THE BUYER DOES NOT TIMELY PROVIDE THE WRITTEN NOTICE AS REQUIRED, THE INSPECTION ITEMS AND THE THIRD-PARTY REQUIREMENTS ARE TO BE DEEMED ACCEPTABLE TO BUYER AND THE COST OF REPAIRING ANY DEFECTS IN THE INSPECTION ITEMS SHALL BE SOLE YAT BUYER'S EXPENSE. If timely notice as provided herein is given, Seller agrees to pay the reasonable cost to repair Inspection Items and Third-Party Requirements, up to but not exceeding $ 2,000.00 (the "Repair Limit"). If repair costs exceed the Repair Limit and Seller refuses to pay the cost of repairs over the Repair Limit, Buyer may accept the Property in its condition at closing with credit to Buyer at closing in the amount of the Repair Limit, less the cost of any repairs made and paid for by Seller after receipt of notice, or Buyer may declare this contract null and void and recover the earnest money. If Buyer closes on the Property and agrees to take a credit equal to the Repair Limit as Buyer is allowed by the Paragraph 16(B), Buyer waives the right to assert a claim against the Seller, Selling Agent Firm or the Listing Agent Firm.

Buyer shall have the right to reinspect the Inspection Items immediately prior to closing to ascertain whether the Inspection Items are still in normal working order and to insure that all designated repairs have been made. If the Inspection Items are not found to be in normal working order upon reinspection, Buyer may either accept the Property in its condition at closing with credit to Buyer at closing only for any portion of the Repair Limit which has not already been spent by Seller for repairs or previously credited to Buyer under this paragraph 16(B), or Buyer may declare this contract null and void if Seller refuses to spend more than the Repair Limit. SELLER SHALL NOT BE OBLIGATED TO EXPEND FOR REPAIRS, OR PROVIDE A CREDIT AGAINST THE PURCHASE PRICE CONCERNING REPAIRS, AN AMOUNT IN EXCESS OF THE REPAIR LIMIT.

If the Property being purchased is not new, Buyer acknowledges that the Inspection Items may not be new. Buyer does not expect the Inspection Items to be like new and recognizes that ordinary wear and tear to the Inspection Items is normal. For the purpose of the Paragraph 16(B), "normal working order" means that the Inspection Items function for the purpose for which they are intended. The fact that any or all of the Inspection Items may cease to be in normal working order after closing shall not require any repair by the Seller, or legal or other liability to the Seller, the Listing Agent Firm or the Selling Agent Firm.

17. SELLER DISCLOSURE:

☐ A Buyer has neither received nor requested from Seller a written disclosure concerning the condition of the Property prior to the execution of this contract, but this fact neither limits nor restricts in any way the Buyer's Disclaimer of Reliance set forth in Paragraph 15 of this contract. BUYER IS STRONGLY URGED BY THE SELLING AGENT FIRM AND THE LISTING AGENT FIRM TO MAKE ALL INDEPENDENT PROPERTY CONDITION INSPECTIONS DEEMED NECESSARY PRIOR TO SIGNING THIS CONTRACT, IN ADDITION TO THOSE INSPECTIONS PERMITTED BY PARAGRAPH 16(B) OF THIS CONTRACT.

☐ B Buyer and Seller acknowledge that, upon the instruction of the Seller, either the Selling Agent Firm or the Listing Agent Firm have delivered to Buyer, prior to the execution of this contract, a written disclosure prepared by Seller concerning the condition of the Property, but this fact neither limits nor restricts in any way the Buyer's Disclaimer of Reliance set forth in Paragraph 15 of this contract, nor the rights provided Buyer in Paragraph 16(B). The written disclosure prepared by Seller is dated _____ and is warranted by Seller to be the latest disclosure and the answers contained in the disclosure are true and correct to the best of the Seller's knowledge.

☑ C Seller will provide to Buyer a disclosure about the condition of the Property which will contain information that it is true and correct to the best of the Seller's knowledge. The disclosure will be presented to Buyer within three (3) business days of acceptance of this offer. Buyer has three (3) business days after receipt of disclosure to accept or reject said disclosure. If Seller fails to provide the disclosure in a timely manner, or if Buyer finds the disclosure unacceptable within three (3) business days after receipt, this contract may be declared null and void by Buyer, with Buyer to receive a refund of the earnest money. Receipt of this disclosure neither limits nor restricts in any way the Buyer's Disclaimer of Reliance set forth in Paragraph 15 of this contract.

18. HOME WARRANTY PLANS:
The Buyer understands the benefits of a home warranty contract which may include coverage for most major appliances, plumbing, electrical, heating and air conditioning systems. The home warranty contract covers unexpected mechanical failures due to wear and tear and is subject to a per claim deductible. The availability of a home warranty contract, cost and applicable deductible have been explained to the Buyer, and the Buyer chooses:

☑ A No home warranty contract concerning the condition or usefulness of any real or personal property to be conveyed from Seller to Buyer for any period after the closing.

☐ B A limited home warranty plan will be provided to Buyer concerning the condition or usefulness of the Property and will be paid for by _____ at a cost not to exceed $_____. This home warranty contract will not imply any warranty by Seller after closing and the items covered by said home warranty contract will be agreed to by a separate agreement between the Buyer and the warranting company.

☐ C OTHER WARRANTY _____.

19. TERMITE CONTROL REQUIREMENTS:

☐ A None

☑ B Unless otherwise specified, Seller shall furnish to Buyer, at Seller's cost, a certificate from a licensed termite control company.
If Buyer is obtaining financing, such certificate shall be in a form acceptable to the lender.

[redacted]

[redacted]

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Addendum To Offer and Acceptance

Page 1 of 1

REALTOR®

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Regarding the Offer and Acceptance dated August 3rd, 1994 between the Buyer, Tomd Amrat Bharadia and the Seller, Mr & Mrs. Pledger covering the real property (the "Property") known as Lot 7 Block 4B, Lakewood Heights AKA 7 Lakewood.

The Undersigned Buyer and Seller hereby agree to the following:

INSPECTION AND REPAIRS

BUYER CHOSE:

☒ 1. To use a representative of the Buyer's choosing to perform the inspection suggested and allowed in Paragraph 16(B) the Offer and Acceptance and to provide in the space below a list of repairs needed. Buyer reserves the right to reinspect the Property prior to closing to make sure all repairs have been done and that nothing else needs repair.

☐ 2. To personally make the inspection suggested and allowed in Paragraph 16(b) of the Offer and Acceptance and to provide in the space below a list of repairs needed. Buyer is not relying on any expertise other than that possessed by Buyer. Buyer reserves the right to reinspect the Property prior to closing to make sure all repairs have been done and that nothing else needs repair.

☐ 3. Buyer waives all rights of inspection and reinspection and accepts the Property in its present condition, intentionally disregarding the rights provide to Buyer in Paragraph 16(B) of the Offer and Acceptance.

List of repairs requested by Buyer other than FHA, VA, Lender or Termite Control Company requirements("Third-Party Requirements"):

Please see attached Comment Section from Inspection Report
All problems have been noted by underlining.

As a result of this Report & the minor & structural repairs needed buyer requests to be released from the offer & acceptance

Buyer _____ Buyer _____ Date 8-15-94

List of repairs needed was submitted to Seller or Listing Agent Firm within (10) business days allowed by the Offer and Acceptance.

Seller or Listing Agent Firm _____ Seller or Listing Agent Firm _____ Date _____

Seller agrees to complete the list of repairs above and the Third Party Requirements, except for the following: _____

Seller or Listing Agent Firm _____ Seller or Listing Agent Firm _____ Date _____

This addendum, upon its execution by both parties, incorporates by reference all provisions of the above-referenced Offer and Acceptance not expressly modified herein. Buyer has completed all inspections Buyer wishes to perform and accepts the Property in its present condition.

IT IS A LEGALLY BINDING CONTRACT WHEN SIGNED BY BOTH BUYER AND SELLER. READ IT CAREFULLY. IF YOU DO NOT UNDERSTAND THE EFFECT OF ANY PART, OR IF YOU ARE UNCERTAIN CONCERNING ANY AND ALL RELATIONSHIPS TO EITHER THE BUYER OR SELLER, CONSULT YOUR ATTORNEY BEFORE SIGNING. REAL ESTATE AGENTS CANNOT GIVE YOU LEGAL ADVICE.

THE SELLER, THE BUYER, THE LISTING AGENT FIRM AND/OR THE SELLING AGENT FIRM INVOLVED IN THIS TRANSACTION EACH CERTIFY THAT THE TERMS OF THIS CONTRACT ARE TRUE TO HIS/HER/THEIR BEST KNOWLEDGE OR BELIEF AND THAT ANY OTHER AGREEMENT ENTERED INTO BY ANY OF THESE PARTIES IN CONNECTION WITH THIS TRANSACTION IS ATTACHED HERETO.

THIS FORM IS PRODUCED AND COPYRIGHTED BY THE ARKANSAS REALTORS ASSOCIATION. THE SERIAL NUMBER BELOW MUST BE A UNIQUE NUMBER TO ANY OTHER FORM OR THIS FORM MAY HAVE BEEN POSSIBLY ALTERED. DO NOT ORIGINATE FORM IF IT IS BEING USED PAST DECEMBER 31, 1994.

Form Serial Number 04-817-94

The above contract is executed on _____ at _____.

Selling Agent Firm _____ Supervising Broker _____ Buyer _____ Social Security # _____

Selling Agent _____ Buyer _____ Social Security # _____

The above contract is accepted on _____ at _____.

Listing Agent Firm _____ Supervising Broker _____ Seller _____ Social Security # _____

1544

Listing Agent _____ Print Seller's Name(s) _____ Seller _____ Social Security # _____

Charlotte FLENTJE *v.* FIRST NATIONAL BANK of WYNNE

99-848 11 S.W.3d 531

Supreme Court of Arkansas
Opinion delivered March 2, 2000

[redacted]

Richard W. Roachell and *Nicana C. Sherman*, for appellant.

Dover & Dixon, P.A., by: *Charles W. Reynolds*, for appellee.

LAVENSKI R. SMITH, Justice. Appellant Charlotte Flentje appeals a summary judgment in favor of Appellee First National Bank of Wynne ("FNB" or "the bank") in her suit alleging gender discrimination under the Arkansas Civil Rights Act. The Arkansas Court of Appeals certified the case to this court because it contains issues of first impression under the Arkansas Civil Rights Act. Hence, we have jurisdiction under Ark. R. Sup. Ct. R. 1-2(b)(1). We affirm.

Facts

Flentje began working for FNB in August of 1976. During her eighteen years at the bank, Flentje served as a bookkeeper, a teller, a branch-office manager, and as the bank's ATM Representative/ Administrator. In September 1993, Flentje underwent a job evaluation by her supervisor, Connie Watts. In this performance review, Watts scored Flentje on a scale of "one" to "five," with "one" being outstanding and "five" being unacceptable, in twenty-one different work categories. Out of the twenty-one factors, Flentje did not score a "one" in any area, and scored a "five" in the area of

"attitude" towards customers and employees. In the other twenty areas, Flentje scored five "fours" for poor work in the areas of quantity of work, speed of work, control over frustration and personal problems, employee relations, and customer relations. Flentje scored six "twos" and eight "threes" in the remaining fifteen areas. Based on this performance review, Flentje was placed on probation for forty-five days.

In January 1994, FNB's board of directors met and discussed the bank's low productivity and profits. According to the affidavits submitted by FNB in support of its motion for summary judgment, the bank had been experiencing a significant reduction in income in 1992 and 1993, and the projections for the 1994 fiscal year indicated another potentially low-profit year. The board directed the bank president, Tandy Menefee, to explore methods to reduce costs, including personnel costs, in order to increase profitability. Menefee, in turn, organized a committee of several of the bank's managers and vice presidents to evaluate options for expense reduction within the bank's departments. The committee ultimately recommended that four positions be eliminated. FNB terminated Flentje, along with three of her co-workers, on March 21, 1994. Flentje, a single woman, was eight months pregnant at the time. The other positions eliminated included an auditor, a correspondence secretary, and a vice president/business development officer. The bank considered the four to be at-will employees. The bank had no seniority system. Besides the eliminated positions, the bank also canceled creation of two additional new positions, and declined to refill one position when an existing employee quit. In all, seven positions were eliminated in the reduction-in-force decisions.

On April 13, 1995, after her termination, Flentje filed suit in federal court against FNB under Title VII of the federal Civil Rights Act of 1964 and under the Arkansas Civil Rights Act, Ark. Code Ann. §§ 16-123-101 (1993) et. seq. In September 1996, Flentje dismissed her federal lawsuit and filed the instant action in state court. Flentje alleged that FNB terminated her because of pregnancy which, if proven, would constitute gender discrimination expressly prohibited under Ark. Code Ann. § 16-123-107(a)(1). Specifically, Flentje alleged that Menefee and Watts began treating her differently after they learned that she was pregnant, and that Menefee told Watts that Flentje should not have the baby under the circumstances but instead should "get rid of it."

Additionally, Flentje alleged that the bank had discriminated against other employees, including Oscar Thomas, who FNB also discharged in the reduction in force. FNB answered the complaint on November 1, 1996, denying the allegations of discrimination.

Following the initial pleadings, the parties engaged in discovery, including exchanging interrogatories and conducting depositions. The interrogatories and answers to interrogatories were filed with the court. On February 2, 1999, FNB filed a motion for summary judgment, to which it attached affidavits from Menefee, Watts, and Shelby Mitchell, Director of Financial Services for the bank. FNB also attached excerpts from Flentje's and Menefee's depositions. In its motion, FNB argued that Flentje could not establish a prima facie case of gender discrimination. FNB argued that Flentje could not show that the Bank used her pregnancy as a determinative factor in her termination nor that the reasons given for the workforce reduction were a pretext for discrimination. FNB further asserted that the Arkansas Civil Rights Act provides that an employer "may avoid liability under this subchapter by showing that his actions were based on legitimate, nondiscriminatory factors and not on unjustified reasons." *See* Ark. Code Ann. § 16-123-106(c). Using federal cases as guidance because of the paucity of Arkansas cases on point, FNB argued that Flentje did not establish the necessary elements for a prima facie case and that FNB's reasons for Flentje's termination were legitimate business reasons.

Flentje responded to FNB's motion for summary judgment on February 16, 1999, and filed a brief in response, but attached no affidavits or other supporting documents. Flentje argued that FNB's reasons for terminating her employment were pretextual, and that the actual reason she was terminated was because of her pregnancy. In her brief, Flentje noted that Arkansas case law is nonexistent on this subject, and that federal law, while persuasive, is not binding. The trial court rendered its decision by letter opinion filed April 1, 1999. The trial court granted FNB's motion for summary judgment. Flentje filed her notice of appeal on April 23, 1999.

Standard of Review

Rule 56 of the Arkansas Rules of Civil Procedure governs disposition of summary-judgment cases. The pertinent language of that rule states:

> (c) *Motion and Proceedings Thereon.* The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party, prior to the day of hearing, may serve opposing affidavits. The judgment sought shall be rendered forthwith if 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.
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> ***
>
> (e) *Form of Affidavits; Further Testimony; Defense Required.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

In discussing summary judgment, we recently stated in *Mashburn v. Meeker Sharkey Financial Group*, 339 Ark. 411, 5 S.W.3d 469 (1999):

> In these cases, we need only decide if the granting of summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of the motion left a material question of fact unanswered. *Nixon v. H & C Elec. Co.*, 307 Ark. 154, 818 S.W.2d 251 (1991). The burden of sustaining a motion for summary judgment is always the responsibility of the moving party. *Cordes v. Outdoor Living Center, Inc.*, 301 Ark. 26, 781 S.W.2d 31 (1989). All proof submitted must be viewed in a

> light most favorable to the party resisting the motion, and any doubts and inferences must be resolved against the moving party. *Lovell v. St. Paul Fire & Marine Ins. Co.*, 310 Ark. 791, 839 S.W.2d 222 (1992); *Harvison v. Charles E. Davis & Assoc.*, 310 Ark. 104, 835 S.W.2d 284 (1992); *Reagan v. City of Piggott*, 305 Ark. 77, 805 S.W.2d 636 (1991). Our rule states, and we have acknowledged, that summary judgment is proper when a claiming party fails to show that there is a genuine issue as to a material fact and when the moving party is entitled to summary judgment as a matter of law. Ark. R. Civ. P. 56(c); *Short v. Little Rock Dodge, Inc.*, 297 Ark. 104, 759 S.W.2d 553 (1988); *see also Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).
>
> . . . .
>
> It is further well-settled that once the moving party establishes a prima facie entitlement to summary judgment by affidavits or other supporting documents or depositions, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact. *See Ford Motor Credit Co. v. Twin City Bank*, 320 Ark. 231, 895 S.W.2d 545 (1995); *Wyatt v. St. Paul Fire & Marine Ins. Co.*, 315 Ark. 547, 868 S.W.2d 505 (1994).

We recognize a "shifting burden" in summary-judgment motions, in that while the moving party has the burden of proving that it is entitled to summary judgment, once it has done so, the burden then shifts to the nonmoving party to show that material questions of fact remain. *See Ford v. St. Paul Fire & Marine Ins. Co.*, 339 Ark. 434, 5 S.W.3d 460 (1999). When the movant makes a prima facie showing of entitlement to a summary judgment, the respondent must discard the shielding cloak of formal allegations and meet proof with proof by showing a genuine issue as to a material fact. *Hughes Western World v. Westmoor Mfg.*, 269 Ark. 300, 601 S.W.2d 826 (1980). Facts stated in an affidavit must be admissible in evidence if they are to be relied upon in granting or denying summary judgment. *Dixie Ins. Co. v. Joe Works Chevrolet, Inc.*, 298 Ark. 106, 766 S.W.2d 4 (1989).

Summary judgment is not proper, however, "where evidence, although in no material dispute as to actuality, reveals aspects from which inconsistent hypothesis might reasonably be drawn and reasonable minds might differ." *Thomas v. Sessions*, 307 Ark. 203, 818 S.W.2d 940 (1991). 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. *Id.* (citing *Rowland v. Gastroenterology Assoc., P.A.*, 280 Ark. 278, 657 S.W.2d 536 (1983)).

As we further explained in *Wallace v. Broyles*, 332 Ark. 189, 961 S.W.2d 712 (1998), we will not engage in a "sufficiency of the evidence" determination. We have ceased referring to summary judgment as a 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 admission 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 fact and the moving party is entitled to judgment as a matter of law. *Id.* However, when there is no material dispute as to the facts, the court will determine whether "reasonable minds" could draw "reasonable" inconsistent hypotheses to render summary judgment inappropriate. In other words, when the facts are not at issue but possible inferences therefrom are, the court will consider whether those inferences can be reasonably drawn from the undisputed facts and whether reasonable minds might differ on those hypotheses.

I. The Arkansas Civil Rights Act

The Arkansas Civil Rights Act, originally enacted in 1993, provides citizens of this state legal redress for civil rights violations of state constitutional or statutory provisions, hate offenses, and discrimination offenses. The Act also seeks to prevent retaliatory conduct against those seeking its protection. As the parties herein note, very few cases have been decided under this Act by Arkansas courts. In fact, as one court noted, "there is precious little case law on the subject."*Bobo v. Wolverine Worldwide, Inc.*, 13 F. Supp. 2d 887 (E.D. Ark. 1998). The Act unequivocally grants to qualified persons the right to be free from employment discrimination "because of gender." Ark. Code Ann. § 16-123-107(a)(1). The definition section of the Act also makes clear that "because of gender" includes "on account of pregnancy." Ark. Code Ann. § 16-123-102(1). Hence, should Flentje prove FNB terminated her on account of her pregnancy, she would be entitled to relief under the Act. To date, no Arkansas appellate court has addressed a pregnancy-gender discrimination case. However, Arkansas's statute spe-

cifically provides that courts may look to state and federal decisions interpreting the federal civil rights laws for persuasive authority.[1] A brief review of pertinent federal decisions is in order. Under federal law, a court can review a gender discrimination case under two alternative theories. As the court in *Stacks v. Southwestern Bell Yellow Pages, Inc.*, 996 F.2d 200 (8th Cir. 1993) summarized:

> If the plaintiff can demonstrate that an illegitimate criterion was a motivating factor in the employment decision, the burden shifting formula set out in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989), is applied. Under the *Price Waterhouse* test, once an employee has established that gender was a motivating factor in the employment decision, the burden of persuasion shifts to the defendant, which must show that "it would have made the same decision even if it had not taken the [illegitimate criterion] into account." *Beshears v. Asbill*, 930 F.2d 1348, 1353 (8th Cir. 1991). If the plaintiff is unable to produce evidence that directly reflects the use of an illegitimate criterion in the challenged decision, the employee may proceed under the now-familiar three-step analytical framework described in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). Under this test, the burden of persuasion never leaves the plaintiff, but there is a shift in the burden to come forward with evidence: (1) the plaintiff must present a prima facie case consisting of four distinct elements; (2) the defendant must rebut the prima facie case by showing nondiscriminatory reasons for termination; and (3) the plaintiff must show the reasons are pretextual.
>
> *Price Waterhouse* requires the district court to make an explicit finding whether the case is or is not a "mixed motives" case. This crucial determination establishes which party will bear the burden of persuasion and, as such, the appellate court must have before it a specific finding to review.

In *Newton v. Cadwell Laboratories*, 156 F.3d 880 (8th Cir. 1998), the Eighth Circuit Court of Appeals further noted that:

> After an employee establishes a prima facie case of gender discrimination, the employer must then advance a legitimate, nondiscriminatory reason for the employee's discharge. *See Johnson v. Baptist*

[1] Ark. Code Ann. § 16-123-105(c) provides: When construing this section, a court may look for guidance to state and federal decisions interpreting the federal Civil Rights Act of 1871, as amended and codified in 42 U.S.C.§ 1983, as in effect on January 1, 1993, which decisions and act shall have persuasive authority only.

> *Med. Ctr.*, 97 F.3d 1070, 1072 (8th Cir. 1996). If the employer advances a legitimate, nondiscriminatory reason for the employee's discharge, the employee must present "facts which if proven at trial would permit a jury to conclude that the [employer's] proffered reason is pretextual and that intentional discrimination was the true reason for the [employer's] actions.' " *Id.* at 1072 (quoting *Krenik v. County of Le Sueur*, 47 F.3d 953, 958 (8th Cir. 1995)).

Although not binding on this court, we find this federal analysis helpful and apply it to the instant case.

II. The Shifting Burden of Proof to Rebut FNB's Nondiscriminatory Termination Reasons

Four elements are necessary to establish a prima facie case of gender discrimination. For Flentje, these would include showing: (1) that she is within the protected class; (2) that she met applicable job qualifications; (3) that her employment was terminated; and (4) that there is some "additional showing" that pregnancy was a factor in her termination. *Thomas v. First National Bank of Wynne*, 111 F.3d 64 (8th Cir. 1997). Unquestionably, Flentje made sufficient allegations to state a prima facie case. However, she proffered no direct evidence of discriminatory intent, thus making the "mixed-motive" analysis of *Price Waterhouse* inapposite.[2] We find that the *McDonnell Douglas* test above, which uses shifting burdens, is the more applicable test on the facts presented here.[3] Because of the prima facie allegations, the burden shifted to FNB to rebut that presumption by showing that it used legitimate, nondiscriminatory factors and not unjustified reasons. To rebut the presumption, FNB cited its low profitability and the need to reduce operating costs, especially in personnel, as a legitimate, nondiscriminatory factor for terminating Flentje and her three co-workers, as well as refusing to

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[2] In *Price Waterhouse* the plaintiff demonstrated by documentary evidence and undisputed testimony that the company included gender as a factor in its employment decision.

[3] In upholding the grant of summary judgment in *Thomas* (age discrimination case under federal law filed by the three other terminated employees mentioned in this case), the Eighth Circuit Court of Appeals also applied the *McDonnell Douglas* test as opposed to the *Price Waterhouse* mixed-motive analysis to uphold the summary judgment. The court determined that there was no "direct evidence" showing a "specific link between the [alleged] discriminatory animus and the challenged decision, sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated" the termination decision by the bank.

create or refill three additional positions at the bank.[4] Regarding Flentje's termination, Watts, Flentje's supervisor, recommended terminating Flentje's employment. Watts's deposition testimony and supporting affidavit indicated that she would not have suggested Flentje's termination for her poor work performance alone, but that it was one of the factors which influenced Watts's decision to recommend Flentje's termination in the reduction-in-force evaluation. In addition, Watts indicated that she recommended Flentje for termination because her job as ATM administrator could be divided among other employees, and Flentje's position could be eliminated all together. Watts indicated that she did not recommend Flentje's termination because she was pregnant, unmarried, or because of her gender. Once FNB provided valid reasons under the statute for termination, it rebutted the presumption created by Flentje's allegations. The burden then returned to Flentje to present facts which if proven at trial would permit a jury to conclude that FNB's proffered reason was pretextual and that its actual reason was discriminatory. *Bobo, supra.*

Flentje did not provide any supporting affidavits or additional evidence with her response to the motion for summary judgment. In fact, she does not argue the facts as presented in FNB's motion and supporting documents. Instead, Flentje argues that although the facts may not be in dispute, there may still be issues for trial because differing inferences may be drawn from those facts. *See Wallace, supra.* However, inferences to be drawn from undisputed facts must be more than mere possibilities; they must be such that "reasonable minds" would come to "reasonably" different hypotheses about the bank's actions. Examining the abstract and record, it is evident that no such reasonable inferences are present and that the appellant thus fails to meet "proof with proof."

To show the existence of differing inferences, Flentje asserts that she testified in her deposition that her relationship with Menefee "became remote, that he ceased stopping by her office or desk to talk, and rarely looked at her after he learned of her pregnancy." The excerpt from Flentje's deposition, which FNB attached with its motion for summary judgment, contains no such

[4] Both federal and Arkansas law recognize that terminations based on legitimate, non discriminatory factors, such as a reduction in force, will allow an employer to avoid liability. *See* Ark. Code Ann. § 16-23-104(c).

statement. Furthermore, Flentje did not attach any depositions or affidavits of her own in support of this contention. The abstract and record contain no such deposition evidence. Consequently, this evidence is not before us, nor was it before the circuit court, and thus cannot be considered. It is well settled that arguments of counsel are not evidence. *Johnson v. State*, 326 Ark. 430, 450, 934 S.W.2d 179, 189 (1996).

Flentje next asserts that her relationship with Watts, "seemed to become remote." Flentje's deposition testimony in the abstract and record indicate the following:

> Q: How well did you get along with Connie Watts?
>
> A: We used to get along real well. After I became pregnant, we just didn't have much to say to each other. I had always tried to help Connie; I stayed a lot of nights and worked with her.
>
> Q: Can you be more specific?
>
> A: It seemed like if I had a question with the ATM, there was either someone in her office with her, or I would walk around to ask her something and she would see me and pick up her phone.
>
> Q: Did she ever tell you she didn't want to talk to you?
>
> A: No.
>
> Q: Did she ever tell you that there was something about your being pregnant that she didn't like?
>
> A: No. She told me that if it was her, she would do the same thing.

Based on this exchange, Flentje argues that the reason for the apparent remoteness could be because of the bank's financial woes, or "another reasonable person could see this change of behavior as shunning and disapproving, and evidence of animus." There is nothing in Watt's statements from which a reasonable inference of animus could be drawn. By Flentje's own admission, she did not confront Watts or ask whether there was a problem. In fact, the only "evidence" is Flentje's own perception of Watts's actions. Flentje's perception, without a supporting affidavit or other form of proof, is insufficient to support a *reasonable* inference of discriminatory intent. Self-serving statements regarding a witness's state of mind or her subjective beliefs are no more than conclusions and are

not, therefore, competent summary-judgment evidence. *Texas Division-Tranter, Inc. v. Carrozza*, 876 S.W.2d 312, (Tex. 1994).

Flentje next argues that her performance review could be viewed in two different ways — one, that it was a common tool used to measure employee performance or two, that it was used to create documentation upon which to base the discharge. Flentje also argues that she had not previously been given a performance review, and she questions whether other employees were given the same employment review. Again, however, Flentje provides no proof that she was the only employee who had been given this performance evaluation, or that this was the first time that she had ever been given this evaluation. She provides no evidence that she was the only employee placed on probation, or that pregnancy contributed to the low rating. If more discovery had been needed to produce such evidence, Rule 56(f) of the Arkansas Rules of Civil Procedure specifically provides for it within the context of a summary-judgment motion. Flentje did not file any pleadings under this rule to request more time for discovery.

Next, Flentje refers in her brief to a statement that Menefee allegedly made to Oscar Thomas, an employee who was also terminated in the reduction in force. Flentje argues in her brief that Menefee told Thomas that Menefee had "done his homework" regarding Thomas's termination. Flentje argues that this carries a negative connotation, and that a reasonable person could infer that Menefee intended to discriminate against Thomas and also against Flentje. FNB's answer admits that Menefee made the statement to Thomas. Flentje fails, however, to set forth facts connecting the statement to her termination. When opposing a summary judgment supported by affidavit, the responding party cannot rest upon the mere allegations or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial. Ark. R. Civ. P. 56(e) also makes it clear that the facts set forth must be based upon personal knowledge and be such as would be admissible in evidence. Flentje did not present an affidavit from Thomas regarding this information, and arguments and explanations by an attorney are not proof on which a party can rely in a summary judgment. *Johnson, supra.*

Flentje next argues that while the bank presented evidence of its financial difficulties, it did not produce some documents that

Flentje requested. This failure to produce, Flentje argues, is evidence of that the bank's financial situation is not as bad as reported. As noted above, Rule 56(f) allows a party in a summary-judgment proceeding to request more time to "meet proof with proof," and it could have been used to obtain additional discovery.

Finally, Flentje asserts that Watts told her that Menefee told Watts that Flentje should not have the baby, should "get rid of it," and that she should protect herself. The record and abstract indicate that Flentje alleged this in her complaint, Menefee denied making the statement in both his affidavit and in deposition testimony, and Watts denied in her affidavit to both hearing the statement and telling the same to Flentje. Again, Flentje failed to meet proof with proof other than raising the allegation in her complaint and asking Menefee during his deposition about the statement. We hold that appellant has failed to show that there is a genuine issue as to a material fact or that reasonable differing inferences could be drawn from the undisputed facts. Therefore, the trial court did not err in granting summary judgment.

Affirmed.

Earl OXFORD, Tommy Lee, and Tom Tinsley *v.* Jim PERRY, David Harper, Frank Atkinson, and Marcy Porter, In Their Official Capacities As Assessor, County Judge, Collector, and Treasurer for Sebastian County, Arkansas; County of Sebastian, Arkansas; Charlie Daniels, In His Official Capacity As Arkansas Land Commissioner; and Jimmie Lou Fisher, Arkansas State Treasurer; Sebastian County Library Board; Greenwood School District; Hackett School District; Hartford School District; Lavaca School District; Charleston School District; Mansfield School District; Booneville School District; Westark Community College; City of Barling, Arkansas; City of Greenwood, Arkansas

99-1141 13 S.W.3d 567

Supreme Court of Arkansas
Opinion delivered March 9, 2000

[redacted]

Oscar Stilley, for appellant.

Thompson & Llewellyn, P.A., by: *James M. Llewellyn, Jr.* and *John C. Riedel*, Deputy Prosecuting Att'y, for appellees Jim Perry, David Harper, Frank Atkinson, and Marcy Porter, and Greenwood School District, Hackett School District, Hartford School District, Lavaca School District and Booneville School District.

Smith, Maurras, Cohen, Redd, & Horan, PLC, by: *S. Walter Maurras* and *Matthew Horan*, for appellee Westark College.

WH. "DUB" ARNOLD, Chief Justice. This case presents an appeal from a decision of the Sebastian County Circuit

Court, Greenwood District, granting summary judgment in favor of all appellees and dismissing appellants' claims with prejudice. The underlying lawsuit involved an alleged illegal exaction and sought recovery of real-property tax payments assessed for 1996. Notably, appellants also alleged that the lawsuit constituted a *refiling* of a previous chancery suit, filed on March 11, 1997, in the Fort Smith District of Sebastian County ("*Oxford I*"). In support of the circuit court's decision dismissing the instant case, appellees contend that (1) the circuit-court case cannot relate back to *Oxford I*, and (2) appellants' claims are barred by the voluntary-payment rule. We agree, and we affirm the circuit court's grant of summary judgment.

Appellant Earl Oxford is, and was at all times relevant to this action, a citizen of the Greenwood District of Sebastian County, Arkansas. Accordingly, on October 9, 1997, Oxford paid his 1996 real-property taxes to the Greenwood District. Similarly, appellants Tommy Lee and Tom Tinsley are, and have been at all relevant times, citizens of the Greenwood District. Tommy Lee paid his 1996 real-property taxes to the Greenwood District on October 6, 1997, and Tom Tinsley paid his taxes to the Greenwood District on October 10, 1997. Significantly, none of the appellants paid real-property taxes in the Fort Smith District of Sebastian County for 1996. Moreover, appellants do not contend that their tax payments were coerced.

Although we disagree that this case *arose* from *Oxford I*, (or from any other previous case filed on the same claim with different parties in a different court), we believe it necessary to review the history of *Oxford I* to distinguish the instant case. First, appellant Earl Oxford was also the plaintiff in *Oxford I*. However, appellants Tommy Lee and Tom Tinsley were not parties in that case. Second, the chancery court dismissed *Oxford I* because the plaintiff's complaint failed to state facts upon which relief could be granted and because the court lacked proper venue. Third, prior to the chancery court's dismissal but on the day set for hearing the motions for dismissal, plaintiff's attorney, Mr. Oscar Stilley, (also appellants' attorney), attempted to amend the *Oxford I* complaint by adding additional Fort Smith district plaintiffs to cure the venue problem. The chancellor refused to accept the amended complaint or any other pleading. Fourth, and most importantly, plaintiff Oxford took no appeal from the *Oxford I* decision.

Ultimately, the chancellor in *Oxford I* determined that venue was improper because the plaintiff's residence in the Greenwood District of Sebastian County placed him in a different judicial jurisdiction than the Fort Smith district. Sebastian County is a dual-jurisdiction county, divided into the Fort Smith District, made up of the City of Fort Smith, and the Greenwood District, comprised of the remainder of the County. Each judicial district has its own courthouse and is a separate taxing entity. *See* Ark. Const. art. 13, § 5. Significantly, the two districts are treated as separate counties for purposes of determining venue. *See Prairie Implement Co. v. Circuit Court of Prairie County*, 311 Ark. 200, 844 S.W.2d 299 (1992). Venue for an action against public officers must be brought in the county where the cause arose, Ark. Code Ann. § 16-60-102 (1987), and venue is not transitory but local. Therefore, Oxford could not challenge his Greenwood District taxes by filing suit against officials in the Fort Smith District.

Rather than appealing the chancery court's ruling in *Oxford I*, Earl Oxford and two new plaintiffs, Lee and Tinsley, filed the instant action in the Sebastian County Circuit Court, Greenwood District, claiming that the action constituted a *refiling* of *Oxford I*. The circuit court disagreed and concluded that *Oxford I* was not a predecessor action to the current action. In fact, the circuit court reasoned that the chancery court never had jurisdiction over the original claim because Oxford was not a citizen of, and did not pay taxes to, the Fort Smith district. Also, the court determined that the statute of limitations was not tolled because the plaintiffs were different in the two cases.

[redacted] Moreover, because all of the appellants paid the challenged 1996 taxes prior to filing their lawsuit on March 19, 1999, the circuit court found that those payments were voluntary. We have held that taxes paid after a complaint is filed are deemed involuntary and recoverable. *See Hoyle v. Faucher*, 334 Ark. 529, 975 S.W.2d 843 (1998). Consequently, the circuit court dismissed appellants' claims based upon the longstanding rule that voluntary payment of taxes is a bar to recovery, even when an illegal-exaction claim is based on constitutional grounds. *See Mertz v. Pappas*, 320 Ark. 368, 896 S.W.2d 593 (1995); *City of Little Rock v. Cash*, 277 Ark. 494, 644 S.W.2d 229 (1982).

From the circuit court's order granting summary judgment in favor of appellees comes the instant appeal. Essentially, appellants suggest that they may benefit from an unappealed and dismissed chancery lawsuit, *Oxford I*, by (1) filing a new action on the same *claim* in circuit court, (2) arguing that the chancery court erred by dismissing *Oxford I*, (3) and appealing the circuit court's decision to this court. We find no merit in appellants' arguments, and we affirm.

I. Standard of review

Although appellants' vehemently challenge the correctness of the chancery court's decision dismissing *Oxford I*, the sole issue properly before us on appeal is whether the circuit court erred by granting summary judgment in favor of appellees. Appellants' confusion of the issues on appeal is made apparent by its erroneous discussion of the proper standard of review. They contend that we should apply the standard of review applicable to appeals from chancery decisions. However, as appellees correctly point out, this is not an appeal from any decision of a chancery court. Rather, this appeal arises from a decision of the Sebastian County Circuit Court, Greenwood District, granting appellees summary judgment.

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. 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 (1999); *Robert D. Holloway, Inc. v. Pine Ridge Add'n Resid. Prop. Owners*, 332 Ark. 450, 453, 966 S.W.2d 241, 243 (1998) (citing *McCutchen v. Huckabee*, 328 Ark. 202, 943 S.W.2d 225 (1997)).

Once the moving party makes a prima facie showing that it is entitled to summary judgment, the opponent must meet proof

with proof by showing a material issue of fact. *Dillard v. Resolution Trust Corp.*, 308 Ark. 357, 359, 824 S.W.2d 387, 388 (1992). However, if a moving party fails to offer proof on a controverted issue, summary judgment is not appropriate, regardless of whether the nonmoving party presents the court with any countervailing evidence. *Collyard v. American Home Ins. Co.*, 271 Ark. 228, 230, 607 S.W.2d 666, 668 (1980).

II. Voluntary-payment rule

In an effort to avoid application of the voluntary-payment rule, appellants attempt to bootstrap this action to *Oxford I*. However, *Oxford I* was not appealed and when dismissed, the action was completed, the results were binding on the parties, and the lawsuit is treated as having never been brought. *See Austin v. Austin*, 241 Ark. 634, 409 S.W.2d 833 (1966). Therefore, appellants cannot revisit the chancery decision in this appeal. Accordingly, we disregard all of appellants' arguments relating to the propriety of a chancery court's decision in an unrelated case.

Here, the circuit court granted summary judgment on the basis of the voluntary-payment rule. The reasoning underlying the common-law rule is that governmental entities budget annually and ordinarily spend revenues within each tax year. When the government is on notice that it may be required to refund those taxes, it can make allowance for a possible refund. *See Mertz v. Pappas*, 320 Ark. 368, 896 S.W.2d 593 (1995) (citing *Hercules, Inc. v. Pledger*, 319 Ark. 702, 894 S.W.2d at 578 (1995)). However, if the governmental entity allowed refunds for taxes voluntarily paid in previous years, current and future funds might be required to make the refund and governmental operations would be jeopardized. *Id.* In the instant case, each of the appellants paid their real-property taxes prior to filing the circuit-court action on March 19, 1999. Therefore, the circuit court's grant of summary judgment was appropriate.

Finally, appellants argue that the savings statute, Ark. Code Ann. § 16-56-126 (1987), effectually revived the dismissed and unappealed chancery action into the circuit-court case. The savings statute extends the time for a plaintiff to correct a dismissal without prejudice when the statute-of-limitations would otherwise

bar the suit. Here, however, the appellants' argument is entirely unsupported by the facts and the law. Appellants made no argument that any statute-of-limitation period has run with regard to the chancery proceeding and cite no authority for applying the savings statute under the instant facts.

In sum, we conclude that appellants may not maintain a claim for past taxes voluntarily paid, and they may not avoid that fact by resurrecting a previously decided and unappealed case from another court. Viewed in the light most favorable to appellants and resolving any doubts against appellees, we affirm the circuit court's grant of summary judgment because the challenged taxes were voluntarily paid before the instant suit was filed.

Michael ALLISON *v.* David Kelly DUFRESNE

99-1224 12 S.W.3d 216

Supreme Court of Arkansas
Opinion delivered March 9, 2000

Jeanne L. Denniston, for appellant.

No response.

TOM GLAZE, Justice. Appellant Michael L. Allison is an attorney who represented Dottie (DuFresne) Moore in a change-in-custody proceeding which was initiated by Moore's former husband, David DuFresne. On the date the custody case was set for hearing, Allison did not appear. The chancellor summarily held him in contempt and fined him for failing to obtain the court's permission to withdraw as Moore's counsel. Allison seeks reversal of the court's ruling solely on the basis that, because the court's action was in the nature of imposing criminal contempt, Allison was first entitled to notice and a show-cause hearing.

To reach Allison's argument, we need to review the relevant events leading to his being held in contempt. On February 11, 1999, David DuFresne filed his action, seeking custody of his and Moore's child. Moore engaged Allison as counsel to represent her. Allison filed a response on Moore's behalf denying DuFresne's allegations, and DuFresne's attorney then obtained a June 16, 1999, trial setting. The abstract of record next reflects that, on June 11, 1999, Allison filed a motion to be relieved as Moore's attorney, asserting he had not been paid a fee. Allison further alleged that, on April 7, 1999, he had notified Moore of the June 16, 1999, setting. He also averred that on June 9, 1999, he had attempted to serve Moore with a copy of his motion to be relieved as counsel. The postal service receipt showed Moore had received Allison's motion on Monday, June 14, 1999. Moore apparently tried to engage other counsel, Allen Waters, on the evening of June 14, but Waters said that he could only agree to represent Moore if a continuance of the June 16 trial could be obtained.

On the day of the Wednesday, June 16 hearing, Moore appeared with Waters, who explained to the chancellor that he was only recently engaged, and would need a continuance if he was to enter an appearance and represent Moore. The chancellor asked of Allison's whereabouts since he had not been relieved as Moore's attorney. The chancellor said that she had talked to Allison and DuFresne's counsel on June 11 and 14, and told them if they wanted a hearing on Allison's motion to be relieved as counsel, they should set up a conference call. No such call was arranged. In view of these events and Allison's failure to appear on June 16, the chancellor found Allison in contempt, fined him $250.00, and reported him to the Professional Conduct Committee.

It is settled law that an act is contemptuous if it interferes with the order of the court's business or proceedings or reflects upon the court's integrity. *Hodges v. Gray*, 321 Ark. 7, 901 S.W.2d 1 (1995); *Carle v. Burnett*, 311 Ark. 477, 845 S.W.2d 11 (1993). Our court has also made it clear that Rule 64(b) of the Arkansas Rules of Civil Procedure provides a lawyer may not withdraw from any proceeding or from representation of any party to a proceeding without permission of the court in which the proceeding is pend-

ing. *Dean v. Williams*, 339 Ark. 439, 6 S.W.3d 89 (1999).[1] Significantly, our court has further held that, in these attorney-withdrawal matters, the trial court must play an active role in determining whether the requirements of Rule 64(b) have been met. *Id.* This rule is aimed at protecting the client's interests, and the trial court must look at a motion to withdraw from the point of view of the client, not the attorney. *Id.*

While it is clearly an attorney's burden to comply with the established principles above, a trial court cannot summarily impose criminal contempt and penalties for violating those principles unless such contemptuous acts are committed in the immediate view and presence of the court. *See* Ark. Code Ann. § 16-10-108(c) (Repl. 1999). In other cases, the party charged shall be notified of the accusation and shall have a reasonable time to make his defense. *Id.* These statutory requirements are consistent with our case law where this court has held that criminal penalties may not be imposed on an alleged contemner who has not been afforded the protections that the constitution requires of criminal proceedings. *Fitzhugh v. State*, 296 Ark. 137, 752 S.W.2d 275 (1988). The *Fitzhugh* court held the following: "The Due Process Clause, as applied in criminal proceedings, requires that an alleged contemner be notified that a charge of contempt is pending against him and be informed of the specific nature of that charge." *Id.* at 140, 752 S.W.2d at 277. Before a person may be held in contempt for violating a court order, the order must be in definite terms as to the duties imposed, and the command must be express rather than implied. *Arkansas Dept. of Human Servs. v. R.P.*, 333 Ark. 516, 970 S.W.2d 225 (1998).

There are some jurisdictions which have held that, where counsel fails to appear when his case has been called, his absence has occurred "in the presence of the court" and constitutes a direct contempt. *See* 17 AM. JUR. 2d *Contempt* § 28 (1990); John E. Theuman, Annotation, *Attorney's Failure to Attend Court, or Tardi-*

[1] Permission to withdraw may be granted for good cause shown if counsel seeking permission presents a motion therefore to the court showing he (1) has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, including giving due notice to his client, allowing time for employment of other counsel; (2) has delivered or stands ready to tender to the client all papers and property to which the client is entitled; and (3) has refunded any unearned fee or part of a fee paid in advance, or stands ready to tender such a refund upon being permitted to withdraw.

ness, as Contempt, 13 A.L.R. 4th 122, at § 9 (Supp. 1999). However, the greater weight of authority appears to hold that, although the absence of an attorney from a trial may constitute contempt, it occurs outside of presence of court and thus is indirect contempt which may not be summarily punished. *Id.*, 13 A.L.R. 4th 122, at § 10. This overriding general principle is consistent with Arkansas's statutory and case law on this subject as discussed above, which requires that the alleged contemner be informed of the specific nature of the trial court's charge.

In fairness to the trial court here, it made an unsuccessful effort to contact attorney Allison by directing opposing counsel to find Allison to ask him to attend court, but these efforts by the court also show it was attempting to gather reasons why Allison had failed to show at the June 16 hearing — information the trial court could only acquire through holding a hearing. In this case, the chancellor apparently made no mention of Rule 64(b), nor did she *order* Allison to arrange a telephone conference or schedule a hearing regarding his motion to be relieved as Moore's counsel. In this respect, we point out that our court has held counsel to be in direct contempt of court for his failure to appear as scheduled *pursuant to a show-cause order. See Streett v. State*, 331 Ark. 139, 959 S.W.2d 744 (1998).[2] Here, however, there was no order, so the result is different.

In the instant case, Allison's acts, or failures to act, cannot be said to have taken place in the immediate view and presence of the court. Allison suggests that, if given the notice and opportunity, he could have offered a meritorious defense that he was not in contempt. That, of course, is yet to be shown or decided, and nothing we have said should be taken to mean that there is no

[2] We are aware of the court of appeals' case of *Arkansas Department of Human Services v. Gruber*, 39 Ark. App. 112, 839 S.W.2d 543 (1992), where DHS was held in contempt and assessed a fine when it failed to appear at a placement hearing in juvenile court. It appears there that the trial court found DHS summarily in contempt for failing to appear as ordered, but the court of appeals reversed because DHS was deprived of procedural due process because no notice of the contempt was given to DHS; the case was remanded so the chancellor could conduct a show-cause hearing. Thus, the court of appeals has held that, even though the alleged contemner was ordered to appear and did not, DHS was still entitled to a hearing before being found in contempt. We need not determine whether the *Gruber* decision is correct because here the trial court issued no order for Allison to appear, which is a fact that is significant when determining whether an attorney or party can be summarily punished for his or her absence.

evidence to support a finding of contempt. We reverse only because this criminal contempt proceeding involved indirect contempt which requires that Allison be given a show-cause hearing. We must reverse and remand so the chancellor can afford him such a hearing.

Horton O. ELZEA, John Hoyle, and Ronald D. Williamson *v.* Jim PERRY, David Hudson, Frank Atkinson, and Marcy Porter, In Their Official Capacities As Assessor, County Judge, Collector, and Treasurer for Sebastian County, Arkansas; County of Sebastian, Arkansas; Charlie Daniels, In His Official Capacity As Arkansas Land Commissioner; Jimmie Lou Fisher, Arkansas State Treasurer; Fort Smith School District; the Fort Smith Public Library Board; Westark Community College; City of Fort Smith, Arkansas

99-1142 12 S.W.3d 213

Supreme Court of Arkansas
Opinion delivered March 9, 2000

Oscar Stilley, for appellant.

Thompson & Llewellyn, P.A., by: *James M. Llewellyn, Jr.*; and *John C. Riedel*, Deputy Prosecuting Att'y, for appellees Jim Perry, David Harper, Frank Atkinson, and Marcy Porter, and Fort Smith School District.

Smith, Maurras, Cohen, Redd, & Horan, PLC, by: *S. Walter Maurras* and *Matthew Horan*, for appellee Westark College.

Daily & Woods, P.L.L.C., by: *Jery Lee Canfield*, for appellee City of Fort Smith.

TOM GLAZE, Justice. This appeal actually arises from two earlier cases. The first was an illegal-exaction case filed by

attorney Oscar Stilley on behalf of Earl Oxford on March 11, 1997, in the Chancery Court of the Fort Smith District in Sebastian County. Named as defendants were the Sebastian County assessor, county judge, collector, and treasurer, and the State Treasurer and Land Commissioner. Plaintiff Oxford's suit challenged the assessment of 1996 property taxes under Act 758 of 1995. The taxes at issue in that suit were paid in 1997, but because Oxford was a resident of Barling, Arkansas, he was unable to allege that he owned property in the Fort Smith District or paid taxes on any property in that district. Sebastian County is divided into two districts, the Fort Smith District and the Greenwood District. *See* Ark. Const. art. 13, § 5. These two districts are treated as separate counties for purposes of determining venue. *See Prairie Implement Co. v. Circuit Court of Prairie County*, 311 Ark. 200, 844 S.W.2d 299 (1992); *Jewett v. Norris*, 170 Ark. 71, 278 S.W. 652 (1926).

In November of 1998, Stilley amended Oxford's complaint to add all of the cities, towns, and school districts of Sebastian County, as well as Westark Community College and the Fort Smith Public Library Board. In December 1998, the various defendants filed motions to dismiss under Ark. R. Civ. P. 12(b)(6), for failure to state a claim for relief, and also under Ark. R. Civ. P. 8(a), for failure to allege sufficient facts showing Oxford was entitled to relief. In addition, the defendants objected to venue and jurisdiction, because Oxford, as a resident of the Greenwood District, had no standing to bring an action in the Fort Smith District. Westark also offered as a defense the argument that the taxes were paid voluntarily. Westark's defense was based on the recognized rule that taxes paid *after* the filing of a suit seeking a tax refund are considered involuntarily paid and recoverable. It is this rule that played significantly in the two suits Stilley's plaintiffs filed.

A hearing on the motions to dismiss was set for February 1, 1999. That same morning, Stilley attempted to file a Second Amended Complaint which would have added plaintiffs who had paid taxes in the Fort Smith District. The chancellor refused to permit the amendment on the grounds that it was untimely. On February 3, 1999, the chancellor entered an order dismissing the complaint without prejudice on the two following grounds: (1) lack of venue, as Oxford did not live in the district in which the suit was filed, and (2) Oxford's failure to state sufficient facts under Rule 8(a), thus depriving the court of subject matter jurisdiction.

Oxford never filed a notice of appeal from the February 3 decision. Instead, on March 15, 1999, Stilley filed a new complaint against the same defendants named in Oxford's suit, but this second suit was filed on behalf of a new set of plaintiffs — Horton Elzea, John Hoyle, and Ronald Williamson — each of whom actually owned property in Fort Smith. Stilley again filed this lawsuit in the Fort Smith District, but in circuit court, rather than chancery court. Stilley and his new plaintiffs again challenged the 1997 payment of 1996 property taxes; however, it is undisputed that these taxes were paid before the Elzea plaintiffs filed their lawsuit.

The defendant taxing entities again moved to dismiss under Rules 12(b)(6) and 8(a), and also defended on the grounds that, because the taxes were voluntarily paid before suit was filed, any recovery of those tax monies was barred. The Elzea plaintiffs, on the other hand, urged that their suit was merely a re-filing of the original suit filed by Oxford, and that the taxes complained of were paid and collected after that suit was initiated and therefore were involuntary.

Ultimately, both the Elzea plaintiffs and the defendants moved for summary judgment. The circuit court granted summary judgment for the defendants, finding that this second suit involved new plaintiffs and was filed in a different court, and was thus not a "re-filing" of the original chancery action, as the plaintiffs contended. Because the second suit was brought in circuit court two years after the Elzea plaintiffs had already paid the 1997 taxes in issue, the court found the plaintiffs were barred from recovering taxes that they had voluntarily paid.

We find this to be a correct application of our law. In *Austin v. Austin*, 241 Ark. 634, 409 S.W.2d 833 (1966), this court held that "a dismissal . . . leaves the situation as though no suit had ever been brought, and it has the effect of an absolute withdrawal of the claim and leaves [the] defendant as though he had never been a party." *Austin*, 241 Ark. at 638, 409 S.W.2d at 836. Because the chancellor dismissed Oxford's original action, that suit is treated as though it never existed. For that reason, Stilley's second suit brought on behalf of the Elzea plaintiffs could not relate back to the date of the original chancery suit, thus removing the basis for their claim that the 1996 taxes they paid in 1997 after the Oxford action were paid involuntarily. At the time of the payment of the disputed

taxes, none of the circuit court plaintiffs were parties to the action challenging the assessment of property taxes. Plaintiffs do not contend their tax payments were coerced. Therefore, there is no basis for the imposition of an "involuntary" status on any tax payments made by the plaintiffs to this suit.

Arkansas has consistently followed the common-law rule that prohibits the recovery of voluntarily paid taxes, except where a recovery is authorized by a statute without regard to whether the payment is voluntary or compulsory. We follow this rule even when an illegal-exaction claim is based, as it was here, on constitutional grounds. *See Mertz v. Pappas*, 320 Ark. 368, 896 S.W.2d 593 (1995); *City of Little Rock v. Cash*, 277 Ark. 494, 644 S.W.2d 229 (1982). We have held that taxes paid after the filing of a complaint are considered to be paid involuntarily, and thus recoverable. *See Hoyle v. Faucher*, 334 Ark. 529, 975 S.W.2d 843 (1998). In this case, as we have pointed out, the taxes were assessed in 1996 and paid in 1997. The Elzea lawsuit filed by Stilley was not filed until 1999; therefore, because the taxes were deemed voluntarily paid and unrecoverable by the plaintiffs, the circuit court properly granted the defendants' motions for summary judgment.[1]

The plaintiff-appellants make one other argument which we need not address. They argue that the savings statute, Ark. Code Ann. § 16-56-126 (1987) should apply and that it should somehow recreate an "involuntary taxpayer" status. However, this statute is only used when the original statute of limitations period expires in the interim between the filing of the complaint and the time at which either a nonsuit is entered or the judgment is reversed or arrested. The statute "only applies to those causes of action which ... would otherwise be barred before the running of one year from the time of taking such nonsuit." *Shelton v. Jack*, 239 Ark. 875, 395 S.W.2d 9 (1965) (citing *Love v. Cahn*, 93 Ark. 215, 124 S.W.2d 259 (1909)). However, in this situation, the original statute of limitations had not yet expired, and thus, the savings statute is

[1] The defendant-appellees raise a number of other arguments for reversal with respect to the propriety of the appellants' notice of appeal. For instance, the appellees point out that the plaintiff-appellants nominally appealed from the order of the circuit court, but the only issues and arguments raised in the appellants' brief concern the order dismissing the suit from *chancery* court, from which no notice of appeal was ever filed. However, while there appears to be some merit in some of the appellees' arguments, we do not reach them, because we decide the case on the basis of the voluntary-payment rule.

simply irrelevant.[2]

For the reasons set out above, we affirm the circuit court's order granting the defendants' motions for summary judgment.

George HAMAKER and Jane Hamaker Bowman *v.* June Hamaker STRICKLAND

99-1274 12 S.W.3d 210

Supreme Court of Arkansas
Opinion delivered March 9, 2000

[2] Defendant-appellee Westark Community College also points out, correctly, that Ark. R. Civ. P. 15(c) cannot be used to somehow relate the Elzea suit back to the Oxford suit. This rule permits the amendment of a pleading to "relate back" to the date of the original pleading. Its purpose is *not* to permit the relation back of an entirely separate lawsuit to a suit that was properly dismissed and never appealed.

Wells Law Office, by: *Bill G. Wells*, for appellant.

Haley, Claycomd, Roper, & Anderson, by: *Richard L. Roper*, for appellee.

DONALD L. CORBIN, Justice. Appellants George Hamaker and Jane Hamaker Bowman appeal the judgment of the Bradley County Probate Court denying their claim against the estate of Robert Lee Hamaker. For reversal, Appellants argue that the probate court erred: (1) in finding that the statute of limitations barred their claim against the estate; and (2) in denying their peti-

tion to compel an inventory of the estate. This case was certified to us from the Arkansas Court of Appeals pursuant to Ark. Code Ann. § 28-1-116(a) (1987); thus our jurisdiction is pursuant to Ark. Sup. Ct. R. 1-2(d). We conclude that the probate court was without jurisdiction to decide this matter, and we reverse.

This case involves a dispute over proceeds from the sale of timber from land owned as a tenancy in common. The record reveals that Robert Lee Hamaker and Reaves Hamaker were brothers who inherited forty acres of land in Banks, Arkansas, from their father George Hamaker. Robert married several times, but never had any children. Reaves married and had two children, Appellants. Robert lived on the land in Banks, while Reaves moved his family to Florida. Following the death of their father, Appellants gained title to the forty acres of land as tenants in common with their uncle.

In 1988, Robert sold $15,970.04 worth of timber from the land. In 1990, he again sold $32,405.72 worth of timber. He never notified Appellants, his co-tenants, of these sales, or shared the proceeds with them. According to Appellants, they visited this property very little. They contend that they did not learn of the timber sales until after their uncle's death on June 6, 1995. Appellant George Hamaker testified that he noticed much of the timber had been removed from the land when he visited the property after his uncle's funeral. George in turn notified his sister Jane of the timber removal. Appellants then made inquiries regarding the timber and discovered the two prior sales by their uncle.

Robert died testate, and his will was admitted to probate on June 19, 1996. That will named his widow, Appellee June Hamaker Strickland, as sole beneficiary, as well as personal representative of his estate. The will also provided that in the event his wife predeceased him, his estate would then pass to Appellants. Notice of the will was first published on June 26, 1996. Appellants, however, claimed they did not receive notice until September 21, 1996. Nevertheless, they filed a claim against the estate for $24,187.88, one-half of the proceeds from the sale of the timber, on September 16, 1996. Appellee filed a response, arguing that the claim was barred by the statute of limitations. Appellants subsequently filed a petition with the probate court seeking an order to compel an inventory of their uncle's estate.

A hearing was held on March 1, 1999, during which the parties stipulated to the facts surrounding the two timber sales. Appellants testified that they visited the land infrequently and did not learn of the timber removal until after the death of their uncle. After receiving briefs on the issue, the probate judge found that the statute of limitations began to run at the time that Appellants' uncle sold the timber, thus barring Appellants' claim. Furthermore, he denied the parties' motion to compel an inventory of the estate. From these orders come this appeal.

Appellants argue on appeal that their uncle as a tenant in common was a fiduciary and had a confidential relationship with them. Therefore, Appellants assert that the statute of limitations did not begin to run until they received notice of the sale. Appellee responds that Appellants' cause of action sounds in trespass, and that the three-year statute of limitations began to run at the time of the trespass. Although neither party raises the issue, we reverse on the ground that the probate court lacked jurisdiction to hear this matter.

Subject-matter jurisdiction is always open, cannot be waived, can be questioned for the first time on appeal, and can even be raised by this court. *Hilburn v. First State Bank*, 259 Ark. 569, 535 S.W.2d 810 (1976). In fact, this court has a duty to determine whether or not we have jurisdiction of the subject matter of an appeal. *Id.* The probate court is a court of special and limited jurisdiction, even though it is a court of superior and general jurisdiction within those limits. *Smith v. Smith*, 338 Ark. 526, 998 S.W.2d 745 (1999); *Hilburn*, 259 Ark. 569, 535 S.W.2d 810. It has only such jurisdiction and powers as are expressly conferred by statute or the constitution, or necessarily incident thereto. *Id.* The constitution vested in the probate courts exclusive original jurisdiction "in matters relative to the probate of wills, the estates of deceased persons, executors, administrators, guardians, and persons of unsound mind and their estates, as is now vested in courts of probate, or may be hereafter prescribed by law." Ark. Const. art. 7, § 34, as amended by Amend. 24, § 1; *Hilburn*, 259 Ark. at 572, 535 S.W.2d at 812. The judge of the probate court shall be responsible for trying all issues of law and of facts arising in causes or proceedings within the jurisdiction of his court. *Id.* The probate court, however, lacks jurisdiction to determine contests over property rights and titles between the personal representative and third par-

ties or "strangers" to the estate. *Smith*, 338 Ark. 526, 998 S.W.2d 745.

We have defined a "stranger" to the estate as one who is not an heir, distributee or devisee of the decedent, or a beneficiary of or claimant against the decedent's estate. *Id.* It is true that Appellants in the present matter were designated as contingent beneficiaries in their uncle's will. Mrs. Hamaker, however, did not predecease her husband, and thus, became the sole heir to his estate. Appellants, therefore, can no longer be considered beneficiaries of their uncle's estate.

Moreover, Appellants cannot be considered claimants to the estate. In *Pickens v. Black*, 316 Ark. 499, 872 S.W.2d 405 (1994), this court held that the appellants' claim to real property based on an alleged oral contract between them and their father and their status as remaindermen were not claims against the estate, but rather represented claims made adversely to the estate by those who were not beneficiaries of the estate. That is the situation now before us. Appellants' claim against the estate is not a claim made as beneficiaries; rather, it is a claim made adversely to the estate by parties with no legal or equitable rights under the estate. The following passage from *Ellsworth v. Cornes*, 204 Ark. 756, 165 S.W.2d 57 (1942), proves enlightening to the present situation:

> The general rule, supported by our own cases, is stated in Gary's Probate Law, 3d Ed., § 23, p. 20, relative to the power of the probate court to determine the title to contested property, and it is limited as to contestants "to those interested in such property as equitably or legally entitled to some distributive share therein or in the residue, and to creditors who voluntarily and upon general notice and without special citation present their claims. All controversies between executors, administrators and guardians, or those interested in the particular estate, and other persons not interested in it, must be settled in another forum." *King v. Stevens*, 146 Ark. 443, 225 S.W. 656, and *Thomas v. Thomas*, 150 Ark. 43, 233 S.W. 808.

Accordingly, we cannot say that Appellants are claimants against their uncle's estate simply by virtue of the fact that they claim entitlement to money owed to them by their uncle at the time of his death. Because Appellants are strangers to the estate, the probate court lacked jurisdiction to decide the dispute over the timber

proceeds. The foregoing decision does not preclude Appellants from filing a cause of action in a court with proper jurisdiction.

Reversed and dismissed without prejudice.

Richard Ottis CARMICHAEL *v.* STATE of Arkansas

CR 99-1121 12 S.W.3d 225

Supreme Court of Arkansas
Opinion delivered March 9, 2000

[redacted]

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

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

RAY THORNTON, Justice. Appellant Richard Ottis Carmichael was convicted of capital murder and sentenced to life imprisonment. Pursuant to *Anders v. California*, 386 U.S. 738 (1976), and our Ark. Sup. Ct. R. 4-3(j)(1), his attorney has filed a motion to withdraw and a brief stating that there is no merit to the appeal previously filed with this court. Appellant's brief filed by counsel offers two rulings adverse to appellant and states that there are no meritorious grounds for appeal. The State agrees that there is no merit to appellant's appeal and appellant has not filed a *pro se* brief arguing additional points for reversal. Based on our review of the issues raised by appellant, together with our consideration of the entire record pursuant to Ark. Sup. Ct. R. 4-3(h), we conclude that there is no merit to the issues raised by appellant, and further that there are no errors with respect to rulings adverse to appellant. Accordingly, we affirm appellant's conviction and sentence, and grant counsel's motion to be relieved.

The State charged appellant with capital murder for causing the death of Ms. Terry Kirton, alleging that he murdered the victim with the premeditated and deliberated purpose of causing her death. The evidence presented at trial revealed that police officers responding to a call from appellant at his apartment on the morning of September 9, 1997, found the victim's partially covered body lying on the couch. Appellant told the officers that after a day of drinking together, he had gone to sleep and awoke to find Ms. Kirton unresponsive. He also volunteered that he had not killed her, a statement the officers found odd because her death was, at that time, considered only a "suspicious death," not a homicide.

Over the course of the investigation, detectives conducted several interviews with appellant about the circumstances of the victim's death. Initially, appellant told detectives that he had invited the victim over and they had gotten drunk and had sex several times

during the day. He said that the last sex act had taken place on the couch and he had then fallen asleep. When he awoke, he found blood on the floor and on the toilet seat and could not rouse Ms. Kirton.

After the medical examiner began his autopsy of the body, he notified police that Ms. Kirton had suffered trauma to the anal area and that her death appeared to be a homicide. Officers then sought and received consent to search appellant's apartment and discovered several items investigators described as "sexual devices," including a pair of table legs wrapped in electrical tape and a length of plastic pipe attached to a pair of boxer shorts. Upon further questioning, appellant admitted that the couple had anal sex and that he had requested the victim use one of the devices on him, but he denied having used any foreign objects on her. He denied that she was bleeding when he went to sleep, or that he had harmed her in any way.

Three days later, after the investigating officers received the medical examiner's report concluding that the cause of Ms. Kirton's death was homicide, appellant agreed to give police a third statement. He repeated his earlier version of meeting the victim in MacArthur Park and getting drunk and having "rough sex" with her in his apartment, but added that he had "lost control" during sex and had hit her, and that the two had fought. He also said that they had used the sexual devices found by the police on one another, including inserting one of them in the victim rectally. The medical examiner's report had revealed that the cause of death was strangulation.

Sufficiency of the Evidence

The first adverse ruling we address is the trial court's denial of appellant's motion for a directed verdict. At the close of the State's case, appellant moved for a directed verdict, arguing that the evidence was insufficient to establish that he had acted with premeditation and deliberation. The trial court denied the motion, and, because we find no error in this ruling, we affirm.

On appeal, we treat a motion for a directed verdict as a challenge to the sufficiency of the evidence. When we review a challenge to the sufficiency of the evidence, we will affirm the

conviction if there is substantial evidence to support it, when viewed in the light most favorable to the State. *Cobb v. State*, 340 Ark. 240, ___ S.W.3d ___ (2000). Substantial evidence is that which is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other, without mere speculation or conjecture. The evidence may be either direct or circumstantial. *Id.* Only evidence supporting the verdict will be considered. Circumstantial evidence can provide the basis to support a conviction, but it must be consistent with the defendant's guilt and inconsistent with any other reasonable conclusion. Whether the evidence excludes every hypothesis is left to the jury to decide. Guilt may be proved in the absence of eyewitness testimony, and evidence of guilt is not less because it is circumstantial. *Id.*

The evidence presented at trial was sufficient to support appellant's capital murder conviction. Pursuant to Ark. Code Ann. § 5-10-101(a)(4) (Repl. 1997), a person commits capital murder if "with the premeditated and deliberated purpose of causing the death of another person, he causes the death of any person." *Id.* Premeditated and deliberated murder occurs when it is the killer's conscious object to cause death and he forms that intention before he acts and acts as a result of a weighing of the consequences of his course of conduct. *See Davis v. State*, 251 Ark. 771, 475 S.W.2d 155 (1972). Premeditation is not required to exist for a particular length of time. *McFarland v. State*, 337 Ark. 386, 989 S.W.2d 899 (1999). It may be formed in an instant and is rarely capable of proof by direct evidence but must usually be inferred from the circumstances of the crime. *Id.* Similarly, premeditation and deliberation may be inferred from the type and character of the weapon, the manner in which the weapon was used, the nature, extent, and location of the wounds, and the accused's conduct. *Id.* One can infer premeditation from the method of death itself where the cause of death is strangulation. *Id.* (*citing Mulkey v. State*, 330 Ark. 113, 952 S.W.2d 149 (1997).

The autopsy revealed that the victim had numerous abrasions and bruises on her body and face, including a contusion to her skull and a laceration on her left ear. In addition, she suffered injuries to her liver and intestines consistent with having been hit or kicked. She also had extensive hemorrhages in her scalp tissue and in the inner aspects of her skull, which the medical examiner testified

were consistent with having been punched or slapped and were sufficiently serious to cause a loss of consciousness.

The autopsy further revealed extensive bruising, distention, and lacerations to the anus and rectum, as well as a four-inch-long tear of the intestines and bowel. This was consistent with appellant's statement to police with regard to the sexual devices that he had put the "big stick" up in her rectum "quite a ways." Lastly, the autopsy indicated evidence of strangulation, including abrasions around the neck and hemorrhaging of the neck muscles. The conclusion drawn from the autopsy was that the victim died as a result of strangulation, with blunt force injuries to her head, abdomen, and rectum. The medical examiner opined that it would have taken between one and five minutes to strangle Ms. Kirton to death, and he concluded that the head, stomach, and rectal injuries occurred prior to death.

We conclude that the testimony of the medical examiner was sufficient to support the jury's verdict of premeditation and deliberation as those terms are defined under Arkansas law. Despite appellant's testimony that he was too drunk to recall much of what occurred, the undisputed evidence was that the victim died of strangulation and that prior to her death she was savagely beaten and sodomized with one or more of several large objects. Furthermore, the testimony of the medical examiner established that it would take anywhere from one to five minutes to cause her death by strangulation, sufficient time in which appellant would have been able to reflect upon his actions and their consequences. The jury could easily have inferred from the numerous injuries to the victim's internal organs, as well as the autopsy evidence that she was strangled, that appellant acted with the purpose to cause her death. *Mulkey, supra.* The State introduced sufficient evidence to show that appellant acted with premeditation and deliberation when he killed Ms. Kirton, and, accordingly, the trial court's denial of appellant's request for a directed verdict was not erroneous.

Constitutionality of Statutes

The only other objection raised in this case was appellant's motion to dismiss the capital murder charge because of its asserted overlap with the first-degree murder statute, Ark. Code Ann. § 5-

10-102 (Repl. 1997). Appellant argued at trial that the same conduct was proscribed in both statutes, thus rendering the capital murder statute unconstitutionally void for vagueness because it failed to give adequate notice of the proscribed conduct, thus violating due process and depriving him of equal protection under the law. In his motion to the trial court, appellant requested that the capital murder charge be dismissed, or, in the alternative, that the trial court omit the jury instruction on first-degree murder as a lesser-included offense to capital murder, offering only second-degree murder instruction in its stead. The trial court denied appellant's motion.

The capital murder statute, Ark. Code Ann. § 5-10-101(a)(4) (Repl. 1997), provides that a person commits capital murder if: "With the premeditated and deliberated purpose of causing the death of another person, he causes the death of another person. . . . ". *Id.* Murder in the first degree occurs when, "with a purpose of causing the death of another person, he causes the death of another person." Ark. Code Ann. § 5-10-102(a)(2)(Repl. 1997). On numerous occasions, we have held that there is no constitutional infirmity in the overlapping of the "premeditated and deliberated" *mens rea* in the capital murder statute and the "purposeful" *mens rea* in the first-degree murder statute. *Camargo v. State*, 327 Ark. 631, 940 S.W.2d 464 (1997)(*citing Nooner v. State*, 322 Ark. 87, 907 S.W.2d 677 (1995); *Greene v. State*, 317 Ark. 360, 878 S.W.2d 384 (1994); *Sanders v. State*, 317 Ark. 328, 878 S.W.2d 391 (1994); *Buchanan v. State*, 315 Ark. 227, 866 S.W.2d 395 (1993); *Mauppin v. State*, 309 Ark. 235, 831 S.W.2d 104 (1992); *Van Pelt v. State*, 306 Ark. 634, 816 S.W.2d 607 (1991); *Smith v. State*, 306 Ark. 483, 815 S.W.2d 922 (1991); *White v. State*, 298 Ark. 55, 764 S.W.2d 613 (1989)). We have explained that it is impossible to avoid the use of general language in the definition of offenses, and that one or the other offense may be established depending on the testimony of witnesses. *Id.* We have consistently found no constitutional or other impediment to the discretion conferred by the "overlap" upon the State to choose between the two laws in charging a particular homicide. *Coulter v. State*, 304 Ark. 527, 804 S.W.2d 348, *cert. denied* 502 U.S. 829 (1991).

Appellant concedes in his brief that he was not prejudiced by any alleged lack of difference between the *mens rea* of the two statutes. The jury was instructed on the additional charge of mur-

der in the second degree, but found appellant guilty of capital murder, thus never reaching the question of the lesser-included offenses. *See* AMI Crim. 2d 302 ("If you have a reasonable doubt of the defendant's guilt on the charge of capital murder, you will then consider the charge of murder in the first degree"). We find no error in the trial court's denial of appellant's motion to dismiss on the basis of an asserted overlap between the capital murder charge and that of first-degree murder.

In conclusion, because we find this appeal to be without merit, counsel's motion to be relieved is granted and the judgment affirmed.

Affirmed.

Jeffrey HICKS and Ricardus Flowers *v.* STATE of Arkansas

CR 99-871 12 S.W.3d 219

Supreme Court of Arkansas
Opinion delivered March 9, 2000

[redacted]

Joe Kelly Hardin, for appellant Jeffrey Hicks.

James P. Clouette, for appellant Ricardus Flowers.

Mark Pryor, Att'y Gen., by: *Michael C. Angel*, Ass't Att'y Gen., for appellee.

RAY THORNTON, Justice. Appellants Jeffrey Hicks and Ricardus Flowers were charged with aggravated robbery, theft of property, and residential burglary as perpetrators of crimes connected with the burglary of Doyle Keith and Debbie Ann Coddington's home in Saline County. They were arrested while fleeing the crime scene and were tried together. The jury returned verdicts convicting each appellant of the charged crimes. Flowers was sentenced to twenty-five years' imprisonment for the aggravated-robbery offense and twenty years' imprisonment for the theft-of-property offense and the residential-burglary offense, with the sentences to be served concurrently. Based on Hicks's status as a habitual offender, he was sentenced to life imprisonment, a sentence reviewable by this court in accordance with Ark. Sup. Ct. R. 1-2(a)(2). Because there was only one trial and one record, we consider their appeals together. Neither appellant has questioned the sufficiency of the evidence in support of their convictions, so we will only summarize the evidence. Each appellant makes a different assignment of error in seeking reversal, and we affirm the convictions.

On December 28, 1997, the appellants, accompanied by John Fell, who remained in the car, entered the Coddington home while Ashley Coddington, Doyne and Debbie Coddington's daughter, was on the telephone to a friend. Ms. Coddington told her friend of the intrusion, and when the phone was disconnected, the friend called 911, and the dispatcher sent a police officer to investigate.

Hicks held the Coddington family at gunpoint, requiring Mrs. Coddington to remove her jewelry while Flowers struck Ashley Coddington's boyfriend, Ronnie Heinz, in the head with his gun. Flowers threatened to shoot Mr. Heinz and forced him to assist in collecting guns and electronic equipment from the home and from Mr. Heinz's car.

As the appellants fled in the getaway car, Mr. Heinz pursued them in his car, using his cellular phone to report their progress to the 911 dispatcher, describing the location of the getaway car. The dispatcher kept Saline County Deputy Dwain Davidson posted, and when Deputy Davidson's patrol car met the fleeing suspects and Mr. Heinz's car on Vimy Ridge Road, he promptly turned his patrol car around, turned on his emergency lights and sirens, and gave chase. The patrol car quickly passed Mr. Heinz's car, but the fleeing suspects did not stop until they had entered Pulaski County. Deputy Davidson was quickly joined by other police officers, who assisted in the apprehension and arrest of the appellants, as well as in the recovery of the stolen property.

Criminal informations were filed against Hicks and Flowers on February 3, 1998, and on April 22, 1998, Hicks filed a motion for discovery. At a hearing held on July 7, 1998, Hicks failed to appear. However, his attorney was present but did not know where Hicks could be found. A bench warrant was issued for his arrest but was later dissolved when it was determined that Hicks's parole had been revoked on another sentence, and he had been returned to the Department of Correction until October 1998, when he was returned to the Saline County Jail. On October 20, 1998, Hicks was brought before the Saline County Circuit Court on the charges filed in this case, and the court quashed the failure-to-appear warrant.

On September 20, 1998, Flowers had requested a continuance until October 27, 1998, and at that hearing, held on October 27,

1998, "officially waive[d] speedy trial" between that date and the trial setting, February 19, 1999. On December 10, 1998, Hicks filed a motion requesting a severance of his case from Flowers's case, but no ruling was obtained on the motion until April 7, 1999. Hicks did not raise speedy-trial considerations as a reason for the requested severance. On February 18, 1999, Hicks filed a motion, adopting each and every motion previously filed by his co-defendant, Flowers, and on that date joined in a new motion for a continuance.

Flowers filed two motions to dismiss, one alleging a violation of his right to a speedy trial, and the other a motion to dismiss based on an alleged illegal arrest and on March 12, 1999, a hearing was held on these motions. The trial court denied Flowers's motion to dismiss based on speedy-trial violations and Flowers did not pursue this argument on appeal. With respect to Flowers's allegation of an illegal arrest, after hearing testimony from Deputy Dwain Davidson, the trial court found that Deputy Davidson was in fresh pursuit when he arrested Flowers and denied Flowers's motion. On April 7, 1999, the trial court denied Hicks's December 10, 1998, motion for severance of the two cases, and the matter was tried to a jury. Both appellants were convicted, and from those convictions they bring their appeals. Each appellant raises one point on appeal, and we affirm the trial court on both points.

Hicks v. State

Hicks's sole point on appeal is that the trial court erred in its denial of his motion to dismiss on the grounds that his right to a speedy trial under Ark. R. Crim. P. 28.1 (1999) had been violated.

Rule 28.1 of the Arkansas Rules of Criminal Procedure requires that any defendant charged with an offense in circuit court and held to bail "shall be entitled to have the charge dismissed with an absolute bar to prosecution if not brought to trial within twelve months" from the date of the arrest. *Id.* When a defendant is not brought to trial within a twelve-month period, the State has the burden of showing the delay was legally justified. *Webb v. Ford*, 340 Ark. 281, 9 S.W.3d 504 (2000). Once the defendant has made a *prima facie* showing of a violation of Rule 28.1, the State bears the burden of showing that there has been no violation, in that some of

the time comprising the one-year period provided in the rule is to be excluded as "legally justified." *Jones v. State*, 329 Ark. 603, 951 S.W.2d 308 (1997). It is generally recognized that a defendant does not have to bring himself to trial and is not required to bang on the courthouse door in order to preserve his right to a speedy trial. *Id.* The burden is on the courts and the prosecutors to see that trials are held in a timely fashion. *Id.* Under Rule 28.2 of the Arkansas Rules of Criminal Procedure, the speedy-trial period commences to run "without demand by the defendant." *Id. See also Gwin v. State*, 340 Ark. 302, 9 S.W.3d 501 (2000).

Rule 28.3 of the Arkansas Rules of Criminal Procedure provides in relevant part that:

> the following periods shall be excluded in computing the time for trial. Such periods shall be set forth by the court in a written order or docket entry, but it shall not be necessary for the court to make the determination until the defendant has moved to enforce his right to a speedy trial pursuant to Rule 28 unless it is specifically provided to the contrary below. The number of days of the excluded period or periods shall be added to the time applicable to the defendant as set forth in Rules 28.1 and 28.2 to determine the limitations and consequences applicable to the defendant.
>
> * * *
>
> (c) The period of delay resulting from a continuance granted at the request of the defendant or his counsel. All continuances granted at the request of the defendant or his counsel shall be to a day certain, and the period of delay shall be from the date the continuance is granted until such subsequent date contained in the order or docket entry granting the continuance.
>
> * * *
>
> (g) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and there is good cause for not granting a severance. In all other cases the defendant acting with due diligence shall be granted a severance so that he may be tried within the time limits applicable to him.

Ark. R. Crim. P. 28.3 (1999).

In the present case, Hicks was arrested for his crime on December 28, 1997, and was tried on April 7, 1999. However, based on the numerous continuances attributable to Hicks and his co-defendant, Flowers, it seems likely that Hicks's right to a speedy trial had not been violated. We note that on December 10, 1998, Hicks filed a motion requesting severance from Flowers's case, but no ruling was made on that motion until the date of trial. On February 18, 1999, Hicks filed a motion adopting "each and every motion" that had been filed by his co-defendant, Flowers, who had previously moved for several continuances, and joined in a new motion for an additional continuance. We also note that on February 19, 1999, the trial court continued the trial from February 19, 1999, to April 7, 1999, and excluded this time from the speedy-trial calculation on the motion of both defendants.

Additionally, Hicks failed to include as a part of the record the docket sheet which might reflect relevant court notations that are pertinent to resolving his speedy-trial claim, and without this information we are unable to review this issue on appeal. In *Scott v. State*, 337 Ark. 320, 989 S.W.2d 891 (1999), a case involving an appellant's claim of violation of his right to speedy trial, we wrote:

> ... we affirm on the basis that Appellant failed to include the trial court's docket sheet in the record on appeal. Without the benefit of being able to examine the entries and notations on the docket sheet, we are at a disadvantage to determine whether the trial court erred in ruling that certain periods of time were excludable under Rule 28.3. It is well settled that the appellant bears the burden of producing a record that demonstrates error, and thus we do not consider on appeal matters outside of the record.

Id. See also, *Odum v. State*, 311 Ark. 576, 845 S.W.2d 524 (1993); *Sullinger v. State*, 310 Ark. 690, 840 S.W.2d 797 (1992).

While it appears that the time attributable to continuances granted to Flowers and adopted by Hicks, considered together with motions for continuances filed by both co-defendants, tolled Hicks's speedy-trial calculation, we are unable to reach the merits of this argument on appeal because Hicks failed to include the docket sheet in the record, and therefore the trial court is affirmed.

On appeal, Flowers contends that the trial court erred when it denied his motion for a mistrial or alternatively a continuance after an alleged discovery violation. Specifically, Flowers argues that Deputy Dwain Davidson's testimony at trial showed that Deputy Davidson had taken measurements to ensure he was in Saline County when he initially observed Flowers, that the existence of these measurements was not disclosed to Flowers prior to trial, and therefore that the trial court should have granted a mistrial or a continuance.

The standard of review for imposing sanctions for discovery violations is whether there has been an abuse of discretion. *MacKintrush v. State*, 334 Ark. 390, 978 S.W.2d 300 (1998). A prosecutorial discovery violation does not automatically result in reversal. *Clements v. State*, 303 Ark. 319, 796 S.W.2d 839 (1990). The key in determining if a reversible discovery violation exists is whether the appellant was prejudiced by the prosecutor's failure to disclose. Absent a showing of prejudice, we will not reverse. *Rychtarik v. State*, 334 Ark. 492, 976 S.W.2d 374 (1998).

Rule 17.1 of the Arkansas Rules of Criminal Procedure provides:

> (a) subject to the provisions of Rule 17.5 and 19.4, the prosecuting attorney shall disclose to defense counsel, upon timely request, the following material and information which is or may come within the possession, control, or knowledge of the prosecuting attorney:
>
> > (i)the names and addresses of persons whom the prosecuting attorney intends to call as witnesses at any hearing or at trial....

Ark. R. Crim. P. 17.1. We have held that this rule requires the prosecutor to provide the names and addresses of the State's witnesses, but not the substance of their testimony. *Holloway v. State*, 310 Ark. 473, 837 S.W.2d 464 (1992). We have also noted that a defendant in a criminal case cannot rely upon discovery as a total substitute for his own investigation. *Rychtarik, supra.*

When a party fails to comply with a discovery rule, the court may exercise any of the following options: order that

party to permit the discovery or inspection of materials not previously disclosed; grant a continuance; prohibit the party from introducing the material; or enter another order that the court deems proper under the circumstances. Ark. R. Crim. P. 19.7. It is within the trial court's discretion which sanction to employ. *Rychtarik, supra.* When testimony 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. *Id.* We have said that a mistrial is an extreme sanction for a discovery violation and is to be avoided unless the fundamental fairness of the trial itself is at stake. *Clements, supra.* We have also held that the action of the trial court in denying a motion for continuance will not be reversed in the absence of a showing of such a clear abuse of the court's discretion as to amount to a denial of justice, and the burden rests upon appellant to show that there has been such an abuse. *Heffernan v. State*, 278 Ark. 325, 645 S.W.2d 666 (1983).

In our analysis of this case, we note that Flowers suffered no prejudice as a result of Deputy Davidson's testimony at trial. There was no concealment by the State of the distances involved nor was any evidence complained of exculpatory in nature. Flowers was provided a list of the witnesses the State intended to call at trial prior to trial and could have interviewed Deputy Davidson or conducted his own investigation into the matter. Next, based on Deputy Davidson's testimony at the pretrial hearing, Flowers was not misled about the nature of his testimony at trial. Specifically, we note the following testimony from the pretrial hearing:

> Q. [PROSECUTOR STANDRIDGE] Did you meet those vehicles in route to Cherylwood?
>
> A. [DEPUTY DAVIDSON] Yes, sir, I did.
>
> Q. And do you recall where you first met them?
>
> A. Yes, sir, it was approximately three-tenths of a mile north of Barth Road.
>
> Q. Was that in Saline County?
>
> A. Yes, sir, it was.
>
> Q. There was some mention about Davis Elementary School

A. Yes, sir.

Q. Where is that in relation to where you were and these vehicles were?

A. It's about a tenth of a mile from the county line.

* * *

Q. Where did you turn around at?

A. It was in a driveway approximately two tenths — or three tenths of a mile north of Barth Road.

Q. And was that in Saline County?

A. Yes, sir.

We observe that this testimony contains the same proof of measurements as that advanced at trial and that there appears to be no concealment of the fact that measurements had been made. The essence of Deputy Davidson's trial testimony was substantially the same as his testimony at the pretrial hearing and merely confirmed his pretrial testimony that he was in Saline County when he began pursuit.

Any failure to disclose that Deputy Davidson carefully measured the distance involved before giving his testimony did not require the trial court to grant a mistrial or a continuance. We conclude that the State's failure to provide Flowers with the information that exact measurements had been made supporting Deputy Davidson's trial testimony did not adversely impact upon the fundamental fairness of the trial. Because there was no clear showing of an abuse of discretion by the trial court, Flowers's requests for a mistrial or a continuance were properly denied, and we affirm.

4-3(h) Review

In compliance with Ark. Sup. Ct. R. 4-3(h), the record has been examined for all objections, motions, and requests made by either party that were decided adversely to appellant, and no error has been found.

Affirmed.

Bobby and Angie ULLOM *v.*
ARKANSAS DEPARTMENT of HUMAN SERVICES

99-816 12 S.W.3d 204

Supreme Court of Arkansas
Opinion delivered March 9, 2000

F. Lewis Steenken, for appellant.

Frank Arey, Chief Counsel and *Johnny E. Gross*, Office of Chief Counsel, for appellee.

RAY THORNTON, JUSTICE. Appellants, Bobby and Angie Ullom, appeal from the judgment of the Benton County Chancery Court terminating their parental rights to their three-year-old child, D.U. For reversal, appellants argue that the chancellor's findings were not supported by clear and convincing evidence. In a three-to-three decision, the court of appeals affirmed the chancellor.[1] We accepted review of this case and affirm the trial

[1] *See Ullom v. Arkansas Dep't of Human Servs.*, 67 Ark. App. 77, 992 S.W.2d 813

court.

Facts and Procedural History

Appellants are the parents of D.U. born August 1, 1996. On August 21, 1996, D.U. was taken to St. Mary's Hospital. While at the hospital, it was determined that she had a spiral fracture of her left arm. Appellants could not explain how the accident occurred. Suspecting that D.U. had been abused, the hospital contacted appellee, the Arkansas Department of Human Services, who took the child into custody.

On September 3, 1996, a probable-cause hearing was held in the matter. At the probable-cause hearing, Michelle Murphy, an employee of the Department of Human Services testified that on the evening of August 21, 1996, she saw D.U. at the hospital and investigated the circumstances surrounding her injury. Ms. Murphy noted that appellants were unable to offer an explanation as to how the injury occurred and, according to the doctor, a three-week-old child is not mobile enough to sustain a spiral fracture on her own.

Bobby Ullom also testified at the hearing, stating that on August 20, 1996, he was at his parents' home along with his wife and daughter. He noted that while they were there his eighteen-month-old nephew and nine-month-old niece were "constantly coming up [to D.U.] and kissing on her and pulling on her..." Mr. Ullom further testified that they left his parents' home between 8:30 and 9:30 because D.U. was "fussy" and that his wife was up with D.U. all night but that they thought the baby had "gas." He also stated that the next day when he got home from work his wife said D.U. had been "fussy" all day. When he went to pick her up he heard a "pop," D.U.'s arm fell, and she began to scream. Finally, Mr. Ullom stated that he had no explanation for the child's injury.

On September 17, 1996, an adjudication hearing was held. Angie Ullom testified that she did not know how D.U. was injured on August 21, 1996, but that she knew D.U. could not have caused the injury herself. Mrs. Ullom further testified that the only people

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(1999).

that had contact with D.U. on that day were she and Mr. Ullom. Finally, she noted that the broken arm caused D.U. intense pain.

Bobby Ullom reiterated his previous testimony from the probable-cause hearing at this hearing. Mr. Ullom also stated that he had had trouble controlling his anger when he was growing up and that he was abused by his stepmother when he was younger. Finally, Mr. Ullom, once again, noted that he did not know how D.U. was injured.

The chancellor determined that the preponderance of the evidence showed that the child's injury was caused by abuse and the child was found to be dependent-neglected. Appellee retained custody of D.U., and appellants were granted supervised visitation.

Appellants attended parenting classes, participated in counseling, and continued supervised visitation with D.U. pursuant to the case plan developed by appellee. After completing the appellee's requirements, and pursuant to a court order following a review hearing, appellants were allowed to have unsupervised visitation at their home.

On February 8, 1997, at the initial unsupervised visit with appellants, D.U. was again injured, sustaining extensive bruising on and around her face. Appellants claimed that a toy had fallen on her face causing the injury. D.U. was taken to Bates Hospital by her foster mother.

On February 18, 1997, appellee filed a petition to terminate appellants' parental rights. Appellee sought termination of appellants' parental rights pursuant to Ark. Code Ann. § 9-27-341 (Repl. 1997)[2]. Specifically, appellee alleged that:

> (a) the parents of the juvenile have abandoned the juvenile, or have executed consent to termination of parental rights, subject to the court's approval, or adoption of the juvenile or the juvenile court has found the juvenile victim dependent-neglected as a result

[2] We note that this statute has been amended numerous times since the beginning of this case. Specifically, the statute was amended in the 1995 replacement volume, in the 1997 replacement volume, and once again in the 1999 replacement volume. However, we also note that the substance of the statute has not been amended but that changes have been made to the numbering of the statutory provisions. We have used the text of the 1997 replacement volume because that was the statutory language relied upon by the chancellor in this case.

of neglect or abuse that could endanger the life of the child, sexual abuse, or sexual exploitation, and which was perpetrated by the juvenile's parent or parents.

(b) the minor child, D.U., has been adjudged to be a dependent-neglected child and currently resides in the care and custody of the Arkansas Department of Human Services pursuant to order of the Benton County Chancery Court, Juvenile Division.

(c) that, subsequent to the filing of the original petition for dependency-neglect, other factors or issues arose which demonstrate that return of the juvenile to the family home is contrary to the juvenile's health, safety, or welfare, and that, despite the offer of appropriate family services, the parent has manifested the incapacity or indifference to remedy the subsequent issues or factors, or rehabilitate the parent's circumstances, which prevents return of the juvenile to the family home.

A termination hearing was held on May 16, 1997. Dr. Barry Allen, who treated D.U. on eleven occasions, testified that he was called to the hospital to examine D.U. in August of 1996. He also testified that according to the x-rays she had a spiral fracture, and noted that this type injury is usually caused by a "twisting motion." Dr. Allen further stated that D.U. was most likely not injured by the actions of a eighteen-month-old child or a nine-month-old child and could not have injured herself to this degree. He questioned the explanation given by appellants, that she had been passed around by relatives the night before they brought her into the hospital and that when they picked her up the next day they heard a popping sound, noting that this was not consistent with a spiral fracture. Dr. Allen also testified that the leading cause of this type of injury in children under the age of three was abuse and that a spiral fracture would be an injury causing severe pain. Finally, he testified that his primary diagnosis was maltreatment syndrome.

Next, Dr. O.L. Henderson testified that causing a spiral fracture would require a great amount of force and that most fractures of this nature occur in children because someone has twisted the child's arm. He stated that this type of injury could have caused either nerve or blood vessel damage, a loss of the limb, and a remote possibility of death.

Finally, Dr. Charles Akin testified that he had seen D.U. on February 8, 1997, when she was brought in to the emergency room

at Bates Hospital for treatment of her second injury. He stated that when he treated D.U., she had "fresh bruising" around her left brow, around her left eye, the left side of the nose, and the cheek, as well as bruising on the right side of her face. Dr. Akin noted that the explanation given for the injury was that a toy had been dropped on the child's face. He expressed his opinion, after examining the toy, that merely dropping the toy could not have caused the type of bruising suffered by D.U. Dr. Akin further noted that if the injury had occurred as explained by appellants the injuries would not have been to both sides of the face.

The termination hearing was concluded on January 2, 1998. Bobby Ullom once again testified at this hearing. However, his testimony regarding the cause of the August 21, 1996, injury changed. Specifically, he testified that when he went to get D.U. from her seat her arm became entrapped in the safety strap and he thought that this could have caused the injury.

On January 23, 1998, the chancellor entered an order terminating appellants' parental rights. The chancellor found:

> (1) that it [is] contrary to the child's best interest and welfare to return her to the parental care and custody of Bobby Ullom and Angie Ullom, and further finds that the Department of Human Services has proven by clear and convincing evidence that the minor child was dependent-neglected as a result of unexplained abuse or neglect that could endanger the life of the child and was perpetrated by the juvenile's parents;
>
> (2) that the Department of Human Services has shown by clear and convincing evidence that subsequent to the filing of the original petition for dependency-neglect, other factors or issues arose which demonstrate that the return of the juvenile to the family home is contrary to the juvenile's health, safety, or welfare, and that, despite the offer of appropriate family services, the parents have manifested the incapacity or indifference to remedy the subsequent issues or factors, or rehabilitate the parent's circumstances, which prevents return of the child to the family home.

It is from this order that appellants appeal. They raise one point on appeal and we affirm the chancellor.

Termination of Appellants' Parental Rights

Appellants contend that the findings supporting the chancellor's order terminating their parental rights was not based on clear and convincing evidence. We have held that when the issue is one involving the termination of parental rights, there is a heavy burden placed upon the party seeking to terminate the relationship. *J.T. v. Arkansas Dep't of Human Servs.*, 329 Ark. 243, 947 S.W.2d 761 (1997). Termination of parental rights is an extreme remedy and in derogation of the natural rights of the parents. *Wade v. Arkansas Dep't of Human Servs.*, 337 Ark. 353, 990 S.W.2d 509 (1999). Parental rights, however, will not be enforced to the detriment or destruction of the health and well-being of the child. *Id.* The facts warranting termination of parental rights must be proven by clear and convincing evidence. In reviewing the trial court's evaluation of the evidence, we will not reverse unless the court's finding of clear and convincing evidence is clearly erroneous. *Baker v. Arkansas Dep't of Human Servs.*, 340 Ark. 42, 8 S.W.3d 499 (2000). Clear and convincing evidence is that degree of proof which will produce in the factfinder a firm conviction regarding the allegation sought to be established. *Id.* In resolving the clearly erroneous question, we must give due regard to the opportunity of the chancery court to judge the credibility of witnesses. Additionally, we have noted that in matters involving the welfare of young children, we will give great weight to the trial judge's personal observations. *Id.*

Appellants argue that the termination was not proper because D.U., was not "out of the home" for more then twelve months as required in Ark. Code Ann. § 9-27-341. Because this argument was not presented to the chancellor at trial, we need not address its merits on review. *See Burke v. Strange*, 335 Ark. 328, 983 S.W.2d 389 (1998). However, we do note that D.U. was removed from the home on September 17, 1996, the petition for termination of appellants' parental rights was filed on February 18, 1997, and the termination order was not entered until January 23, 1998. Accordingly, the child had clearly been out of the home for more than twelve months at the time the termination order was entered.

Appellants also argue that termination of parental rights was not appropriate because appellee failed to pursue meaningful efforts to rehabilitate their home. We cannot agree with appellants' contention. Appellee devised a plan in September of 1996 for

reunification of the family which was followed until the second injury occurred in February of 1997. Specifically, appellee provided appellants with counseling and parenting classes and appellants were allowed visitation with D.U. However, following appellants' participation in the counseling and parenting classes, D.U. suffered a new injury at her initial unsupervised visit with appellants. It was at that time that appellee changed the goal of its plan from reunification to termination of appellants' parental rights. We also note that on both occasions in which D.U. was injured appellants were the only people with the child and neither parent had a plausible explanation for her injuries. Thus, we find that there was clear and convincing evidence that appellee pursued meaningful efforts to rehabilitate the home and that appellants chose to ignore or failed to benefit from the services provided by appellee. Thus, we find no error and affirm the chancellor.

Next, appellants argue that the chancellor erred when he found that appellants manifested an incapacity or indifference to remedy the subsequent issues or factors that demonstrate that return of D.U. to the family home would be contrary to her health, safety, or welfare pursuant to Ark. Code Ann. § 9-27-341. Once again we cannot agree with appellants. The evidence shows that appellants' actions demonstrated a pattern of abuse that is contrary to the health and safety of D.U. Specifically, as the medical evidence revealed, when D.U. was only twenty-one-days-old appellants caused her to suffer a spiral fracture and then, even after receiving family services provided by appellee, on the very next occasion in which they were alone with D.U. she suffered bruising to both sides of her face, injuries for which no satisfactory explanation was provided. The chancellor found that return of D.U. to the family home would be harmful to her health and safety and that appellants manifested an indifference to remedy the situation. Under these circumstances, we cannot say that the chancellor's findings were not based upon clear and convincing evidence. Therefore, we affirm.

Finally, appellants contend that the chancellor's findings were erroneous because it was not established by clear and convincing evidence that D.U.'s injuries endangered her life. The medical evidence established that the injuries suffered by D.U. were severe and very painful. Further, Dr. Henderson testified that the spiral fracture could have been life-threatening. Because we give great deference to the chancellor on witness credibility we must assume

that the chancellor found D.U.'s injuries to be life-endangering. Accordingly, we affirm the chancellor's findings.

Affirmed.

SMITH, J., concurs.

LAVENSKI R. SMITH, Justice, concurring. I join the court's decision to affirm but for different reasons than the majority. The majority erroneously holds that Dr. O.L. Henderson's testimony supports a finding that D.U. suffered injuries that endangered her life. To the contrary, Dr. Henderson, though certainly opining that the injury to D.U.'s arm was serious, stated on direct examination, "[t]he possibility of loss of life would be very remote." On cross-examination, he acknowledged that he observed no life-threatening conditions involving D.U. No one testified the subsequent facial bruises to the child were life-threatening. At base, the trial court's decision to terminate parental rights arose from its stated conviction at the close of testimony that it discounted the parent's testimony explaining the injuries and was convinced the child's injuries were not accidental but the results of intentional abuse. A return of custody to a parent or parents that the court is convinced purposely injured a child is clearly against their best interest.

In juvenile matters, the concern to which all others must yield is the best interests of the child. *Baker v. Arkansas Dep't of Human Servs.*, 340 Ark. 42, 8 S.W.3d 499 (2000). With the exception of a few weeks, D.U.'s entire life has been spent apart from her natural parents. She has now had little or no meaningful contact with them in the last two years. She has been out of their custody for almost three-and-one-half years. At this point, she no doubt, does not even know them as her parents. The need for stability and permanence weigh in favor of affirmance. Yet, I am troubled by the untenable position our law places the ADHS. The agency in this case, and no doubt others, simultaneously pursued reunification with the natural parents and termination of parental rights. The rights of parents to raise their natural children, though subordinate to the children's welfare, remain precious and demand undistracted attention by a service provider that is not likely to become at cross-purposes with itself.

Sharlett CRAIG, Personal Representative of the Estate of Earle L. Berrell, Deceased *v.* Bonita CARRIGO and Edward J. Berrell

99-878 12 S.W.3d 229

Supreme Court of Arkansas
Opinion delivered March 9, 2000
[Petition for rehearing denied April 20, 2000.]

[redacted]

Kay L. Matthews and *William F. Sherman*, for appellant.

No response.

LAVENSKI R. SMITH, Justice. Attorney William Sherman appeals the order of the Pulaski County Probate Court disqualifying him as the attorney for the estate in an ancillary probate proceeding for decedent Earle L. Berrell, who died in Canada. The trial court disqualified Sherman after finding that Sherman appeared to represent not just the general interest of the estate but also the specific interest of one beneficiary to the detriment of other beneficiaries. Sherman argues three points on appeal. First, he contends that the legal arguments he made that were conducive to Arndt's interests under the Canadian will did not justify disqualifying him from representing the estate in the ancillary

proceeding. Second, Sherman argues that the trial court based its finding on insufficient evidence. Third, Sherman argues that he should be able to represent the personal representative in the appeal of this matter despite the fact that he testified below. We find merit in Sherman's points and reverse.

Facts

Earle L. Berrell, age sixty-four, died on October 20, 1997, in Makepeace, Alberta, Canada. At the time of his death, Berrell possessed real and personal property in Canada and Pulaski County, Arkansas. Berrell executed his last will and testament on February 4, 1994, entirely in his own handwriting. This holographic will stated that Berrell had no children and named only one beneficiary, Erika Arndt. This will specifically stated:

> This will makes null and void all previous wills and statements.
>
> In the event of my death, I wish Erika Arndt of Makepeace Alberta to have all of my property both real and personal in both Canada and the State of Arkansas. This is to include the house at 24 Coolwood Dr. Little Rock, Ark. and all monies held by Craig-Crews Inc. Realty to the house, all insurance money — United States, Veterans Ins., Mutual of Minn. & Equitable Ins. Co. My interest in the house at Makepeace Alberta, and my profits derived from sale of my Plymouth Sundance and Delta Motorhome (unless she decides to keep them for personal use). She is to get my bank accounts and my death benefits that might be available. She is to further get my checks owing to me or cash. She is to get the proceeds from my RRSP and my stocks I have not sold held by Richardson-Greenshields — She is to pay my outstanding debts from these monies —
>
> Signed this 4th day of February, 1994
>
> /s/Earl L. Berrell
>
> P.S. I am of sound mind and body and am not under any threat or coersion(*sic*).
>
> /s/Earl L. Berrell

This will, unlike Berrell's previously executed wills, did not mention Berrell's two children from previous marriages, namely Edward James Berrell and Bonita Berrell Carrigo.

About four months after Berrell's death, Arndt initiated Canadian probate proceedings, and the Canadian court appointed her the personal representative of the estate in Canada. She retained the Canadian law firm of Hoffman Dorchik, which filed the necessary pleadings on February 13, 1998. In that a portion of Berrell's estate was located in Arkansas, Arndt, through her Canadian attorneys, contacted Sherman, who had handled Berrell's mother's probate affairs in the 1980s, to open an ancillary probate proceeding in Arkansas. Upon being retained, Sherman filed the necessary papers with the Pulaski County Probate Court to open the ancillary probate. The original pleadings, filed on April 8, 1998, did not mention Berrell's children. In those pleadings, Arndt requested that she be appointed the personal representative of the estate in Arkansas as well.

In a letter dated April 8, 1998, Sherman acknowledged receipt of a letter from Gordon Hoffman of Hoffman Dorchik in which Hoffman apparently referred Arndt to Sherman to represent the estate in Arkansas. Sherman acknowledged that he had filed the ancillary probate, and detailed the filing and publication fees spent to date. In this letter, Sherman advised Hoffman that he had spoken to one of Berrell's friends, Sharlett Craig, who managed Berrell's property in Arkansas, and that Craig was holding $2,000 in escrow for the estate fees. Sherman also noted that he remembered that Berrell had a son, and requested that Hoffman find out whether this child had been adopted by Berrell. Sherman specifically advised Hoffman that the existence of a child not mentioned in the will could cause a problem in that Arkansas law allows a child pretermitted-heir rights to inherit when not specifically acknowledged in the will. Furthermore, Sherman indicated that his fees to handle the estate were $100 to $125 per hour, not to exceed the Arkansas statutory allowance to handle the estate. In this case, the Arkansas estate, valued at approximately $50,000, would not allow fees above $1,860.

Sherman filed an amended ancillary probate pleading on June 29, 1998, specifying that Berrell had two children who may be entitled to share in Berrell's Arkansas estate property. Sherman

followed up with a letter to the probate judge on July 18, 1998, in which Sherman advised the judge that Arndt was Berrell's common-law wife in Canada, and that after the ancillary probate order is issued, he would send the statutory notice to Berrell's son. Sherman also advised the judge that he was currently searching for the second child, a daughter, and would provide notice to her as well if she was located. Sherman further advised the judge regarding possible conflict-of-laws issues between Canadian and Arkansas law.

On August 4, 1998, the probate court issued an order granting and directing issuance of ancillary letters, but found that it would not be in the best interest of the estate in Arkansas to have Arndt remain as the personal representative for the ancillary probate because she resided in Canada. The court directed that an Arkansas citizen be appointed as personal representative. The court therefore appointed Craig personal representative in the Arkansas ancillary probate. Sherman continued as the ancillary estate's attorney.

Once Berrell's children were located, Sherman sent notice to them regarding the ancillary probate of their father's estate in Arkansas. Sherman notified Edward Berrell and Bonita Berrell Carrigo by letters dated August 10, 1998, and December 14, 1998, respectively. Sherman included in the letters the necessary notice information required by Ark. Code Ann. § 20-40-111(c). Sherman also included additional information including copies of documents filed in the ancillary probate, and noted that Craig would take the position that Canadian law governs the disposition of the assets of the estate. Further, Sherman advised Edward and Bonita that they could have rights as pretermitted children because they were not mentioned in the will, and determination of this issue was up to the probate court.

On December 23, 1998, Craig filed a motion for determination of heirship and legal interests in assets. The pleading noted that Berrell's holographic will did not mention his children and that under Arkansas law, this failure to mention the children could enable them to obtain rights to property in Arkansas as if Berrell had died intestate. Craig requested the court to determine what rights the children had to the property to advance the administration of the estate. Also on this date, Craig filed a motion to sell the real estate in Arkansas. Sherman sent a letter to Edward Berrell notifying him that he and Carrigo would probably be found heirs

to the real estate, but not to the personal property, and that Arndt may have a dower interest in the real estate. As with the prior correspondence, Sherman informed Edward Berrell and Carrigo that the probate court would make these determinations.

On February 12, 1999, Carrigo, through her attorney Ann C. Donovan, filed her notice of intent to take against the will or to contest the validity of the will. She specifically requested to be a pretermitted heir and that the Arkansas court should determine Arndt's status as a common-law wife. On March 3, 1999, the probate court issued an order requesting that the ancillary personal representative, Craig, file a trial brief laying out the issues which the court should address at the scheduled March 25, 1999, hearing to probate the estate. In response, Sherman wrote a letter to the probate judge on March 3, 1999, noting his concern that the issues involved might take more than two hours to address.

Craig, through Sherman, filed her trial brief as personal representative on March 10, 1999. In the brief, Craig identified the issues facing the court at the hearing, and opined that the personal property in Arkansas would probably be governed by the law of the domiciliary jurisdiction, namely Canada. However, the real property is subject to the law of Arkansas where it is located and would be subject to the pretermitted children's rights because the will omitted them. In addition, Craig surmised that while Canada does not recognize common-law marriages, that case law in that province appears to be moving towards recognizing them. Craig contended that Arkansas law requires courts to construe the will to give effect to the testator's wishes, and Berrell's will wanted Arndt to have everything. Craig requested that the court consider whether she could testify about a conversation she had with Berrell in which he indicated that he wanted Arndt to have all of his property. In closing, Craig presented two alternative approaches for the court. One, the court could follow the strict language of the Arkansas statutes indicating that the domiciliary estate jurisdiction should govern, in which case Arndt should get all of the real estate or, two, the court could follow the common-law rule that the situs of the real property determines distribution, and the children should inherit the land.

Carrigo filed her response brief on April 7, 1999. In her brief, Carrigo noted that Canada does not have common-law marriages,

but will recognize them from other locations, as will Arkansas. Furthermore, she noted that the Canadian probate court had not made a determination about Arndt's status as a common-law wife. Carrigo also contended that the court should address additional issues. Specifically, Carrigo raised the issue of whether extrinsic evidence is permissible to show the intent of the testator, since the Uniform Rules of Evidence and Arkansas case law would prevent such evidence. Carrigo also questioned whether Sherman could represent both Arndt and the estate because he "filed the original application as attorney for Erika Arndt." Carrigo asserted in this brief that this constituted a conflict of interest, and that the court should decide who Sherman represents. Craig, through Sherman, filed a reply brief on March 23, 1999, and attached the case of *Pauliuk v. Pauliuk*, [1986] 48 Alta. L.R.2d 25, for the proposition that common-law marriages are recognized in Alberta, Canada. Edward Berrell also questioned Sherman's status.

Because of allegations of Sherman's possible conflict of interest, the trial judge scheduled a phone conference with all of the parties and attorneys to settle the matter before the scheduled hearing. The phone conference began on April 13, 1999, but was postponed because of technical problems until the scheduled hearing. The judge also requested that the parties challenging Sherman's representation submit formal motions which Carrigo did through her attorney on April 19, 1999. Carrigo also submitted proposed findings of fact, to which Sherman objected on April 19, 1999. Craig also filed a response to the motion to disqualify Sherman.

The court heard the matter on April 20, 1999, with all of the parties and attorneys present in the courtroom. During the hearing, Arndt, Sherman, Craig, and Carrigo testified. At one point, the court asked Sherman several questions regarding his perception of his duties and obligations as attorney for the estate. A portion of that dialogue follows:

> THE COURT: Let me just ask you, Mr. Sherman, do you feel an obligation to the children, to Mr. Berrell's children, as attorney?
>
> SHERMAN: Of course, I do, Your Honor.
>
> THE COURT: And what is that obligation?
>
> SHERMAN: My obligation, first and foremost is to show that they have complete notice of the proceeding and a chance to make

their positions known, to be represented, and to have their issues, have their positions considered by the Court. I don't think I have a duty to agree with them. In fact, I said to the Court in the briefs, this question, to me, is a very close question and it's open. There's no deciding precedent from the Arkansas Supreme Court.

THE COURT: I guess I'm looking for something else from you. You have three people, two who may have the same interest, two children. Then you have Ms. Arndt. You seem to be advancing Ms. Arndt's position with respect to the letters and so forth and what you've done in this case. Who is to advance the position of the children? Do you feel any responsibility to the children to advance their position, as well?

SHERMAN: I don't think I can make — I've tried, as best I can, to show the Court the competing argument. I think, in general, Your Honor, I had concluded that the law of the situs would control the passage of realty. It wasn't a final conclusion but it looked that way as I researched it. I was trying to notify Ms. Carrigo, just trying to locate her, so I could give her notice of the case. This evolved over time. The letters which have been introduced, most of them came in the spring of 1998 and I was not in touch with Ms. Carrigo or Mr. Edward Berrell. I wasn't trying to keep them out. I was trying to locate them.

THE COURT: Well, I'm not passing judgment on what you've done. I'm just trying to understand your intention with respect to what you've done thus far. Now, with respect to Erika Arndt, you've done more than simply notify her.

SHERMAN: She contacted me —

THE COURT: But with respect to the children, you have not. Okay. Go ahead.

SHERMAN: She contacted me, her lawyers contacted me to handle the ancillary administration. Every case I've ever been involved in, it's always —

THE COURT: When I speak of Erika Arndt, I mean Erika Arndt as a devisee or as a person who lived with Earle Berrell prior to his death. I'm not talking about her as the administrator in Canada. But when you look at the three of them as potential beneficiaries of this estate you've notified the children but with respect to Erika Arndt you've notified her and you have advanced her position.

> SHERMAN: I think in the briefing, the positions I've taken as a lawyer concur with the position she has, yes. I think in the final analysis that's where I am with the arguments.
>
> * * *
>
> THE COURT: Now, Ms. Arndt then didn't have to hire a personal attorney to advance her position, but the children did, is that right? Because you're representing the estate and not either of the potential beneficiaries of the estate. Now, you said that the children seem to have hired competent counsel to advance their positions. What about Ms. Arndt? She hasn't had to hire a personal attorney to advance her position because it has been advanced by the attorney for the estate. Or has she? I don't know of one.

After Sherman testified, Craig testified regarding her status as personal representative of the Arkansas ancillary probate. Carrigo also testified, stating that she received the letters from Sherman, and that Sherman had called her regarding the sale of the Arkansas real estate. Carrigo testified that she felt that Sherman was trying to pressure her into selling the property, and that she was concerned because Sherman had filed pleadings for Arndt. Sherman was then recalled to the stand by the trial judge, who again questioned him. The trial judge questioned Sherman's use of the word "we" in the December 23, 1998, letter to Carrigo in which Sherman stated, "As you will see in the Motion to Determine Heirship, we have concluded that the Court will likely find that you and Edward James Berrell are heirs to the real estate, but not the personal property. Erika Arndt may have a dower interest in the real estate." In response, Sherman answered that "we" included himself and Craig, the personal representative. The trial judge further questioned why Sherman seemed to communicate with Arndt, but not the children, regarding the sale of the property in Arkansas. Sherman testified that it was some time after the ancillary estate was opened before he actually found the children. Furthermore, Sherman responded that there was a concern that the house would deteriorate, but that the house could not and would not be sold without the concurrence of all interested parties.

After examination of the witnesses, the court issued its decision finding that Sherman should be disqualified as the attorney for the ancillary probate because "it would appear that his efforts have

been directed toward advocating for Erika Arndt's interests. The attorney for the estate has advanced the position of one potential beneficiary of the estate to the exclusion of the two children of the decedent." The trial court entered this order on May 7, 1999. Sherman filed his Notice of Appeal the same day.

Standard of Review

We review a trial court's decision to disqualify an attorney under the abuse-of-discretion standard. *Seeco, Inc, v. Hales*, 334 Ark. 134, 969 S.W.2d 193 (1993); *Berry v. Saline Memorial Hosp.*, 322 Ark. 182, 907 S.W.2d 736 (1995). An abuse of discretion may be manifested by an erroneous interpretation of the law. *Seeco, supra.* We have held that the Model Rules of Professional Conduct are applicable in disqualification proceedings. *Berry, supra*; *See also, Saline Memorial Hosp. v. Berry*, 321 Ark. 588, 906 S.W.2d 297 (1995); *Norman v. Norman*, 333 Ark. 644, 970 S.W.2d 270 (1998). Disqualification can be warranted in the absence of an ethical violation. It is an available remedy to a trial court "to protect and preserve the integrity of the attorney-client relationship." *Burnett v. Morgan*, 303 Ark. 150, 794 S.W.2d 145 (1990). Yet, it is a drastic measure to be imposed only where clearly required by the circumstances. *Burnett, supra.*

I. Ancillary Probate Under Arkansas Law

In the instant case, it must be borne in mind that the action below is an ancillary probate proceeding. An ancillary administration is a separate but related proceeding to the administration of the decedent's estate in the jurisdiction where the decedent died. The primary administration of the decedent's estate in this case is occurring in Alberta, Canada. The ancillary proceeding serves to collect assets and pay debts of the decedent in that locality. Ancillary administration of an estate in Arkansas is governed by Ark. Code Ann. §§ 28-42-101—28-42-111. Under these code provisions, a foreign personal representative such as Arndt may file for ancillary letters in Arkansas by filing an authenticated copy of his or her domiciliary letters with the proper Arkansas probate court. Ark. Code Ann. § 28-42-102(a)(1). This foreign personal representative shall be given preference to become the personal representa-

tive in Arkansas unless the probate court determines that such appointment would not be in the best interest of the estate. Ark. Code Ann. § 28-42-102(b). If such a determination is made, as it was here, the court may order the issuance of ancillary letters here to a qualified person, other than the domiciliary personal representative, pursuant to Ark. Code Ann. 28-48-101(b). Under Ark. Code Ann. § 28-48-101(a), a "hierarchy" of qualified people to act as personal representative of the estate in Arkansas exists. Under Ark. Code Ann. § 28-48-101(a), this order of priority includes:

> (a)(1) To the executor or executors nominated in the will;
>
> (2) To the surviving spouse, or his or her nominee, upon petition filed during a period of thirty (30) days after the death of the decedent;
>
> (3) To one (1) or more of the persons entitled to a distributive share of the estate, or his or her nominee, as the court in its discretion may determine, if application for letters is made within forty (40) days after the death of the decedent, in case there is a surviving spouse and, if no surviving spouse, within thirty (30) days after the death of the decedent;
>
> (4) To any other qualified person.

In the instant case, the probate court appointed Craig, an Arkansas resident, as the ancillary personal representative. Craig managed Berrell's property interests in Little Rock and was a logical choice as the ancillary personal representative under subsection (4) as "any other qualified person." Sherman, who had filed the initial paperwork on Arndt's behalf, continued as legal counsel for the appointed personal representative, Craig.[1]

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[1] Ark. Code Ann. § 28-48-108(d) allows the personal representative to employ legal counsel in connection with the probate of the will or the administration of the estate. This attorney

> shall prepare and present to the probate court all necessary notices, petitions, orders, appraisals, bills of sale, deeds, leases, contracts, agreements, inventories, financial accounts, reports, and all other proper and necessary legal instruments during the entire six (6) months, or longer when necessary, while the estate is required by law to remain open.

Ark. Code Ann. § 28-48-108(d). Section (d) also indicates that the attorney's fee is based on the total market value of the real and personal property reportable to the probate court, regardless of who inherits the real and personal property.

II. Sherman's Duties to the Estate in the Ancillary Probate

Arkansas law requires the attorney retained by the personal representative to perform several legal tasks on behalf of the estate. Ark. Code Ann. § 28-48-108(d). One of the tasks is to give proper notice of the appointment of the personal representative to all persons having claims against the estate, including heirs and creditors, pursuant to Ark. Code Ann. § 28-40-111. The statute provides a form section (c) for that purpose. This form provides a basic notice of the proceedings, including the date of the will, the date of the death of the testator, the name of the personal representative, and notice of the time to file any objections to the will or claims against the estate.

The record reflects that Sherman provided this information and more to Berrell's children once they were located. In addition to the required notice information, Sherman informed them by letter that their father's will was a holographic will that nominated Arndt as executrix and named her sole beneficiary of the assets of the estate. Sherman further explained that Craig, as ancillary personal representative, was taking the position that Canadian law applied to the will and distribution of the assets. However, Sherman indicated to both children and to the probate court that Berrell's failure to mention either child in his will gave the children inheritance rights in the Arkansas estate as if Berrell had died intestate. Sherman concluded from his research that Arkansas inheritance law would apply to the real estate but not the personal property in Arkansas.[2] Sherman opined in the letters to the children and the court that this would be an issue that the probate court would have to resolve.

[2] Sherman based his reasoning on several Arkansas statutes and cases. Under Ark. Code Ann. § 28-39-407(b), children not mentioned in the will have certain rights. Because the children were not mentioned in Berrell's holographic will, they are considered under Arkansas law to be "pretermitted children" allowed to take Arkansas property under the intestate statutes. Ark. Code Ann. § 28-9-203 details the general rules of intestate succession. Under this section, any real property in Arkansas would pass to the children despite the language of the will. Personal property, however, is not as clearly dilineated for distribution because this statute seems to indicate that the personalty may pass to the heirs through the personal representative, although leading authorities indicate that distribution of personal property is governed by the domicile of the deceased. *See* AM. JUR. 2d *Executors and Administrators* § 1171 (1991). As such, if Canadian law governs the distribution of personal property, Arndt would take all the personalty because failure to mention adult children in a will created in Canada does not allow the children to take any of that property there.

Sherman also addressed the issue of whether Arndt, who had been identified in the Canadian probate as Berrell's common-law wife and who was receiving retirement benefits from a Canadian state agency as Berrell's common-law wife, would be recognized in Arkansas as Berrell's common-law wife for purposes of dower and curtesy under the Arkansas statutes. If she is considered a common-law wife in Canada, Arkansas would recognize that and allow her dower rights of one-third of all the lands for life and one-third interest in any lands sold, as well as one-third of the personal estate. Sherman advised the court that he believed that Arndt had been identified as a common-law wife in Canada by the probate court there, and cited *Pauliuk* and the fact that she was receiving Berrell's retirement benefits from a state agency in Canada for that proposition.

III. The Probate Court's Order Disqualifying Sherman

In making its disqualification order, the probate court made specific findings in support of its ruling. In pertinent part, the court stated:

> Mr. William Sherman, attorney, efforts were diligent, earnest and honest in this case. The efforts of Mr. Sherman have been directed towards advocating for Erika Arndt's interest with the exception of ultimately providing notice to the children of these proceedings.
>
> Mr. Sherman has advanced a position of one potential beneficiary of the estate to the exclusion of the two children of the decedent. The argument that Ms. Arndt should not have to hire or bear the expense of hiring separate counsel does not justify Mr. Sherman advocating for one potential beneficiary to the exclusion of the children. At the very least, the children have justifiably concluded their efforts are being prejudiced by the attorney's actions and filings in this estate.

From statements in the hearing on March 3, 1999, wherein Sherman appeared on behalf of the estate, but no other parties appeared, it can be surmised that Sherman considered himself to be counsel for the estate rather than Arndt's counsel. Sherman addressed payment to the personal representative of a fee for managing the decedent's real estate and notified the court of the probable signifi-

cant issues which could arise at the upcoming probate hearing. Sherman gave a brief overview of those issues, including the issue regarding Arndt's status as a common-law wife in Canada and the effect of that on the property in Arkansas, and then stated:

> I represent the estate, I think it's my duty to show both arguments on that issue. I think that Ms. Donovan will do a good job of arguing her client's position. And I'd just alert the court to the fact we do have that very unique question, which is both interesting and difficult.

After hearing the matter on April 20, 1999, the trial court felt Sherman's representation of the estate disadvantaged the pretermitted children, though finding no conflict of interest.

As stated in *Saline, supra*, "[t]he primary reference in any modern day disqualification case is to Rule 1.7 of the Model Rules of Professional Conduct." Rule 1.7 of the Arkansas Model Rules of Professional Conduct defines conflicts of interest. Generally under the rule, an attorney should not represent a client if the representation will be directly adverse to another client. In Arkansas, it is not necessarily a conflict of interest for an attorney to represent both the estate and the only devisee in the will. There must be an additional showing of prejudice. *King v. King*, 273 Ark. 55, 616 S.W.2d 483 (1981). In *King*, the testator died leaving a will in which he named and disinherited six of his seven children, but did not name the seventh or the seventh's children. As such, they were pretermitted heirs under the statute, and were allowed to take that portion they would have been allowed had the deceased died without a will. Also in that case, the attorney for the executor of the estate filed a brief in opposition to the pretermitted heirs' stance on an issue, and the court still did not find that a conflict of interest arose.

The trial court did not discuss conflicts of interest under Rule 1.7. While we could remand for consideration of the conflict-of-interest issue, it is well settled that we have the power to hear probate cases *de novo*. *Babb v. Matlock*, 340 Ark. 263, 9 S.W.3d 508 (2000). When the facts have been fully developed, a remand would serve little purpose. *Norman, supra*. Apparently, attorney ethics was not a factor in this case. In fact, the trial court complimented Sherman's honesty and diligence. Here, the core issue is whether the existence of parallel legal positions held by the personal representative for the estate, Craig, and one of the potential heirs of that

estate, Arndt, has been shown to be prejudicial to the other potential heirs. In other words, did Sherman's arguments on behalf of the personal representative charged with probating Berrell's holographic will which happened to be consistent with the interests of the sole devisee under the will prejudice the remaining potential heirs? We hold they did not.

The actions taken by Sherman throughout the proceedings below reflect conscientious legal services consistent with the duties of counsel for a personal representative in an ancillary probate. Mr. Sherman fulfilled his obligations of notice and adequately advised the court of the issues confronting it. His obligations as estate counsel would not include advocacy for any individual heirs, but neither would those obligations prevent the estate from having positions that proved consistent with those of some individual heirs. Based upon the preceding analysis, we hold the trial court erred in disqualifying appellant, and, accordingly, we reverse.

Reversed.

Sonny EADS and Vicki Lynn Eads *v.* Bill (Rick) HALL; Jeanita Ives; Laura Bohannon; and Joyce L. Lindsey, d/b/a Century 21 Southgate Realty

99-1247 11 S.W.3d 562

Supreme Court of Arkansas
Opinion delivered March 9, 2000

J. Hudson Shepard, for appellants.

Mark W. Dossett, for appellees.

PER CURIAM. On February 17, 2000, attorney Mark W. Dossett filed an affidavit on behalf of the appellees in support of attorney's fees and costs incurred by virtue of appellants' motion for rule on clerk. This affidavit was filed in response to this court's *per curiam* opinion dated February 10, 2000, wherein we found that the appellants had violated Rule 11 of the Arkansas Rules of Appellate Procedure—Civil, and that the appellees were entitled to costs and attorney's fees. Mr. Dossett shows this court that he spent 5.40 hours on this matter and incurred costs of $33.60. We award the appellees attorney's fees at a rate of $75 per hour for total fees of $405. The appellants are directed to pay the appellees $438.60 as attorney's fees and costs forthwith.

Wardell FRANKS *v.* STATE of Arkansas

CR 00-205 11 S.W.3d 561

Supreme Court of Arkansas
Opinion delivered March 9, 2000

Bishop & Bishop, by: *Eric T. Bishop*, for appellant.

No response.

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

His attorney, Eric T. Bishop, 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.

BOB COLE BONDING *v.* STATE of Arkansas

99-1327 13 S.W.3d 147

Supreme Court of Arkansas
Opinion delivered March 16, 2000

Wright & Van Noy, by: *Herbert T. Wright, Jr.*, for appellant.

Mark Pryor, Att'y Gen., by: *C. Joseph Cordi, Jr.*, Ass't Att'y Gen., for appellee.

ROBERT L. BROWN, Justice. This appeal involves a bond forfeiture. The trial court awarded judgment to the State and against the appellant, Bob Cole Bail Bonds, Inc. ("the bonding company"), in the amount of $2,000. The court of appeals reversed and dismissed. *Bob Cole Bail Bonds, Inc. v. State*, 68 Ark. App. 13, 2 S.W.3d 94 (1999). This court granted review of the court of appeals's decision on December 9, 1999. When we grant review of a case decided by the court of appeals, we treat the appeal as if it were originally filed in this court. *See Youngman v. State Farm Mut. Auto. Ins. Co.*, 334 Ark. 73, 971 S.W.2d 248 (1998).

The two major points raised by the bonding company in this appeal are (1) the trial court failed to give it statutory notice, and (2) the defendant, Lacey Dawn Helmert, was surrendered to the trial court before the bond was forfeited. Despite the points raised, we believe that resolution of this case turns on the absence of the bail bond in the circuit court's file on Helmert and the issue of whose burden it was to introduce the bail bond at the bond forfeiture hearing.

According to her criminal docket, on July 16, 1997, Helmert was arrested on a petition to revoke her probation on drug offenses and bonded by "Bob Cole Bonding Agent Steve Outlaw." On December 1, 1997, Helmert failed to appear at a scheduled hearing on that petition, and on that same date, statutory notice which begins the 120-day notice period for failure to appear was mailed by the circuit court administrator to "Cole Bonding, 1005 N. Center, Lonoke, Arkansas 72086." *See* Ark. Code Ann. § 16-84-201(a)(1)(B) (Supp. 1999).

On May 5, 1998, the circuit court executed a Bond Forfeiture Summons ordering Helmert's arrest and directing the bonding company to appear to show cause why the bail bond should not be forfeited and judgment entered against it. The summons stated that the bail bond was attached, but that was not done. The summons was served on the bonding company in Fort Smith.

On June 25, 1998, Helmert was arrested. On July 15, 1998, the bond forfeiture hearing was held. At the hearing, the bonding company argued that the original bond was not in the court file and that the 120-day notice was defective because it went to the wrong address. The circuit court entered judgment against the bonding

company in the amount of $2,000. At no time during the hearing was the bail bond presented to the circuit court or introduced into evidence. The bail bond is not part of the record in this appeal.

Two points bear emphasis at the outset of this appeal. The first is that even though the bail bond at issue was attached to the bonding company's brief in this appeal, it cannot be considered by this court because it is not part of the record. It is, of course, the appellant's duty to bring up a sufficient record to enable this court to consider the issues raised. *See, e.g., Edwards v. Neuse,* 312 Ark. 302, 849 S.W.2d 479 (1993). The second point is the manner in which the bonding company framed the issue before the trial court. The bonding company did not contend that the State was not entitled to judgment because the State did not introduce the bail bond at the forfeiture hearing. *See Hernden v. State,* 865 S.W.2d 521 (Tex. Ct. App. 1993). Rather, the bonding company mounted a *defense* to forfeiture on the basis that the statutory notice was defective and, thus, the 120 days for notice never commenced running. Even in its appeal, the bonding company only makes passing reference without citation of authority to the necessity for there to be a bail bond presented to the circuit court in order for a forfeiture to occur. The focal point of the bonding company's appeal is the circuit court's failure to give it statutory notice. Again, the framing of the issue is important because the crucial question before this court is which party had the burden of introducing either an original or a copy of the bail bond into evidence at the bond forfeiture hearing.

The law regarding statutory notice to bonding companies is clear and precise:

> (a)(1)(A) If the defendant fails to appear for trial or judgment, or at any other time when his presence in court may be lawfully required, or to surrender himself in execution of the judgment, the court may direct the fact to be entered on the minutes, and shall promptly issue an order requiring the surety to appear, on a date set by the court not less than ninety (90) days nor more than one hundred twenty (120) days after the issuance of the order, to show cause why the sum specified in the bail bond or the money deposited in lieu of bail should not be forfeited.

> (B) The one hundred twenty-day period begins to run from the date notice is sent by certified mail to the surety company *at the address shown on the bond*, whether or not it is received by the surety.

Arkansas Code Ann. § 16-84-201(a)(1)(A) and (B) (Supp. 1997) (emphasis added).[1]

We have held that statutory service requirements, being in derogation of common law rights, must be strictly construed and that compliance with them must be exact. *Holt Bonding Co. v. State*, 328 Ark. 178, 182, 942 S.W.2d 834, 837 (1997); *see also Carruth v. Design Interiors, Inc.*, 324 Ark. 373, 921 S.W.2d 944 (1996). Substantial compliance will not suffice. *Holt Bonding Co. v. State, supra; AAA Bail Bond Co. v. State,* 319 Ark. 327, 891 S.W.2d 362 (1995). Nor can defective service be validated by actual knowledge. *Wilburn v. Keenan Cos.*, 298 Ark. 461, 768 S.W.2d 531 (1989).

In the instant case, the bonding company contends that the statutory notice required under § 16-84-201(a)(1)(A) was defective because it was not sent to the "address shown on the bond." This begs the question, however, of what address was shown on the bond and whose burden it was to present that proof. If the bonding company is raising the defense of defective service, in our view it had the burden to show that the circuit court administrator sent the notice to the wrong address based on the bail bond. This it failed to do.

Our conclusion in this regard is on all fours with statements made by this court and the court of appeals in previous cases. For example, the court of appeals has said that in a bail bond proceeding, "[o]nce the defendant has failed to appear, the entire amount of the bond is subject to forfeiture. The surety is given the opportunity to present evidence why the bond should not be forfeited, or why the full amount of the bond should not be forfeited...." *M & M Bonding Company v. State*, 59 Ark. App. 228, 232, 955 S.W.2d 521, 523 (1997). Along the same line, this court has said, "[t]he show-cause order did not abrogate the statutory forfeiture. It merely afforded the bondsmen an opportunity to be heard with respect to a total or partial remission of the forfeiture...." *Craig v. State*, 257 Ark. 112, 115, 514 S.W.2d 383, 385 (1974). That, of

[1] This statute was amended by Act 567 of 1999.

course, is the essence of a show-cause hearing — that the summoned bonding company should offer proof or argument as to why the bail bond should not be forfeited. In the instant case, the bonding company failed to present the circuit court with evidence of the bail bond itself which was the key to the bonding company's defense of erroneous service. In failing to do so, it did not meet its burden of proof. We reverse the holding of the court of appeals in *Bob Cole Bail Bonds, Inc. v. State*, 68 Ark. App. 13, 2 S.W.3d 94 (1999), that the burden of proof in the instant case rested with the State.

The bonding company also argues that the notice it received of non-appearance was not prompt. This argument, however, was not addressed to the circuit court and, accordingly, is not preserved for our review. *Pyle v. State*, 340 Ark. 53, 8 S.W.3d 491 (2000); *Ayers v. State*, 334 Ark. 258, 975 S.W.2d 88 (1998). Nor was the argument made to the circuit court that the bonding company should not be liable because Helmert was surrendered to the circuit court prior to judgment on the bond forfeiture. Accordingly, we will not address the issue. *Id.*

We affirm the judgment of the trial court.

T & T MATERIALS, INC. *v.* Willie MOONEY
and Northwest Paving Co., Inc.

99-1425 12 S.W.3d 635

Supreme Court of Arkansas
Opinion delivered March 16, 2000

Hardin & Grace, PA, by: *William T. Terrell*, for appellants.

James & Carter, PLC, by: *Paul J. James*, for appellees.

ROBERT L. BROWN, Justice. This appeal concerns the ability of a plaintiff-garnishor (T & T Materials, Inc.) to bring a separate fraud action against a garnishee (Northwest Paving Co., Inc.) and the original defendant (Willie Mooney). The trial court dismissed the separate fraud action, and the court of appeals affirmed. *T & T Materials, Inc. v. Mooney*, 68 Ark. App. 77, 4 S.W.3d 512 (1999). We granted review on February 3, 2000. We conclude that T & T's remedy lay within the framework of the garnishment statutes, and we affirm the dismissal of the fraud action.

On January 6, 1997, Mooney agreed to a consent judgment in favor of T & T in the amount of $55,023.31 plus postjudgment interest and costs. The judgment was taken in Crawford County Circuit Court, Crawford County being Mooney's residence. On May 29, 1997, Mooney answered T & T's interrogatories and request for production of documents and stated that his present occupation was "Superintendent, Northwest Paving Co., Inc.," which was located in Crawford County. On June 2, 1997, T & T sent a writ of garnishment to Mooney and to his employer, Northwest Paving, as garnishee, accompanied by allegations and interrogatories propounded to Northwest Paving.

On June 24, 1997, Northwest Paving answered the allegations and interrogatories and stated that it, as garnishee, held $200 payable to Mooney. Counsel for T & T next wrote three letters to counsel for Northwest Paving (dated July 9, 1997; August 11, 1997; and August 25, 1997), requesting information about payroll deductions resulting from the writ of garnishment. No response was forthcoming from Northwest Paving.

On September 11, 1997, counsel for T & T wrote the circuit judge in Crawford County and enclosed a precedent for an order of disbursement for Northwest Paving to pay over to T & T all garnished wages. On September 15, 1997, Northwest Paving filed an amended response to the writ of garnishment in which it stated that it was not Mooney's employer and that it was not holding any money for Mooney and was not indebted to Mooney. The amended response further stated that Northwest Paving leased its employees from a Texas firm named Certified Systems, Inc.[1] On April 15, 1998, the Crawford County circuit judge dismissed the writ of garnishment against Northwest Paving.

On March 17, 1998, T & T sued Mooney and Northwest Paving in Pulaski County Circuit Court and alleged that the named defendants had engaged in a pattern of fraud and deceit by providing false information relating to Mooney's employment status and by not disclosing Mooney's true employment. T & T sought compensatory damages in the form of uncollected garnishment proceeds and punitive damages. T & T later filed an amended complaint in its fraud action and added a claim for constructive fraud. Mooney and Northwest Paving moved to dismiss the amended complaint under Ark. R. Civ. P. 12(b) on six grounds. The Pulaski County circuit judge then transferred the fraud action to Van Buren County, which was T & T's place of business. On October 20, 1998, the Van Buren County circuit judge dismissed the fraud action without prejudice, and in an accompanying letter opinion, concluded that the garnishment statutes covered the situation raised by T & T.

When this court grants a petition to review a case decided by the court of appeals, it reviews the case as if it had originally been filed in this court. *Youngman v. State Farm Mut. Ins. Co.*, 334 Ark. 73, 971 S.W.2d 248 (1998). The pivotal point raised by T & T in this appeal is whether the Van Buren County circuit judge erred in finding that only the Crawford County Circuit Court had jurisdiction over this matter as part of the garnishment process. Specifically, T & T contends that because Northwest Paving was not Mooney's employer and was not holding money for Mooney, it was

[1] On September 22, 1997, T & T did attempt a garnishment action against Certified Systems, Inc., but by that time Mooney's wages had decreased and were insufficient for garnishment purposes.

not a garnishee and the garnishment statutes are inapposite. This left a separate fraud action as T & T's only recourse, under its theory of the case.

We disagree with T & T's characterization of this matter for several reasons. It is clear from the record that Northwest Paving first identified itself as a garnishee. It was not until some three months later that Northwest Paving amended its response to say that it was not Mooney's employer. That was on September 15, 1997. T & T did not take the issue to the Crawford County circuit judge as part of the garnishment action but rather waited until March 17, 1998, to file a separate fraud action in Pulaski County Circuit Court.

The garnishment statutes that are applicable to this case are these:

> The garnishee shall, on the return day named in the writ, exhibit and file, under his oath, full, direct, and true answers to all such allegations and interrogatories as may have been exhibited against him by the plaintiff.

Ark. Code Ann. § 16-110-404 (1987).

....

> (a) If the garnishee files his answer to the interrogatories exhibited and the plaintiff deems the answers untrue or insufficient, he may deny the answer and cause his denial to be entered on the record.
>
> (b) The court or justice, if neither party requires a jury, shall proceed to try the facts put in issue by the answer of the garnishee and the denial of the plaintiff.

Ark. Code Ann. § 16-110-405 (1987).

....

> (a) If the issue is found for the garnishee, he shall be discharged without further proceedings.
>
> (b) However, if the issue is found for the plaintiff, judgment shall be entered for the amount due from the garnishee to the defendant in the original judgment, or so much thereof as will be sufficient to satisfy the plaintiff's judgment, with costs.

Ark. Code Ann. § 16-110-410 (1987).[2]

Northwest Paving and Mooney contend that if T & T believed the response to its allegations and interrogatories to be untrue or insufficient, it should have "denied" or objected to the response under § 16-110-405 and submitted the matter to the circuit judge or a jury for determination. We agree. T & T claims that there was no garnishment jurisdiction because Northwest Paving was not an employer. But that was exactly the issue to be decided by the circuit judge. And the ancillary issue was if Northwest Paving and Mooney abused the garnishment process, in what amount was T & T damaged? T & T argues that § 16-110-410 limits its recovery against Northwest Paving to the amount it owed to Mooney and that no amount was due. Thus, it contends that the remedy afforded was an empty one. We disagree. T & T is correct that garnishment is purely a statutory remedy, and the garnishment statutes must be strictly construed. *See Moory v. Quadras, Inc.*, 333 Ark. 624, 970 S.W.2d 275 (1998). But surely T & T could have claimed the amount Northwest Paving stated it owed as the garnishee prior to the time it reneged and filed an amended response denying Mooney's employment. Again, this was an issue for the circuit judge to resolve within the context of the garnishment statutes. In sum, T & T failed to object to the amended response or otherwise to pursue its remedies under the garnishment statutes and instead waited six months and filed a separate fraud action in Pulaski County.

There are several reasons that militate against affirming T & T's manner of proceeding in this matter. First and foremost, as already referenced, T & T had a remedy under the garnishment statutes. Also, were we to authorize T & T to forego that remedy and file a splinter action in a different venue, we would be sanctioning split causes of action, which is something we have expressly held we will not do. *See Spickes v. Medtronic*, 275 Ark. 421, 631 S.W.2d 5 (1982); *Lisenby v. Farm Bureau Mut. Ins. Co.*, 245 Ark. 145, 431 S.W.2d 484 (1968); *Eiermann v. Beck*, 221 Ark. 138, 252 S.W.2d 388 (1952).

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[2] A second statute speaks in terms of rendering judgment against the garnishee in the amount the garnishee held for the defendant at the time the writ of garnishment was served, but the statute is limited to cases where the garnishee neglects or refuses to answer interrogatories. *See* Ark. Code. Ann. § 16-110-407 (Supp. 1999).

Moreover, there is no question in our minds that the real character of T & T's cause of action is one involving abuse of the garnishment process and not fraud. We have been very clear in our decisions that when two or more actions are pled that lie in different venues, the proper venue is decided by the real character of the action and the principal right being asserted. *See Bristol-Myers Squibb Co. v. Saline County Circuit Court*, 329 Ark. 357, 947 S.W.2d 12 (1997) (*per curiam*); *Fraser Bros. v. Darragh Co.*, 316 Ark. 297, 871 S.W.2d 367 (1994); *Atkins Pickle Co., Inc. v. Burrough-Uerling-Brasuell Consult. Eng'rs, Inc.*, 275 Ark. 135, 628 S.W.2d 9 (1982). This was a garnishment proceeding and the proper remedy for any abuse of the garnishment process lay under the garnishment statutes.

In short, T & T had a remedy under the Garnishment Act and failed to pursue it. We affirm the dismissal of the fraud action by the Van Buren County Circuit Court. Because we do not countenance a separate action for fraud under these facts, we need not address T & T's second point relating to proper venue for the fraud action.

Affirmed.

STATE of Arkansas *v.* Christina Marie RIGGS

CR 98-1281 12 S.W.3d 634

Supreme Court of Arkansas
Opinion delivered March 16, 2000

Mark Pryor, Att'y Gen., by: *O. Milton Fine, II,* Ass't Att'y Gen., for appellant.

John Wesley Hall, Jr., for appellee.

PER CURIAM. On June 30, 1998, Christina Riggs was convicted in Pulaski County Circuit Court of capital murder and was sentenced to death by lethal injection. On November 4, 1999, this court affirmed her conviction. *Riggs v. State*, 339 Ark. 111, 3 S.W.3d 305 (1999).

On December 20, 1999, a hearing was held in Pulaski County Circuit Court pursuant to Ark. R. Crim. P. 37.5. At that hearing, Riggs was represented by her counsel, John Wesley Hall. The circuit court declared Riggs to be indigent and advised her of her right to have counsel appointed for her. Riggs informed the circuit court that she wished to waive appointment of counsel. The circuit court then ordered that a competency examination of Riggs be performed to determine her ability to waive counsel. A second hearing on Riggs's competency was scheduled for January 14, 2000.

Riggs was evaluated by O. Wendell Hall, III, M.D., Forensic Medical Examiner, and by John K. Anderson, Ph.D., Forensic Staff

Psychologist, of the Arkansas State Hospital. On January 7, 2000, they issued their report to the circuit court in which they concluded that Riggs was competent to waive her Rule 37.5 remedies.

On January 14, 2000, a hearing was held before the circuit court on Riggs's competency to effect a waiver of her Rule 37.5 remedies. At that hearing, Dr. Hall and Riggs testified. Dr. Hall testified that Riggs had the capacity to knowingly and intelligently waive her postconviction remedies, and Riggs stated that that was her desire. Riggs testified specifically that she had read Rule 37.5 and did not want an attorney appointed to pursue her rights under that rule.

On January 21, 2000, the circuit court entered its order based on Dr. Hall's examination of Riggs and his conclusion. The court found:

> 1. The defendant has been fully advised of her rights to seek post-conviction relief with the assistance of court-appointed counsel, at no cost to her.
>
> 2. The defendant has knowingly, intelligently, and voluntarily waived her right to appointed counsel in open court.
>
> 3. The defendant has rejected the appointment of counsel, and fully and completely understands the legal consequences of her decision.

The circuit court concluded that it would not appoint counsel to represent Riggs for the purpose of pursuing her Rule 37.5 remedies.

The State now petitions this court for a writ of certiorari for the purpose of accepting the record filed herein and for the further purpose of affirming the trial court's findings. We grant the petition for writ of certiorari and hold that the trial court's findings are supported by the transcript of the hearing held on January 14, 2000, and the record in this matter. We affirm the circuit court's findings, as set out above.

Riggs further moves this court to issue its mandate forthwith and to expedite this motion. According to her motion, Riggs desires her execution "to move along and not be unnecessarily

delayed," and she further desires that intervenors not interfere "with her personal decision in this case." Her motion is denied.

William D. TAYLOR, Sr. *v.* STATE of Arkansas

CR 99-1471 12 S.W.3d 238

Supreme Court of Arkansas
Opinion delivered March 16, 2000

Hurst Law Offices, by: *Q. Byrum Hurst, Jr.*, for appellant.

No response.

PER CURIAM. This is a Rule 37 appeal. *See* Ark. R. Crim. P. 37. Appellant William D. Taylor, Sr., moves the court to supplement the record of the Rule 37 proceedings with the record prepared for appeal from the original judgment of conviction in case No. 97-01240. *See Taylor v. State*, 334 Ark. 339, 974 S.W.2d 454 (1998).

The motion is denied. It is not necessary to consolidate the Rule 37 record with the record of the original trial, because the record of the original trial is already on file with this court. *See Dryman v. State*, 327 Ark. 375, 938 S.W.2d 825 (1997). It is neces-

sary, though, for the appellant in a Rule 37 appeal to abstract the material portions of the trial record. *Id.*

We note that the record in the Rule 37 appeal was lodged on December 16, 1999, and that appellant has been granted three extensions of time in which to file his brief. The first extension was granted on January 24, 2000, based on the heavy trial schedule of appellant's counsel. The second extension was granted on February 22, 2000, based on an assertion that appellant's counsel's computer had "crashed" and that he had lost the abstract. The third extension was granted March 8, 2000, also based on the computer crash, with the deadline for the brief set for March 23, 2000. This means that appellant's brief will be filed more than three months after the record was lodged in this appeal. There will be no more extensions for filing the appellant's brief granted in this case.

Tracy YOUNG *v.* STATE of Arkansas

00-225 12 S.W.3d 239

Supreme Court of Arkansas
Opinion delivered March 16, 2000

Ann Hill, for appellant.

No response.

PER CURIAM. Appellant, Tracy Young, by his attorney, Ann Hill, has filed a motion for rule on the clerk. On September 30, 1999, the Garland County Juvenile Court determined that Young was a delinquent juvenile, based upon the underlying offense

of aggravated robbery, and committed him to the Division of Children and Family Services, Youth Services Center. Young then filed a timely notice of appeal on October 15, 1999. On December 28, 1999, Young filed a motion for extension of time to docket the appeal, but the order granting the extension was not filed until January 14, 2000, one day past the ninety-day deadline for filing the record with the Supreme Court Clerk, as set forth in Ark. R. App. P.—Civil 5(a) (1999).

Ms. Hill admits in the instant motion that the record was tendered late 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). Accordingly, we grant the motion for rule on the clerk. A copy of this opinion will be forwarded to the Committee on Professional Conduct. *Id.*

Issac A. COLBERT *v.* STATE of Arkansas

CR 99-1101 13 S.W.3d 162

Supreme Court of Arkansas
Opinion delivered March 23, 2000

Christy M. Adams, for appellant.

Mark Pryor, Att'y Gen., by: *Valerie L. Kelly*, Ass't Att'y Gen., for appellee.

TOM GLAZE, Justice. Isaac Colbert brings this appeal from his conviction for possession of a controlled substance with intent to deliver. He argues that the trial court erred in denying his motion to suppress evidence seized from his vehicle. We agree, because the initial stop of his car was constitutionally invalid, and because the admission of the cocaine seized from his car was not harmless error. Therefore, we reverse his conviction.

In the late afternoon of March 18, 1999, a warrant was issued for the search of Colbert's house, located at 330 West Olive Street in Prescott, Arkansas. The warrant was based on information gained from a confidential informant who had purchased crack cocaine at Colbert's house. The scope of the warrant covered the Colbert residence and all curtilage, vehicles, persons, and outbuildings on the premises.

Investigator Todd Daley of the Arkansas State Police and Investigator Wayne Kisselburg with the Nevada County Sheriff's Office went to Colbert's house at about 6:15 that evening to execute the warrant. However, when they drove up to his house, they saw that his car was not there, so they decided not to search the house at that point. Rather, they chose to drive around Prescott, looking for Colbert's car, because they had a suspicion that if he was not at home, the drugs might be on him. The officers later testified that they chose to look for Colbert's car because they wanted him to return home and allow them access to his house so they could avoid damaging it.

As they drove around looking for Colbert, Daley and Kisselburg spotted Colbert's car turning onto Highway 67, heading away from town. Although Colbert was not speeding or committing any traffic violation, Daley instructed Deputy Danny Martin, who was driving a marked patrol vehicle, to pull Colbert over. Colbert stopped when Martin flashed his blue lights at him. Daley stopped his vehicle in front of Colbert's and, as Daley departed his car and walked back to Colbert's car, Colbert's car began rolling towards Daley. Unsure whether Colbert's foot had merely slipped off the brake pedal or if he was attempting to flee, Daley drew his gun and ordered Colbert to stop and get out of the vehicle.

As Colbert got out, a piece of plastic fell to the ground. Kisselburg picked it up and saw a substance that looked like crack

cocaine. At that time, Daley placed Colbert under arrest for possession of cocaine, and proceeded to search the car. The officers found one rock of cocaine on the driver's side floorboard, a plastic bag containing cocaine residue and three smaller rocks of cocaine (also on the driver's side floor), and what appeared to be a crack pipe stuffed down between the passenger's seat and the center console.

Once the search of the car was completed, Daley executed the search warrant at Colbert's house around 7:15 p.m. The search turned up $110.00, a .22 pistol, approximately 45 rounds of .22 ammunition; a .22 rifle with scope; a 12-gauge shotgun; and a paper towel containing two rocks of cocaine totaling .576 grams in the butter tray of the refrigerator. The total amount of cocaine found, including that from the car, was a little over 1.3 grams.

After Colbert was charged with possession of a controlled substance with intent to deliver and simultaneous possession of drugs and a firearm, he filed a motion to suppress the evidence seized from the car. Colbert argued that he was stopped without any probable cause, and that the subsequent search of his car and seizure of the cocaine violated his Fourth Amendment rights. The trial court denied this motion, finding that the officers were acting in good faith. The case proceeded to trial, and Colbert was convicted and sentenced to life in prison on each of the two counts.

On appeal, Colbert argues that the trial court erred in denying his motion to suppress the evidence seized from his car because the traffic stop was illegal. He does not challenge the execution of the search warrant at his home or his conviction on the simultaneous possession charge.

When reviewing the denial of a motion to suppress, this court makes an independent examination based upon the totality of the circumstances and reverses only if the decision is clearly against the preponderance of the evidence. *Muhammad v. State*, 337 Ark. 291, 988 S.W.2d 17 (1999); *Brunson v. State*, 327 Ark. 567, 940 S.W.2d 440 (1997). The facts and evidence are reviewed in the light most favorable to the state. *Id.*

Rule 14.1 of the Arkansas Rules of Criminal Procedure provides that a police officer "who has reasonable cause to believe that a moving ... vehicle ... contains things subject to seizure may, without a search warrant, stop, detain, and search the vehicle and

may seize things subject to seizure discovered in the course of the search where the vehicle is: (i) on a public way...." Reasonable cause, as required by this rule, exists when officers have trustworthy information which rises to more than mere suspicion that the vehicle contains evidence subject to seizure and a person of reasonable caution would be justified in believing an offense has been committed or is being committed. *Reyes v. State*, 329 Ark. 539, 954 S.W.2d 199 (1997) (citing *Bohanan v. State*, 324 Ark. 158, 919 S.W.2d 198 (1996)).

Although Colbert does not explicitly rely on Rule 14.1, he bases a large part of his argument on *Tillman v. State*, 271 Ark. 552, 609 S.W.2d 340 (1980), in which this rule figured prominently. The court in that case held that "[t]he right of police officers to stop a vehicle on the public highway for the purpose of searching it exists when there is probable cause for that action, i.e., when the facts within the knowledge of the officers ... amounts to *more than a mere suspicion* that it contains something subject to seizure." *Id.* at 557 (emphasis added).

The officers in this case admitted that at the time they obtained the warrant to search Colbert's house, they did not have probable cause to search Colbert's vehicle. Nevertheless, they chose to locate Colbert and his car because, as Officer Daley testified at the suppression hearing, they felt there might be a *possibility* that Colbert could have taken some or all of the drugs with him. Daley stated, "[a]lthough I suspected there may be some drugs, I had no probable cause to believe there was anything in the car." Based on these facts, the officers appeared to have no more than possible or mere suspicion that Colbert possessed drugs when they stopped Colbert's car. Consequently, we hold the officers failed to comply with Rule 14.1.

Rule 3.1 also governs police stops. That rule provides that "[a] law enforcement officer lawfully present in any place may ... stop and detain any person who he *reasonably suspects* is committing, has committed, or is about to commit ... a felony. . . , if such action is reasonably necessary either to obtain or verify the identification of the person or to determine the lawfulness of his conduct." (Emphasis added.) Ark. R. Crim. P. 3.1; *see also* Ark. Code Ann. § 16-81-204 (1987). Rule 2.1 of the Arkansas Rules of Criminal Procedure defines "reasonable suspicion" as "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." *See also* Ark. Code Ann. § 16-81-202 (1987).

Again, investigators Daley and Kisselburg had only a "bare suspicion" that Colbert had taken the drugs with him in his car; they did not articulate a single reason why they might have thought that to be the case. It is worth noting that the search warrant was issued based upon an alleged controlled buy that took place in Colbert's house, not his car. Although the State argues that the search warrant, obtained on the basis of a confidential informant's purchase of cocaine from Colbert, gave the officers reasonable suspicion to stop Colbert's car, the officers themselves admitted that the purpose of the stop was not to "determine the lawfulness of Colbert's conduct," as required by Rule 3.1. Rather, the reason they gave for stopping Colbert was to ask him to return to his house so they could search it when he was present. This, however, does not fall within the language of the rule.

[redacted] When the initial "reasonable suspicion" is lacking, the stop itself is impermissible. *See Stewart v. State*, 332 Ark. 138, 964 S.W.2d 793 (1998). In that case, this court held that where the arresting officer's suspicions were aroused only *after* he asked Stewart to approach his car, those suspicions could not form the justification needed for the initial stop. *Stewart*, 332 Ark. at 145, 964 S.W.2d at 797. Such is the case here, as well.

The State also attempts to analogize this case to that presented in *Kilpatrick v. State*, 322 Ark. 728, 912 S.W.2d 917 (1995), in which this court affirmed the trial court's denial of a motion to suppress for the reason that the police had reasonable suspicion to stop and search defendant Kilpatrick on the basis of a tip from a confidential informant. However, there, the case turned on the reliability of the informant, who had given detailed information about exactly who was involved in the drug sales and where the sales were taking place. In affirming the trial court, this court held that the prior reliability of the informant, combined with the accuracy of the informant's information and the detective's knowledge that the area was known for drug trafficking, "was enough to give the officers specific, particularized and articulable reasons indicating

the person or vehicle may be involved in criminal activity." *Kilpatrick*, 322 Ark. at 736, 912 S.W.2d at 921.

No such specific, particularized, or articulable reasons were present here. The traffic stop of Colbert's car was unnecessary; the search warrant could have been executed any time, day or night, and the officers knew they could enter Colbert's house regardless of whether he was there. The only lawful reason the officers could have stopped Colbert was if they reasonably suspected him of committing a felony, *if* the stop was reasonably necessary to determine the lawfulness of Colbert's conduct. However, Colbert was not engaging in any apparent lawless conduct; instead, he was pulled over on the basis of the officers' unreasonable suspicion that he might have drugs on him. Thus, the officers' initial stop of Colbert was invalid under Ark. R. Crim. P. 3.1.

Although the stop cannot be justified under the Arkansas Rules of Criminal Procedure, the State argues that the inevitable discovery rule should validate the search of Colbert's car. That rule provides that evidence otherwise subject to suppression can be admissible if the State proves by a preponderance of the evidence that the police would have inevitably discovered the evidence by lawful means. *Thompson v. State*, 333 Ark. 92, 966 S.W.2d 901 (1998); *Brunson v. State*, 296 Ark. 220, 753 S.W.2d 859 (1988). The State urges that if Colbert's car had been at his house when the officers first drove by, or had the officers merely waited for Colbert to come home, the warrant would then have permitted them to search the car. However, this argument ignores the fact that Colbert was not returning home when the officers spotted him. Because Colbert appeared to be leaving town when the officers decided to stop him, it is impossible to conclude the officers would have inevitably discovered drugs in Colbert's car when he eventually returned home. Nor did the officers suggest they intended to stake out Colbert's house to await his return. In short, the State fails to show how the inevitable discovery rule can be employed to validate the stop and search of Colbert's car.

In its final argument, the State asserts that, even if the trial court erred in allowing the drugs seized from Colbert's car, the error was harmless. Again, we must disagree.

As mentioned earlier, Colbert does not challenge his conviction of simultaneous possession of drugs and a firearm, which resulted from the officers' finding .576 grams of cocaine and firearms in their search of Colbert's house. The State argues this contraband can be used also to prove Colbert violated Ark. Code Ann. § 5-64-401 (Supp. 1999), which makes it a felony to possess a controlled substance with the intent to deliver it. The State cites *Hendrickson v. State*, 316 Ark. 182, 871 S.W.2d 362 (1994), where the court held that, even where a criminal defendant possesses less than the presumptive amount, a conviction can stand where other proof of intent to deliver is present. In *Johnson v. State*, 333 Ark. 673, 972 S.W.2d 935 (1998), we held that when an accused is charged with possession of a controlled substance with intent to deliver, evidence of possession of firearms is relevant to prove intent.

The *Hendrickson* and *Johnson* holdings are good for the proposition that firearms evidence may be used to prove intent to deliver and can be substantial evidence to affirm a conviction for possession with intent to deliver. However, those cases are not otherwise applicable to the facts in the instant case. Here, the State was allowed to introduce inadmissible evidence taken from Colbert's car to show he possessed 1.3 grams of cocaine, which, unlike the .576 grams found in Colbert's house, was more than the presumptive amount Arkansas law established to prove intent to deliver. The prosecutor relied on the drugs seized from Colbert's car and argued its significance to the jury, and the jury had a right to rely on the drugs taken from the car to find Colbert violated § 5-64-401, since the trial court allowed that evidence at trial.

The State cites *Rockett v. State*, 318 Ark. 831, 890 S.W.2d 235 (1994), in support of its harmless error argument, but there this court stated that illegally seized items from a motel room did not affect the defendant's guilty verdict based upon other overwhelming evidence of defendant's guilt. Here, although the jurors could have found Colbert had violated § 5-64-401 by inferring that he intended to deliver drugs, since firearms were found in his house, that sole factual issue was not presented to them. To the contrary, the State's case, beginning with its opening argument, relied on the fact that Colbert had over 1.3 grams in his car and house and that the amount of cocaine the General Assembly had established to be sufficient to raise that legal presumption of intent to deliver is one

gram. Harmless error is simply inapplicable to the evidence and facts now before us.

For the reasons above, we reverse and remand.

Mary Lee ORSINI *v.* STATE of Arkansas

98-1119 13 S.W.3d 167

Supreme Court of Arkansas
Opinion delivered March 23, 2000

Appellant, pro se.

Winston Bryant, Att'y Gen., by: *Annamary Dougherty*, Ass't Att'y Gen., for appellee.

ROBERT L. BROWN, Justice. This case involves an allegation of a Freedom of Information Act (FOIA) violation by an inmate at the Women's Unit of the Arkansas Department of Correction. The inmate, appellant Mary Lee Orsini, contends that

the appellees who are officers of the Arkansas Department of Correction as well as the Department itself withheld information vital to her defense at a disciplinary proceeding. Orsini further contends that she was denied a hearing within seven days of her FOIA request, as required by Ark. Code Ann. § 25-19-107(b) (Repl. 1996). We agree that Orsini should have had her request heard by the trial court, and we reverse and remand for a hearing.

On April 11, 1997, Officer Bulah Hampton of the Department charged Orsini with two major disciplinaries — belligerence toward an officer and insolence. She stated in her report that she had beckoned Orsini to come to her, that Orsini had refused to come, that she then gave Orsini a direct order to come, and that Orsini answered that she did not have time for the officer's "drama." Orsini next slammed a door which, according to Officer Hampton, hurt her hand.[1]

Officer Felicia Brothers witnessed part of the incident and gave a witness statement on April 16, 1997, in which she indicated that Officer Hampton may have intentionally aggravated Orsini. She referred in her witness statement to "005's," which are additional incident reports made by her and which apparently were made at 10:00 a.m. and 3:00 p.m. on the day of the confrontation, according to Orsini's pleadings.

Orsini was disciplined as a result of Officer Hampton's charge and had two weeks of privileges revoked. Orsini then began her quest to obtain copies of Officer Brothers's 005 reports. She first made FOIA requests to Larry Norris, Director of the Department, and to Robert Clark, Internal Affairs/Disciplinary Administrator for the Department. On August 19, 1997, Administrator Clark denied her request and responded that the requested documents were in Orsini's "institutional jacket and available for [her] review, upon request to the unit records supervisor." Director Norris never replied. Orsini then made another request to L. Polk, the Records Supervisor. On September 8, 1997, Polk denied the request "due to disciplinaries, not a part of FOIA."

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[1] It is not clear whether Officer Hampton charged Orsini with deliberately slamming the door. Her report reads: "My hand was on the door and the force with which the door was swung injured my hand. I do think this was a deliberate assault, just an infortunate [sic] accident. However, Inmate Orsini #2440 Belligerency/Blatant Display of Insolence wasn't."

This denial was followed by Orsini's appeal to Jefferson County Circuit Court on September 18, 1997. In her appeal, Orsini requested the Brothers 005 reports and other documents used to affirm her disciplinary. She also requested the circuit court to hear her petition within seven days. On October 8, 1997, the Department responded to the appeal to circuit court and stated that Orsini already had the requested documents. On November 4, 1997, and then again on June 18, 1998, Orsini moved the circuit court to set her FOIA request down for a hearing. On July 22, 1998, the circuit court dismissed the Orsini appeal for failure to state a claim. The circuit court's order of dismissal noted that "defendants have furnished plaintiff with the documents required...."

Orsini claims that she does not have the requested documents. She first contends that the circuit court violated the FOIA by failing to conduct a hearing on her request for public documents, as required by Ark. Code Ann. § 25-19-107(b) (Repl. 1996). Section 25-19-107(b) reads:

> (b) Upon written application of the person denied the rights provided for in this chapter, or any interested party, it shall be mandatory upon the circuit court having jurisdiction to fix and assess a day the petition is to be heard within seven (7) days of the date of the application of the petitioner, and to hear and determine the case.

Whether § 25-19-107(b) requires that a hearing be set within seven days of the FOIA request or actually conducted within that time frame is not important to our decision because the circuit court did neither. Clearly, however, this section of the FOIA sets a policy in favor of expeditious hearings on all FOIA requests.

In the case of *Furman v. Holloway*, 312 Ark. 378, 849 S.W.2d 520 (1993), this court concluded that an inmate's file met the definition of a "public record" under Ark. Code Ann. § 25-19-105(a) (Repl. 1996), because it was required to be kept by the director of the Department. *See* Ark. Code Ann. § 12-27-113(e) (Repl. 1999) and § 25-19-103(1) (Repl. 1996). Furthermore, there is no dispute that the Department is an agency of the state and that it denied Orsini's FOIA request. *See* Ark. Code Ann. § 25-19-107(a) (Repl. 1996). Thus, it would appear that Orsini was entitled to a hearing, and none was set or held by the circuit court.

The Department does not address this procedural lapse in its brief. Its sole argument is that Orsini was not entitled to the Brothers 005 reports under Department Regulation 804 and Department Administrative Directive 93-14. This, of course, was not the basis upon which the circuit court dismissed Orsini's appeal. The Department further contends that the regulation and directive were adopted pursuant to legislative authority, as set forth at Ark. Code Ann. § 12-27-113(e)(1) (Repl. 1999). Section 12-27-113(e)(1) reads:

> (1) To protect the integrity of those records [inmate files] and to insure their proper use, it shall be unlawful to permit inspection of or disclose information contained in those records or to copy or issue a copy of all or part of any record to any person so committed except as authorized by administrative regulation or by order of a court of competent jurisdiction. The regulations shall provide for adequate standards of security and confidentiality of records.

We turn first to Regulation 804. This regulation was approved by the Department's Board on February 17, 1994, and it is on file with the Arkansas Secretary of State. Regulation 804 reads in pertinent part:

> 1. An offender is entitled to inspect his or her offender record pursuant to the Arkansas Freedom of Information Act and subject to the following limitations:
>
> . . . .
>
> c. Documents of a sensitive or confidential nature and which would cause great harm to third persons if disclosed are exempt from disclosure;

Regulation 804 mentions Administrative Directive 93:14 as a "reference."

Administrative Directive 93-14 appears to be a policy statement issued by the Department and not a regulation adopted by the Board. It states in part under Section III, F:

> F. Exemptions by Inmate Record Organization:
>
> The following is a list of specific forms and/or documentation that may be contained within inmate records and are determined to be exempted from disclosure under the FOIA, other Arkansas codes,

and federal law. This serves only as a guide for inmate records while other exemptions may exist.

. . . .

2. Confidential Reporting of Incidents (005's)

The distinction between a Board's regulation and an agency's directive is an important one. Regulations adopted pursuant to legislative authority are considered to be part of the substantive law of this state. *State v. Jones*, 338 Ark. 781, 3 S.W.3d 675 (1999). Formally adopted regulations are registered with the Arkansas Secretary of State and are open to public inspection. Ark. Code Ann. § 25-15-204(d)(2) (Repl. 1996). Administrative Directive 93-14, however, has not been adopted by the Board and is not registered with the Secretary of State. Thus, it is not a regulation establishing an exemption as contemplated by § 12-27-113(e)(1). The result is that Administrative Directive 93-14 does not provide an automatic exemption from the FOIA for all 005 reports.

The remaining question then is whether Regulation 804 establishes an exemption for the documents requested. Our law with respect to FOIA exemptions has been often stated:

> We liberally construe the FOIA to accomplish its broad and laudable purpose that public business be performed in an open and public manner. *Sebastian County Chap. of the Am. Red Cross v. Weatherford*, 311 Ark. 656, 846 S.W.2d 641 (1993); *Bryant v. Mars*, 309 Ark. 480, 830 S.W.2d 869 (1992). In conjunction with this rule of construction, we narrowly construe exceptions to the FOIA to counterbalance the self-protective instincts of the government bureaucracy. *Byrne v. Eagle*, 319 Ark. 587, 892 S.W.2d 487 (1995); *McCambridge v. City of Little Rock*, 298 Ark. 219, 766 S.W.2d 909 (1989). A statutory provision for nondisclosure must be specific. Ark. Code Ann. § 25-19-105(a) (Supp. 1993); *Troutt Bros. v. Emison*, 311 Ark. 27, 841 S.W.2d 604 (1992). Less than clear or ambiguous exemptions will be interpreted in a manner favoring disclosure. *Troutt Bros. v. Emison, supra*; *Young v. Rice*, 308 Ark. 593, 826 S.W.2d 252 (1992).

Arkansas Dept. of Health v. Westark Christian Action Council, 322 Ark. 440, 443, 910 S.W.2d 199, 201 (1995). The burden of proving exemptions to the FOIA rests with the keeper of the requested

records claiming the exemption. *Young v. Rice*, 308 Ark. 593, 826 S.W.2d 252 (1992).

Regulation 804 allows inmates to inspect their files subject to certain procedures and so long as the documents are not "of a sensitive or confidential nature which would cause great harm to third persons if disclosed." This regulation provides an exemption to the FOIA. The circuit court, though, disallowed Orsini's appeal because it believed that she already had the information requested. According to the State's brief on appeal, this apparently is not the case. Rather, as already noted, the State contends that the 005 reports were denied because they contained confidential and sensitive information and Administrative Directive 93-14 provided for a specific FOIA exemption.

We hold that a hearing is required under § 25-19-107(b) for the circuit court to determine whether the requested Brothers 005 reports as well as any of the other documents used to affirm the Orsini disciplinary qualify for exemption as sensitive or confidential information under Regulation 804. Such a determination on an exemption may be made by the court *in camera*. *See Gannett River States Publ'g v. Ark. Indus. Dev. Comm'n*, 303 Ark. 684, 799 S.W.2d 543 (1990).

Reversed and remanded.

CONAGRA, INC. *v.* Vida STROTHER

99-1413 13 S.W.3d 150

Supreme Court of Arkansas
Opinion delivered March 23, 2000

Walmsley & Weaver, by: *Tim Weaver*, for appellant.

Comer Boyett, Jr., for appellee.

ANNABELLE CLINTON IMBER, Justice. This is a slip-and-fall case. Vida Strother worked for more than twenty years as a poultry inspector for the United States Department of Agriculture (USDA) at Conagra's processing plant in Batesville, Arkansas. On March 24, 1994, Ms. Strother had just completed her shift when she went upstairs to the breakroom provided by Conagra for USDA employees, changed into her civilian clothing, stepped "two or three steps" outside the breakroom, and slipped and fell. She fractured her left elbow and injured her lower back and hips as a result of the fall.

Ms. Strother filed a complaint against Conagra in which she alleged that she slipped and fell on the wet tile floor at Conagra and sustained injuries as a result of Conagra's negligence. Following a jury trial, the jury returned a verdict in favor of Ms. Strother for

$125,000 in damages. Conagra appealed the jury's verdict to the Arkansas Court of Appeals and raised two points of error for reversal: (1) the trial court erred in failing to grant Conagra's motion for a directed verdict at the close of trial and motion for judgment notwithstanding the verdict (JNOV) after the verdict was returned; and (2) the trial court erred in failing to grant Conagra's motion for a new trial.

The Court of Appeals found no reversible error and affirmed. *Conagra , Inc. v. Strother*, 68 Ark. App. 120, 5 S.W.3d 69 (1999). In doing so, the Court of Appeals held that this case did not require analysis under a traditional slip-and-fall theory of recovery. *Id.* In a petition for review filed in this court pursuant to Ark. Sup. Ct. R. 2-4, Conagra now challenges the decision by the Court of Appeals. Specifically, Conagra contends that the Court of Appeals incorrectly analyzed this case as a hidden-danger case by citing *Heigle v. Miller*, 332 Ark. 315, 965 S.W.2d 116 (1998), instead of applying a traditional slip-and-fall theory of recovery upon which the case was submitted to the jury. We granted Conagra's petition for review. When this court grants a petition to review a case decided by the Court of Appeals, we review it as if it was originally filed in this court. *McKay v. McKay*, 340 Ark. 171, 8 S.W.3d 525 (2000); *Youngman v. State Farm Mut. Auto. Ins. Co.*, 334 Ark. 73, 971 S.W.2d 248 (1998).

For its first point on appeal, Conagra contends that the trial court erred in failing to grant its motion for a directed verdict at the close of the trial and its motion for judgment notwithstanding the verdict after the verdict was returned. In its directed verdict motion and JNOV motion, Conagra raised questions about the sufficiency of the evidence.

In addressing the sufficiency issue, we must first view the evidence in the light most favorable to the party against whom the verdict is sought and give that evidence the highest probative value, taking into account all reasonable inferences that can be derived from it. *Morehart v. Dillard Dep't Stores*, 322 Ark. 290, 908 S.W.2d 331 (1995); *Lytle v. Wal-Mart Stores, Inc.*, 309 Ark. 139, 827 S.W.2d 652 (1992). A motion for a directed verdict should be granted only when the evidence viewed is so insubstantial as to require the jury's verdict for the party to be set aside. *Wal-Mart Stores, Inc. v. Kelton*, 305 Ark. 173, 806 S.W.2d 373 (1991). A motion for a directed

verdict should be denied when there is a conflict in the evidence or when the evidence is such that fair-minded people might reach different conclusions. *Id.* Under those circumstances a jury question is presented and a directed verdict is inappropriate. *Id.*

It is not this court's province to try issues of fact; we simply examine the record to determine if there is substantial evidence to support the jury verdict. *City of Caddo Valley v. George*, 340 Ark. 203, 9 S.W.3d 481 (2000). Substantial evidence is defined as evidence of sufficient force and character to compel a conclusion one way or another with reasonable certainty; it must force the mind to pass beyond suspicion or conjecture. *Union Pac. R.R. Co. v. Sharp*, 330 Ark. 174, 952 S.W.2d 658 (1997).

We have stated that a motion for JNOV is technically only a renewal of the motion for a directed verdict made at the close of the evidence. *Wheeler Motor Co., Inc. v. Roth*, 315 Ark. 318, 867 S.W.2d 446 (1993). Accordingly, we are also governed by the rule that a trial court may enter judgment notwithstanding the verdict only if there is no substantial evidence to support the jury verdict and the moving party is entitled to judgment as a matter of law. *Ellis v. Price*, 337 Ark. 542, 990 S.W.2d 543 (1999); *Schmidt v. Pearson, Evans & Chadwick*, 326 Ark. 499, 931 S.W.2d 774 (1996).

The principles that govern slip-and-fall cases have been frequently stated by this court. Those principles are set against the general backdrop that an owner has a duty to exercise ordinary care to maintain the premises in a reasonably safe condition for the benefit of invitees. *Morehart v. Dillard Dep't Stores, supra*; *Black v. Wal-Mart Stores, Inc.*, 316 Ark. 418, 872 S.W.2d 56 (1994). To establish a violation of that duty, the plaintiff must prove either: (1) that the presence of a substance upon the floor was the result of the defendant's negligence, or (2) that 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. *Wilson v. J. Wade Quinn Co.*, 330 Ark. 306, 952 S.W.2d 167 (1997); *Kelly v. National Union Fire Ins. Co.*, 327 Ark. 329, 937 S.W.2d 660 (1997); *Brunt v. Food 4 Less, Inc.*, 318 Ark. 427, 885 S.W.2d 894 (1994) (quoting *Derrick v. Mexico Chiquito, Inc.*, 307 Ark. 217, 819 S.W.2d 4 (1991)). The mere fact that a person slips and falls does not give rise to an inference of negligence. *Brunt v. Food 4 Less, Inc., supra.*

Consistent with these principles, AMI Civ. 3d 1105 (Revised 1995) sets out the elements a plaintiff must prove in order to prevail in a slip-and-fall case.[1] *Thompson v. American Drug Stores, Inc.*, 326 Ark. 586, 932 S.W.2d 333 (1996). The jury was instructed with the following version of AMI Civ. 3d 1105:

> Vida Strother contends that she slipped and fell on greasy water which was present on Defendant Con Agra's premises. Con Agra owed to Vida Strother a duty to use ordinary care to maintain the premises in a reasonably safe condition.
>
> To establish a violation of this duty, Vida Strother must prove either that the presence of the greasy water upon the floor was a result of negligence on the part of Con Agra; or
>
> That Con Agra knew of the presence upon the floor; or
>
> That the greasy water had been on the floor for such a length of time that Con Agra reasonably should have known of its presence and failed to use ordinary care to remove it.

Conagra forcefully argues that Ms. Strother failed to establish either of the elements required in a slip-and-fall case. In other words, Conagra asserts that Ms. Strother did not prove (1) that the presence of greasy water on the floor was the result of Conagra's negligence, or (2) that Conagra knew of its presence, or should have known of its presence due to the length of time it was there, and failed to use ordinary care to remove it. We disagree.

Testimony was presented at trial to support Ms. Strother's claim. Conagra had complete control of the building where Ms. Strother worked as a USDA poultry inspector. The first floor of the Conagra plant had a non-skid floor, whereas the floor covering in the hallway leading to the USDA breakroom on the second floor was tile. Due to the nature of the chicken processing business, it was a common everyday occurrence for greasy water to get on the tile floor in the second floor hallway and make the floor slick. According to Conagra's plant superintendent, Steve Felts, a great deal of water must be used in the chicken processing business, with the Batesville plant using approximately 630,000 gallons of water to process 120,000 birds in one shift. Under these circumstances,

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[1] The Fourth Edition of *Arkansas Model Jury Instructions - Civil,* published in 1999, changed the number of this instruction to AMI Civ. 4th 1106.

greasy water that collected on the aprons and boots of USDA and Conagra employees would be tracked around the hallways by the employees as they went for coffee breaks. In response to these conditions, Conagra placed safety mats in the hallways where people would be walking. Conagra also established a policy regarding the removal of the safety mats: the safety mats were not to be removed until all employees and USDA inspectors had left the building. On March 24, 1994, when Ms. Strother slipped and fell outside the breakroom, there were no safety mats on the floor and the tile floor was wet.

This testimony collectively constitutes substantial evidence under the first basis for liability in a slip-and-fall case. The jury could readily infer that greasy water was present on the tile floor in the hallway outside the breakroom and that its presence was the result of Conagra's negligence; that is, as a result of the removal of the safety mats before Conagra and USDA employees had left the building, in violation of company policy, the tile floor became wet and slick.

Conagra suggests that the facts in this case are similar to those in *Mulligan's Grille, Inc. v. Aultman*, 300 Ark. 544, 780 S.W.2d 554 (1989). That case, however, is inapposite. In *Aultman* there was no proof of any foreign substance presented to the jury.

Conagra further contends that Ms. Strother failed to prove how long the substance had been on the floor and cites three cases in support of this argument — *Mankey v. Wal-Mart Stores, Inc.*, 314 Ark. 14, 858 S.W.2d 85 (1993); *Bank of Malvern v. Dunklin*, 307 Ark. 127, 817 S.W.2d 873 (1991); and *Johnson v. Arkla*, 299 Ark. 379, 771 S.W.2d 782 (1989). This argument, however, relates to the elements of proof under the second basis for liability in a slip-and-fall case — that the defendant either knew a substance had been on the floor, or should have known of its presence due to the length of time it was there, and failed to use ordinary care to remove it. Conagra fails to acknowledge that there are two separate and distinct bases for liability and that the plaintiff in a slip-and-fall case need only prove one of those bases in order to prevail. We have already concluded that there is substantial evidence to support the jury verdict under the first basis for liability — that the presence of the greasy water on the tile floor was the result of Conagra's negli-

gence. Thus, we need not address the sufficiency of the evidence under an alternative basis for liability.

Finally, Conagra suggests that the trial court erred when it applied the analysis contained in the case of *Heigle v. Miller*, 332 Ark. 315, 965 S.W.2d 116 (1998), in determining whether to grant Conagra's motion for JNOV. Similarly, Conagra contends in its petition for review that the Court of Appeals also erred when it analyzed this case as a hidden-danger case by citing *Heigle v. Miller, supra*. While the facts in both cases appear to be similar, we agree that *Heigle* is nonetheless inapposite. We concluded in *Heigle* that the trial court erroneously granted the defendant's motion for summary judgment because there was an issue of disputed facts concerning the defendant's duty to warn the plaintiff-licensee of hidden dangers. In contrast, this case involves a challenge to the sufficiency of the evidence for a jury award based on slip-and-fall jury instructions, i.e., AMI Civ. 3d 1105. Under these circumstances, the trial court should have confined its analysis regarding the sufficiency of the evidence to the theory of liability upon which the case was submitted to the jury.

We must therefore determine whether the trial court's incorrect legal analysis is reversible error. The issue here is whether the trial court properly denied Conagra's motion for JNOV. We have already concluded that there is substantial evidence to support the jury verdict under the first basis for liability set out in AMI Civ. 3d 1105. If denying Conagra's motion JNOV was the proper action to take, that action does not become reversible error simply because the trial court gave the wrong reason for taking it. *Borden v. St. Louis Southwestern Ry. Co.*, 287 Ark. 316, 698 S.W.2d 795 (1985); *Martin v. Blackmon*, 277 Ark. 190, 640 S.W.2d 435 (1982).

For these reasons, we hold that no prejudice resulted from the trial court's erroneous application of the hidden-danger analysis contained in *Heigle v. Miller, supra*. When the evidence is viewed in a light most favorable to the appellee, Ms. Strother, we agree that sufficient evidence existed to allow the case to proceed to the jury on a traditional slip-and-fall theory of recovery, and consequently, we cannot say that the trial court erred in denying Conagra's motion for JNOV.

For its second point on appeal, Conagra argues that the trial court erred in failing to grant its motion for new trial. Conagra submitted a post-trial motion in which it again challenged the sufficiency of the evidence to support the verdict and challenged the trial court's decision to allow Ms. Strother to introduce evidence concerning the presence of water on the floor at times other than when she slipped and fell on March 24, 1994. Prior to trial, the trial court had granted Conagra's motion in limine to exclude testimony about other times when water was on the floor and instructed Ms. Strother to confine the evidence to the date of the accident. However, at trial she introduced testimony concerning the daily presence of greasy water in the area and the presence of safety mats. Over Conagra's objection, the trial court admitted the testimony for the limited purpose of establishing that Conagra had notice of the floor's condition.

[redacted] We have noted that a motion in limine is a threshold motion. *Nolen v. State*, 278 Ark. 17, 643 S.W.2d 257 (1982). We have also held that the trial judge is at liberty to reconsider his or her prior rulings during the course of a single trial. *Davis v. State*, 325 Ark. 96, 925 S.W.2d 768 (1996); *Hill v. State*, 276 Ark. 300, 634 S.W.2d 120 (1982). Thus, the trial court's initial ruling on Conagra's motion in limine was a threshold ruling subject to reconsideration and change as the evidence was more fully developed at trial. Clearly, the trial court was convinced by the presentation of evidence to modify its earlier ruling and allow testimony about the daily presence of greasy water on the floor and the presence of safety mats for the limited purpose of establishing that Conagra had prior notice that such a condition existed. We will not reverse a trial court's ruling on the admission of evidence absent an abuse of discretion. *Edwards v. Stills*, 335 Ark. 470, 984 S.W.2d 366 (1998); *Smith v. Galaz*, 330 Ark. 222, 953 S.W.2d 576 (1997). We cannot say that the trial court abused its discretion when it admitted the testimony for the limited purpose of establishing that Conagra had prior notice that the floor outside the breakroom would become wet and slick upon removal of the safety mats.

Affirmed.

Ron OLIVER, President, First Arkansas Bail Bonds, Inc. *v.* PULASKI COUNTY CIRCUIT COURT; Arkansas Professional Bail Bond Company and Professional Bail Bondsman Licensing Board, Interveners; Jamie Mann and Affordable Bail Bonds, Inc., Interveners

00-33 13 S.W.3d 156

Supreme Court of Arkansas
Opinion delivered March 23, 2000

Gruber Law Firm, by: *Wayne A. Gruber*, for petitioner.

Mark Pryor, Att'y Gen., by: *Larry E. Crane*, Ass't Att'y Gen., for interveners Arkansas Professional Bail Bond Company and Professional Bail Bondsman Licensing Board.

Lueken Law Firm, by: *Patty W. Lueken*, for interveners Jamie Mann and Affordable Bail Bonds, Inc.

LAVENSKI R. SMITH, Justice. Petitioner, Ron Oliver, along with Interveners, Arkansas Professional Bail Bond Company ("Arkansas Professional") and the Professional Bail Bondsman Licensing Board ("the Board"), seek a Writ of Prohibition against the Pulaski County Circuit Court. Oliver contends that the court exceeded its authority in issuing several subpoenas duces tecum after having remanded the matter to the Board for additional evidentiary development. Intervener Jamie Mann and his employer, Affordable Bail Bonds, Inc. ("Affordable"), contest the issuance of the writ. We have jurisdiction of this case pursuant to Arkansas Supreme Court Rule 1-2(a)(3). Petition denied.

Facts

This dispute arises out of an underlying disciplinary action before the Board. The Baxter County Sheriff filed a complaint in 1997 against Affordable and Mann. The complaint alleged that they had violated several provisions of the Bail Bondsman Licensing laws, codified at Ark. Code Ann. § 17-19-101 et. seq., as well as the rules and regulations promulgated by the Board regulating the profession. The Board held a hearing on October 24, 1997. On November 12, 1997, the Board issued its decision finding that Mann and Affordable had indeed violated several provisions of the Bail Bondsman Licensing statutes. The Board suspended Mann's license for a total of eight months for violations in two separate incidents in which Mann participated. The Board also fined Affordable $2,500 and suspended the company's operating license for sixty days for one of the incidents.

Pursuant to Ark. Code Ann. § 17-19-209(g) (Supp. 1997), Mann and Affordable appealed to the Pulaski County Circuit Court for a *de novo* review of the Board's decision. Before the circuit court could hear the matter, the Arkansas Legislature enacted Act 1477 of 1999. This Act, codified at Ark. Code Ann. § 17-19-209(g), eliminated the right for a *de novo* review in the circuit court of the Board's decisions. Instead, the legislature required that all appeals from the Board be reviewed pursuant to the Arkansas Administrative Procedures Act ("APA"), codified at Ark. Code Ann. § 25-15-101 et seq. Based upon this change in the law, the Board argued to the circuit court that the circuit court was bound by the record from the underlying Board hearing. They contended the amendment to the law would apply immediately because the change was procedural rather than substantive in nature. Mann and Affordable objected, arguing that it would be prejudiced by retroactive application of the new law. They asserted that the existence of a *de novo* review by the circuit court influenced their trial strategy before the Board. Mann and Affordable argued that if the amended manner of review applied, they should be entitled to a remand to develop the record thoroughly before the Board prior to appellate review. In addition, Mann and Affordable argued that evidence of bias of one of the Board members had not been developed before the Board. On September 15, 1999, the circuit court in an agreed order found that the amended manner of review would apply to the case in

accordance with the APA. However, the court then remanded the case to the Board for further proceedings to permit Mann and Affordable to develop the factual record. In doing so, the circuit court analogized Mann's and Affordable's argument to an application to present additional evidence pursuant to Ark. Code Ann. § 25-15-212(f), which allows the circuit court to order the Board to take additional evidence and modify its decision accordingly. The circuit court ordered that the case be remanded "for proceedings consistent with" Ark. Code Ann. § 25-15-212(f).

Following the remand order, Mann and Affordable apparently suspected a potential conflict with one of the Board members hearing the case. Mann and Affordable believed that the Board member, Charles Pearson, had been an owner or stockholder at Oliver's company, First Arkansas Bail Bonds ("First Arkansas"). First Arkansas was Affordable's only local competition. As such, Mann and Affordable wished to take Oliver's deposition to develop this information prior to the Board hearing on remand. They intended to show that Pearson held a pecuniary interest in voting for Mann's and Affordable's suspension. To compel this deposition, Mann and Affordable sought and received an order from the circuit court to depose Oliver. The circuit court issued a subpoena duces tecum on September 23, 1999, eight days after the circuit court remanded the matter to the Board for a new hearing. Mann filed notice of the Oliver deposition with the Pulaski County Circuit Clerk on January 10, 2000. Oliver moved to quash the deposition, and the circuit court denied the motion. Oliver filed his petition for writ of prohibition in this court on January 11, 2000. Oliver also filed an Application for Temporary Relief to stay all further action relating to the deposition pending a decision on his prohibition petition. In a per curiam decision delivered on January 20, 2000, this court requested that the parties brief the issues.[1] We stayed Oliver's deposition pending the outcome of the matter, and also allowed Mann and Affordable, as well as Arkansas Professional and the Board, to intervene in the appeal.

[1] *Oliver v. Pulaski County Circuit Court*, 340 Ark. 199, 8 S.W.3d 35 (2000).

Standard of Review

While Oliver filed this matter as a petition for writ of prohibition, it is apparent that the petitioner is actually seeking a writ of certiorari. The remedy Oliver seeks in quashing the subpoena is directed towards an action already taken by the circuit court as opposed to some prospective action. A writ of prohibition will not lie for actions already taken. We recently listed the requirements for a writ of prohibition in *Pike v. Benton Circuit Court*, 340 Ark. 311, 10 S.W.3d 447 (2000), where we stated:

> A writ of prohibition is extraordinary relief which is appropriate only when the trial court is wholly without jurisdiction. *Henderson Specialties, Inc. v. Boone County Circuit Court*, 334 Ark. 111, 971 S.W.2d 234 (1998); *Nucor Holding Co. v. Rinkines*, 326 Ark. 217, 931 S.W.2d 426 (1996). The writ is appropriate only when there is no other remedy, such as an appeal, available. *Henderson Specialties, Inc. v. Boone County Circuit Court, supra*; *West Memphis Sch. Dist. No. 4 v. Circuit Court*, 316 Ark. 290, 871 S.W.2d 368 (1994) (quoting *National Sec. Fire & Cas. Co. v. Poskey*, 309 Ark. 206, 828 S.W.2d 836 (1992)). When deciding whether prohibition will lie, we confine our review to the pleadings in the case. *The Wise Company, Inc. v. Clay Circuit*, 315 Ark. 333, 869 S.W.2d 6 (1993); *State v. Circuit Court of Lincoln County*, 336 Ark. 122, 125, 984 S.W.2d 412, 414 (1999). We have further held that we do not issue a writ of prohibition for something that has already been done. *Holmes v. Lessenberry*, 297 Ark. 23, 759 S.W.2d 37 (1988) (per curiam).

The writ of certiorari, unlike prohibition, can address actions already taken by the lower court. We stated our approach to this issue in the recent case of *Arkansas Public Defender Comm. v. Burnett*, 340 Ark. 233, 12 S.W.3d 191 (2000). There we pointed out that when circumstances warrant, we will treat a petition for writ of prohibition as though it were correctly filed as a petition for writ of certiorari. We stated:

> We hold that although the Commission has sought a writ of prohibition, a writ of certiorari is the more appropriate remedy. A writ of prohibition cannot be invoked to correct an order already entered, and where, as here, the lower court's order has been entered without or in excess of jurisdiction, we carve through the technicalities and treat the application as one for certiorari. *Bates v. McNeil*, 318 Ark. 764, 888 S.W.2d 642 (1994). A writ of certiorari

> lies only where it is apparent on the face of the record that there has been a plain, manifest, clear, and gross abuse of discretion, and there is no other adequate remedy. *Hanley v. Arkansas State Claims Comm'n*, 333 Ark. 159, 970 S.W.2d 198 (1998). These principles apply when a petitioner claims that the lower court did not have jurisdiction to hear a claim or to issue a particular type of remedy. *Id.*

Burnett, 340 Ark. at 236.

In sum, we will grant a writ of certiorari only when there is a lack of jurisdiction, an act in excess of jurisdiction on the face of the record, or the proceedings are erroneous on the face of the record. *Cooper Communities, Inc. v. Benton County Circuit Court*, 336 Ark. 136, 984 S.W.2d 429 (1999). It is not to be used to look beyond the face of the record to ascertain the actual merits of a controversy, or to control discretion, or to review a finding of facts, or to reverse a trial court's discretionary authority. *Juvenile H. v. Crabtree*, 310 Ark. 208, 833 S.W.2d 766 (1992).

The Trial Court's Jurisdiction

On appeal, Oliver contends that the circuit court lacked jurisdiction to subpoena him and his records for a deposition once that court remanded the matter to an administrative board. Oliver argues that an appellate court loses jurisdiction after issuance of its mandate or after remand. As such, the Board, not the circuit court, has the authority to issue subpoenas when it has the case. Interveners Arkansas Professional and the Board support this argument, and also contend that jurisdiction cannot lie in two tribunals at the same time. These interveners also argue that the Board has the power to issue subpoenas, and Mann and Affordable could have conducted discovery under jurisdiction of the Board prior to the hearing on remand. To the contrary, Mann and Affordable argue that a writ of prohibition is not the appropriate remedy here because the proof sought from Oliver in his deposition has to do with a procedural matter over which the circuit court maintains jurisdiction. Mann and Affordable argue that the type of remand contemplated in Ark. Code Ann. § 25-15-212(f) allows the circuit court to retain jurisdiction over the matter while the Board hears additional evidence and modifies its decision if necessary. Mann and Affordable further argue that Ark. Code Ann. § 25-15-212(g) allows the circuit court

to retain jurisdiction when alleged procedural irregularities exist before the agency.

Oliver argues that the circuit court in the administrative-appeals process is analogous to an appellate court. Hence, just as an appellate court's jurisdiction ends with the issuance of a mandate or upon remand, so would the circuit court's. *See Cooper Communities, supra*; *First Pyramid Life Ins. Co. v. Stoltz*, 312 Ark. 516, 849 S.W.2d 525 (1993); *Brimson v. Brimson*, 228 Ark. 562, 309 S.W.2d 29 (1958). This general rule would seem to support Oliver's argument that once the circuit court remanded the case to the Board, it lost all jurisdiction to issue the subpoena duces tecum to Oliver, as then only the Board had the authority and power to issue the subpoena. However, the circuit court's role as a reviewing court of administrative appeals is not the same as that of an appellate court. Mann and Affordable argue that Ark. Code Ann. § 25-15-212(f), the statutory section to which the circuit court referred in its remand order, actually allows the circuit court to retain jurisdiction. We agree. Ark. Code Ann. § 25-15-212(f) states:

> (f) If before the date set for hearing, application is made to the court for leave to present additional evidence and the court finds that the evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon any conditions which may be just. The agency may modify its findings and decision by reason of the additional evidence and shall file that evidence and any modifications, new findings, or decisions with the reviewing court.

It was under this section of the APA that the circuit court remanded the matter to the Board after the parties agreed that the circuit court no longer could conduct a *de novo* review of the Board's original proceeding but instead must follow the APA requiring the circuit court to conduct an appellate review of the Board's proceedings. Ark. Code Ann. § 25-15-212(f) contemplates a reservation of jurisdiction in the reviewing court in that it expressly requires that upon remand the agency "shall file that evidence and any modifications, new findings, or decisions with the reviewing court." A remand ends a proceeding before an appellate court, and it has nothing further to do. Here, however, the circuit court remains a reviewing court and retains continuing jurisdiction over the appeal. After the board completes its action, the circuit court may then proceed with

its consideration of the appeal on the merits. *See Hickory Hills Limited Partnership, et. al., v. Secretary of State of Maryland*, 84 Md.App. 677, 581 A.2d 834 (1990); *See also, Rosecky v. Illinois Department of Public Aid*, 147 Ill.App.3d 608, 511 N.E.2d 167 (1987). We also note that Ark. Code Ann. § 25-15-214 authorizes the Pulaski County Circuit Court to command agencies failing or refusing to act to the injury of any person or their property to do so where the agency acts unlawfully, unreasonably, or capriciously. This authority would seem to apply to any stage of the proceedings.[2]

We hold that the petitioner has fallen short in establishing that there has been a plain, manifest, clear, and gross abuse of discretion without any other remedy such as appeal. Nor has petitioner shown that the circuit court is wholly without jurisdiction. On the record before us, we cannot say that the trial court exceeded its jurisdiction in issuing subpoenas to Oliver.

Petition denied without prejudice.

GLAZE and BROWN, JJ., concur.

TOM GLAZE, Justice, concurring. I concur. The intervenors, Jamie Mann and Affordable Bail Bonds, Inc., received an adverse decision from the Professional Bail Bondsman Licensing Board and appealed that decision to circuit court, which subsequently remanded to the Board for additional evidence. Although the Board had authority, Ark. Code Ann. § 17-19-209(f)(Supp. 1999), to issue subpoenas to compel attendance of witnesses and the production of evidence, interveners obtained their subpoenas from the circuit court that had remanded their case to the Board. Interveners issued subpoenas for Ron Oliver, Board member Charles Pearson, and two Board employees. Through these witnesses, interveners sought to challenge Pearson's qualifications to serve on the Board. Oliver and the Board asked the circuit court to quash the subpoenas, stating (1) the court had no jurisdiction to issue subpoenas after it remanded the case to the Board, (2) the Board had no authority to hear questions bearing on a member's qualifications,

[2] We note that although the language in §214 mentions the chancery court that the case of *Harber v. Rhodes*, 248 Ark. 1188, 455 S.W.2d 926 (1970), declared the section unconstitutional as to the chancery court, but the remainder of the language would still be applicable to the circuit court.

and (3) similar to point (2), Pearson's credentials could not be attacked in a proceeding before the Board.

It appears clear from the record that the Board had no intention of issuing subpoenas to allow interveners to present or proffer testimony on why they believed Pearson should not sit as a Board member at a scheduled hearing of their case. It has long been settled that the law never requires the performance of a vain and useless act. *Leggett v. Kirby*, 231 Ark. 576, 331 S.W.2d 267 (1960). Since interveners were made aware that the Board's position was that it had no authority to allow interveners to question Pearson's credentials, they were compelled to seek relief from the court.

Ark. Code Ann. § 17-19-209(d)(3) (Supp. 1999) specifically provides the circuit court with authority to enforce the Board's subpoenas, and Ark. Code Ann. § 17-19-209(g) permits a party to appeal to the circuit court any order of the Board as a matter of right. Ark. Code Ann. § 17-19-209(c) also provides that Board hearings shall be conducted in the same manner as those under the Arkansas Administrative Procedure Act (APA), and the APA provides under Ark. Code Ann. § 25-15-214 (Repl. 1996), as follows:

> In any case of rule making or adjudication, if an agency shall unlawfully, unreasonably, or capriciously fail, refuse, or delay to act, any person who considers himself injured in his person, business, or property by the failure, refusal, or delay may bring suit in the [circuit] court of any county in which he resides or does business, or in the [Circuit] Court of Pulaski County for an order commanding the agency to act.[1]

As is obvious from a reading of the provisions above, the circuit court's jurisdiction may be invoked for a number of reasons after the court remands a case to an agency or board for a hearing. In the unique circumstances presented here, interveners called upon the circuit court to obtain subpoenas.

While I join the majority opinion in denying a writ of certiorari in these circumstances, I do not read the court's opinion to permit a party to circumvent the procedures set out in § 17-19-209

[1] Section 25-15-214 is codified as reading "may bring suit in the chancery court," but the designation of chancery court was held unconstitutional, and this court held it was appropriate to transfer such matters to circuit court. *See Harber v. Rhodes*, 248 Ark. 1188, 455 S.W.2d 926 (1970).

when they seek subpoenas or other evidence. Once again, the Board here effectively prevented the Interveners from utilizing § 17-19-209 by disclaiming any authority to issue subpoenas in this case or to hear questions bearing on a Board member's qualifications. While the Board might eventually prevail in its arguments, such points must necessarily be presented on appeal.

BROWN, J., joins this concurrence.

Sanford BUCHANAN *v.* STATE of Arkansas

CR 00-271 12 S.W.3d 638

Supreme Court of Arkansas
Opinion delivered March 23, 2000

Steve J. Jackson, for appellant.

No response.

PER CURIAM. Appellant Sanford Buchanan, by and through his attorney, has filed a motion for rule on the clerk. The motion reflects that the record on appeal was due to be filed on March 1, 2000, but that it was not tendered until March 3, 2000. Appellant's attorney, Steve J. Jackson, admits responsibility for tendering the record late.

We find that such error, admittedly made by the attorney for a criminal defendant, is good cause to grant the motion. *Jones v. State*, 338 Ark. 29, 992 S.W.2d 85 (1999) (*per curiam*) (citing *Tarry v. State*, 288 Ark. 172, 702 S.W.2d 804 (1986) (*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. *See In Re: Belated Appeals in Criminal Cases*, 265 Ark. 964 (1979) (*per curiam*).

Vincent James HUSSEY *v.* STATE of Arkansas

CR 00-269 20 S.W.3d 271

Supreme Court of Arkansas
Opinion delivered March 23, 2000

G.B. "Bing" Colvin, III, for appellant.

No response.

PER CURIAM. Petitioner, Vincent James Hussey, by his attorney, G. B. "Bing" Colvin, III, 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 (1979).

SIMMONS FIRST BANK of Arkansas *v.*
BOB CALLAHAN SERVICES, INC.

99-181 13 S.W.3d 570

Supreme Court of Arkansas
Opinion delivered March 30, 2000
[Petition for rehearing denied May 11, 2000. *]

[redacted]

[redacted]

* GLAZE, J., not participating.

Peel & Simmons, P.A., by: *John R. Peel*, for appellant.

James R. Wallace & Associates, by: *James R. Wallace*, for appellee/cross-appellant.

DONALD L. CORBIN, Justice. This case involves an issue of first impression regarding the priority of liens as between a general contractor and a bank. Appellant Simmons First Bank of Arkansas (Simmons) appeals the judgment of the Pulaski County Chancery Court awarding $250,528.05, plus interest, from a foreclosure sale to Appellee Bob Callahan Services, Inc. (Callahan). There are four points on appeal and one point on cross-appeal. Resolution of these issues requires our interpretation of the laws regarding mechanics' and materialmen's liens. *See* Ark. Code Ann. §§ 18-44-101 to -135 (1987 and Supp. 1999). Our jurisdiction is thus pursuant to Ark. Sup. Ct. R. 1-2(b)(1) & (6). We reverse and remand on appeal, but affirm on cross-appeal.

The record reflects that Doyle and Barbara DeWoody purchased a health club in North Little Rock by warranty deed dated May 26, 1994. On October 26, 1995, the DeWoodys executed and delivered to Appellant Simmons, then doing business as First Bank of Arkansas, a mortgage on the health-club property in the amount of $1,200,000.00. The mortgage was recorded on October 27, 1995, and reflects that it was executed for "personal purposes." Sometime in late 1995, Appellee Callahan, a general contractor, entered into a contract with the DeWoodys to perform certain construction and remodeling to their health club. The first phase of the work was completed pursuant to a written contract dated November 30, 1995, which provided for a fixed fee of $135,403.34. The second phase of the work was completed on a cost-plus basis, whereby Callahan hired the necessary subcontractors, materialmen, and laborers to construct improvements to the building. Callahan began work on the second phase of construction on January 4, 1996, and the construction was completed on August 8, 1996. Callahan and its employees furnished materials and labor to the DeWoodys as the general contractor for the total price of $979,476.62. Over the course of the construction, Callahan received payments from the DeWoodys totaling $523,080.00, leaving an unpaid balance of $456,396.62. The DeWoodys subsequently defaulted in their obligations under the mortgage and filed for bankruptcy.

Callahan filed suit on August 30, 1996, to foreclose its materialmen's lien for the labor, materials, and services provided. Simmons filed a counterclaim, asserting that its mortgage was entitled to priority over Callahan's lien. The chancellor found that Calla-

han's lien had priority on the basis that the mortgage, although filed before the construction began, failed to put anyone on notice that it was executed for the purpose of funding the construction, as provided in section 18-44-110(b)(1). The chancellor found further that Callahan's lien was superior to the mortgage even though the improvements to the health club were not removable. Thus, the chancellor concluded that Callahan was entitled to foreclose on the DeWoodys' property to satisfy its lien. The property was purchased at foreclosure sale by Simmons for the sum of $1,225,000.00. The proceeds of the sale were distributed first to Callahan, in the amount of $250,528.05, and then to Simmons. This appeal followed.

Simmons does not contest the validity of Callahan's lien, nor does it contest that the lien was properly perfected. The central point on appeal involves the chancellor's determination of the priority of the respective liens. We review chancery cases *de novo* on the record, but we do not reverse a finding of fact by the chancellor unless it is clearly erroneous. *Myrick v. Myrick*, 339 Ark. 1, 2 S.W.3d 60 (1999); *Western Foods, Inc. v. Weiss*, 338 Ark. 140, 992 S.W.2d 100 (1999). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed. *Id.* Similarly, we review issues of statutory construction *de novo*, as it is for this court to decide what a statute means. *Hodges v. Huckabee*, 338 Ark. 454, 995 S.W.2d 341 (1999); *State v. Farm Credit Servs.*, 338 Ark. 322, 994 S.W.2d 453 (1999). In this respect, we are not bound by the trial court's decision; however, in the absence of a showing that the trial court erred, its interpretation will be accepted as correct on appeal. *Id.* With these standards in mind, we discuss the issue of priority of the liens.

Simmons argues that the chancellor erred in ruling that Callahan's lien had priority over its mortgage as to the entire health-club property.[1] Simmons asserts that when the General Assembly passed Act 1298 of 1995, thereby amending the law of materialmen's liens,

[1] It is not clear from the record how much land is at issue here. The record reflects, however, that the lien and the mortgage are coextensive, as both describe the property as: "Lot 9, Block 1, McCain Commercial Park Addition to the City of North Little Rock, Pulaski County, Arkansas."

it intended to provide priority of such liens only in situations where the constructed improvement is removable. In the event the improvement is not removable, Simmons argues, the entire property should be foreclosed upon with the sale being subject to any prior encumbrance on the property. In short, Simmons contends that under section 18-44-110(b) a materialmen's lien enjoys priority over a mortgage only insofar as the improvements are removable.

We construe lien statutes strictly, as they are a derogation to the common law. *BB & B Constr. Co. v. F.D.I.C.*, 316 Ark. 663, 875 S.W.2d 48 (1994). Strict construction means narrow construction and requires that nothing be taken as intended that is not clearly expressed. *Lawhon Farm Servs. v. Brown*, 335 Ark. 272, 984 S.W.2d 1 (1998). The doctrine of strict construction is to use the plain meaning of the language employed. *Id.* Nevertheless, even when statutes are to be strictly construed, they must be construed in their entirety, harmonizing each subsection where possible. *Id.*

As amended by Act 1298, section 18-44-110(b)(1) provides:

> The liens for labor performed or materials or fixtures furnished, as provided for in this subchapter, *shall attach to the improvement* on which the labor was performed or the materials or fixtures were furnished *in preference to any encumbrance existing on the real estate prior to the commencement of construction or repair of the improvement.* In all cases where the prior encumbrance was given for the purpose of funding construction or repair of the improvement, that lien shall have priority over all liens given by this subchapter. [Emphasis added.]

It is clear from the plain language of this provision that the materialmen's lien attaches to the improvement and enjoys priority over all prior encumbrances on the real estate *except* those given for the purpose of funding the construction. Simmons concedes that the mortgage it held on the DeWoodys' property was not a construction mortgage as described in subsection (b)(1). Notwithstanding, Simmons contends that its mortgage retains priority over Callahan's lien because the improvements made to the DeWoodys' property are not removable. We disagree.

Prior to the 1995 amendments, the statutes provided that the improvement had to be removable for the materialmen's lien to

have priority over a prior encumbrance on the property. *See BB & B Constr. Co.*, 316 Ark. 663, 875 S.W.2d 48. Former section 18-44-130 provided that "[a]ny person enforcing the lien may have the *building, erection, or improvement* sold under execution, and the purchaser may *remove* it within a reasonable time after sale." (Emphasis added.) That section was repealed by Act 1298. As it stands now, section 18-44-110(b)(2) provides the means for enforcing materialmen's liens:

> The liens, as provided for in this subchapter, *shall be enforced by foreclosure*, as further provided for in this subchapter, and the property ordered sold *subject to the lien of the prior encumbrance* on the real estate. [Emphasis added.]

As can be seen from this language, there is no longer a requirement that the improvement be removable for the materialmen's lien to be enforced. This notion is further evident from the recommendations made by the legislative task force created by Act 970 of 1993.

Act 970 provided that the duty of the task force was to examine existing laws concerning materialmen's liens and to determine whether the public and the industry were adequately protected. In its Final Report, the task force recommended that the materialmen's lien "should generally be subordinate to encumbrances on the real estate which pre-date the improvement, *but have priority as to the improvement itself.*" *Final Report of the Arkansas Task Force on Materialmen's Lien and Bonding Notice Requirements*, at 11 (November 1994) (emphasis added). The task force recommended eliminating the requirement that the improvement be removable, as it concluded that removability was impossible in most cases. In its place, the task force urged the legislature to "authorize the lienholder to foreclose the lien and force a sale of the property subject to the prior encumbrance in those cases where removal of the improvement is impracticable." *Id.* at 12. Notably, there was no recommendation that the priority status of the materialmen's lien be *conditioned* on the removability of the improvement, as Simmons urges.

■ We thus reject Simmons's interpretation of Act 1298. Were we to accept its argument, we would be effectively rendering superfluous and meaningless the provision in section 18-44-110(b)(1) that the materialmen's lien *on the improvement* has preference over *any* prior encumbrance *other than* one given for the

purpose of funding the construction. There is simply no indication from that section that the priority of the materialmen's lien is dependent upon the improvement being removable. The question then is whether, practically speaking, the priority of the materialmen's lien on the improvement may be enforced by foreclosure sale of the entire property. We conclude that the only way to adequately protect the competing interests is to require the chancery court to conduct a double appraisal of the property, determining the value of the property prior to construction of the improvement and the value of the property with the improvement.

This method is best illustrated by the case law of the Supreme Court of Alabama. Similar to our section 18-44-110, the statutory law of Alabama provided that as to the building or improvement, materialmen's liens were given priority over all other liens, mortgages, or encumbrances, whether executed before or after construction began.[2] *See Empire Home Loans, Inc. v. W.C. Bradley Co.*, 241 So. 2d 317 (Ala. 1970); *Baker Sand & Gravel Co. v. Rogers Plumbing & Heating Co.*, 154 So. 591 (Ala. 1934). Enforcement was also by means of foreclosure sale. *Id.* The dilemma faced by the Alabama court was how to adjust the proceeds of the sale in a way that gave the materialmen's lien priority as to the improvement while simultaneously giving priority to the bank as to the real estate. The solution was to sell the entire property and distribute the proceeds in an equitable manner. The court held:

> On principle as well as the authority of our former decisions, we hold the court of equity has plenary power to mold its decrees in such form as to conserve the equities of all parties; and may, when a removal of the building would, in large measure, operate a destruction of the security, order a sale of the property as a whole, adjusting priorities in the proceeds on equitable principles.

Id. at 597 (citations omitted). We believe that this approach best implements our current statutory scheme.

Section 18-44-101 provides that every contractor who supplies labor, materials, or services shall have a lien upon the improvement and up to one acre of land, or to the extent of the number of acres

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[2] Alabama law currently provides priority for materialmen's liens over other prior encumbrances only insofar as the improvement is removable. *See* Ala. Code § 35-11-211 (Repl. 1991).

upon which improvement has been made. Section 18-44-110(b)(1) provides that the materialmen's lien attaches only to the improvement, and thus enjoys priority over prior encumbrances on the property only as to the value of the improvement. Subsection (b)(2) provides that the means of enforcing a materialmen's lien is foreclosure of the entire property, subject to the prior encumbrance on the land. To give meaning to each of these provisions, the chancery court must determine the value of the improvement using the double-appraisal method.

Accordingly, we reverse and remand this matter to the chancery court to conduct a double-appraisal of the property, determining the value of the property both with and without the improvement. Pursuant to its plenary powers in equity matters, the chancellor shall then distribute the proceeds of the sale, first to Callahan for the value of the improvement and the remainder to Simmons. *See* Ark. Code Ann. § 16-13-304(a) & (c) (Repl. 1999); *Monette Road Imp. Dist. v. Dudley*, 144 Ark. 169, 222 S.W. 59 (1920). Because we reverse on this point, it is not necessary to reach the merits of the remaining points on appeal. We note, however, that our holding today should not be extended beyond the particular facts of this case, as we are mindful of certain situations, *i.e.*, where the mortgage on the property is not in default, that may require distinct analysis. We turn now to the point raised by Callahan on cross-appeal.

For its cross-appeal, Callahan argues that the chancellor erred in denying an award for (1) its direct payroll costs and (2) the amount of time spent on the construction job by Bob Callahan, individually. The order reflects that the chancellor did not award the requested payroll amount, $10,088.00, because there was insufficient evidence to show that the employees named actually performed the labor on the DeWoody project. The order also reflects that the amount requested for Bob Callahan's labor was not included in the award because the amount testified to was speculative. We cannot say that the chancellor's findings were clearly erroneous.

Regarding its direct payroll costs, Callahan has failed to sufficiently abstract the record on this issue. Specifically, Callahan has failed to abstract the individual time sheets that it claims indisputably show that the $10,088.00 payroll figure represents the

employees' time spent exclusively on the DeWoody project. Accordingly, we affirm the chancellor's ruling on this issue. It is the appellant's burden to abstract the record to demonstrate error, and this court will not go to the record to determine whether reversible error occurred. *McPeek v. White River Lodge Enters.*, 325 Ark. 68, 924 S.W.2d 456 (1996). Of course, the same rule applies to cross-appellants. *Id.*

We further conclude that it was not error to deny the labor claimed by Bob Callahan. At trial, Bob testified that he did not keep time sheets for his work. Rather, he stated that he called in his time to his office each day, and that his office staff would write down the information. He did not produce any such daily records made by his office staff. Instead, he introduced a summary sheet of his time, indicating that he had spent 623 hours on the DeWoody project at $35.00 per hour, for a total of $21,805.00. He admitted, however, that he had previously only requested payment of $9,467.50 for his labor on the job. Given his contradictory testimony, we cannot say that the chancellor erred in finding that the amount of labor expended by Bob on the project was speculative. We give due deference to the superior position of the chancellor to determine the credibility of witnesses and the weight to be accorded to their testimony. *Myrick*, 339 Ark. 1, 2 S.W.3d 60. We thus affirm the chancellor's ruling on this point.

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

GLAZE, J., not participating.

ARKANSAS BANKERS LIFE INSURANCE COMPANY *v.* Randy TOMERLIN

99-1489 13 S.W.3d 581

Supreme Court of Arkansas
Opinion delivered March 30, 2000
[Petition for rehearing denied May 4, 2000.]

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

Hodges & Hodges, by: *David Hodges, Jr.*, for appellee.

RAY THORNTON, Justice. Appellee and his father purchased a vehicle in 1988. In addition to the vehicle, the parties purchased credit-life insurance from appellant so that in the

event of death, the debt on the car would be discharged. In 1991, appellee's father died and the vehicle was later repossessed and sold. Following the trial, a deficiency judgment was entered against appellee. Appellee then filed a third-party complaint against appellant seeking payment pursuant to the credit-life insurance policy. We conclude that the trial court abused its discretion when it allowed appellee to file a third-party complaint after judgment had been entered in the underlying suit and erred when it denied appellant's motion to strike appellee's third-party complaint.

On December 16, 1988, appellee, Randy Tomerlin and his father, Hugh Tomerlin, purchased a 1989 Ford truck from Ryburn Motor Company in Monticello. The truck was financed by Ford Motor Credit Company in the names of "Hugh Tomerlin or Randy Tomerlin as buyers." The purchase was recorded on a standardized Arkansas "vehicle retail installment contract." The Tomerlins also purchased credit-life and credit-disability insurance on the truck. On the retail installment contract, Hugh Tomerlin was listed as the proposed insured, and the contract was signed by both Randy and Hugh Tomerlin. Appellant, Arkansas Bankers Life Insurance Company, issued a policy for credit-life and credit-disability on the purchase, naming Randy Tomerlin as the insured.

On August 18, 1991, Hugh Tomerlin died. Appellee did not make a claim with appellant at that time. On October 6, 1994, Ford Motor Credit Company (Ford) filed a complaint against appellee, who had defaulted on his payments on the vehicle. Ford alleged that the vehicle had been repossessed, sold pursuant to the Uniform Commercial Code, and that appellee owed a deficiency of $ 4,717.31. During the pendency of the litigation, appellee did not seek recovery from appellant. A trial was held on the matter and on July 7, 1995, a judgment was entered against appellee.

On September 12, 1995, appellee filed a motion seeking permission to file a third-party complaint against appellant. Appellee's motion was granted and the third-party complaint was filed against appellant. The complaint alleged that appellant had issued a credit-life policy on Hugh Tomerlin and that appellee was entitled to judgment against appellant pursuant to the requirements of the credit-life policy. Appellant filed an answer to the third-party complaint and a motion to dismiss. On October 2, 1996, appellant filed a motion to strike the third-party complaint. The trial court found

that appellant had waived the issues presented in its motion to strike appellee's complaint by not filing the motion in a timely fashion.

On April 9, 1998, appellant filed a motion for summary judgment. Appellee responded to appellant's motion and sought summary judgment on several other issues. The trial court found that there were genuine issues of material fact that needed to be determined in the case and denied both motions for summary judgment.

A trial was held, and the jury returned a verdict for appellee in the amount of $5,560.97. The trial court also awarded appellee $189.50 in costs, a twelve percent penalty of $676.32, and $10,000 in attorney's fees. Appellees's total judgment was $16, 417.79. It was from that judgment that appellant appealed to the Arkansas Court of Appeals that affirmed the trial court in a nonpublished opinion that was handed down on December 1, 1999. On appeal to this court, appellant raises five points on appeal. Finding merit in the first point, we reverse.

Appellant contends that the trial court erred in failing to strike appellee's third-party complaint as its first point on appeal. Specifically, appellant argues that appellee should not have been allowed to file a third-party complaint against appellant after judgment had been entered against appellee in the underlying suit and that the trial court erred when it denied appellant's motion to strike the third-party complaint. In our evaluation of this issue, we must consider Ark. R. Civ. P. 14, which states:

> (a) At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. The third-party plaintiff need not obtain leave to make the service if he files the third party complaint not later than ten days after he files his answer. Otherwise, he must obtain leave on motion upon notice to all parties to the action. The person served with the summons and the third-party complaint, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in Rule 12 and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out

> of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff and the third-party defendant shall thereupon assert his defenses as provided in Rule 12 and his counterclaims and cross-claims as provided in Rule 13. Any party may move to strike the third party claim or for its severance or separate trial. A third- party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third-party defendant.

Ark. R. Civ. P. 14. We have explained that the purpose of the rule is to settle all controversies at one time, thereby avoiding multiplicity of suits. *See Farm Bureau Mutual Ins. Co. v. Riverside Marine Remanufacturing, Inc.*, 278 Ark. 585, 647 S.W.2d 462 (1983). We also note that in his book on the Arkansas Rules of Civil Procedure, David Newbern states that "permission to file a third party complaint may properly be denied if it is unnecessarily late and would cause a delay in a scheduled trial." David Newbern, *Arkansas Civil Practice and Procedure*, § 14-1 (2d ed. 1993). Additionally, Newbern states that "if the third party claim is inappropriate, whether because of the delay it will cause or other prejudice which might result, it may be stricken or severed for separate trial." *Id.*

In *Aclin Ford Co. v. Fiat Motors of North America, Inc.*, 275 Ark. 445, 631 S.W.2d 283 (1982), a case very similar to the case on appeal, we were asked to determine whether a trial court erred by granting a motion to strike a third-party complaint. In *Aclin*, a plaintiff brought a breach of warranty action against Aclin Ford Company, Inc. and Fiat Motors of North America, Inc., involving the purchase of a Fiat automobile. *Id.* Fiat was dismissed from the suit prior to the trial. Aclin then orally requested permission to file a third-party complaint against Fiat which was denied. The trial resulted in judgment for the plaintiff and Aclin requested a new trial. In its motion for a new trial, Aclin again requested that it be allowed to file a third-party complaint against Fiat. Aclin's motion to file the third-party complaint was granted. *Id.* However, the trial court thereafter granted Fiat's motion to strike Aclin's third-party complaint finding that it was untimely filed. Affirming the trial court, we held that

> implicit in Rule 14 is the assumption that the third party complaint will be filed before the issues are resolved at trial; otherwise, its provisions allowing the third party defendant to assert defenses against the original plaintiff would have no meaning. Therefore, the trial court was correct in granting Fiat's motion to strike the third party complaint since it was filed after trial.

Id.

The facts in the present case are not distinguishable from the facts in *Aclin*. Here, Ford filed suit against appellee and recovered judgment. Thereafter, appellee requested and was granted permission to file a third-party complaint against appellant and the trial court denied appellant's motion to strike appellee's third-party complaint. Based on *Aclin*, we conclude that permitting the third-party complaint to be filed after the entry of the judgment in the underlying suit was error and requires that the ruling be reversed.

Because the initial erroneous ruling led to the other issues on appeal, it is not necessary for us to address the remaining points on appeal.

Reversed.

UNION PLANTERS NATIONAL BANK *v.* EAST CENTRAL ARKANSAS ECONOMIC DEVELOPMENT CORPORATION

99-573 13 S.W.3d 578

Supreme Court of Arkansas
Opinion delivered March 30, 2000

W. Frank Morledge, P.A., by: *W. Frank Morledge*, for appellant.

Christopher W. Morledge, P.A., by: *Christopher W. Morledge*, for appellee and court-appointed receiver.

RAY THORNTON, Justice. Appellant, Union Planters National Bank, brings this appeal seeking review of the chancery court's determination to appoint a receiver at the request of appellee to oversee the dissolution and liquidation of its not-for-profit corporation on the grounds of insolvency, urging that the chancellor was without subject-matter jurisdiction over the proceeding in the absence of a base or ancillary proceeding, and that the appointment of a receiver was improper. Because we conclude that Rule 66 of the Arkansas Rules of Civil Procedure and our prior case law on the subject support the chancellor's decision to appoint a receiver, we affirm.

Appellee, the East Central Arkansas Economic Development Corporation, filed a petition for dissolution and liquidation in the chancery court of St. Francis County on February 13, 1998, alleging that its board of directors had voted to dissolve the corporation due to insolvency. The corporation was allegedly the subject of lawsuits and other claims against which it could not defend or satisfy judgments, and asserted that in order to avoid multiplicity of lawsuits or preferential treatment of creditors, the court should take jurisdiction of the winding up of the affairs of the corporation by appointing a receiver. A receiver was appointed on June 16, 1998, and a warning order notice to creditors to appear and enter their claims was issued by the receiver.

Appellant filed a Motion for Leave to Intervene, alleging that it had been granted judgment against appellee and that the judgment remained unsatisfied, and requesting intervention in the dissolution proceedings. Contemporaneously appellant filed a motion to dismiss, specifically contending that the allegations of the petition filed by appellee for dissolution and liquidation failed to give rise to authority for the appointment of a receiver, and that such appointment in the absence of a base proceeding before the chancery court was improper and should be set aside. In response, appellee pointed out that it was formed by the filing of documents well prior to the adoption of the Arkansas Non-Profit Corporation Act of 1993, and because the prior law did not provide for a procedure for approval of extraordinary transactions involving voluntary dissolution of a nonprofit corporation, appellee turned to the chancery court specifically for guidance in requesting supervision of the dissolution.

The chancery court granted appellee's motion to establish a receivership and denied appellant's Motion to Dismiss, finding that the appointment of a receiver was proper and within the jurisdiction of the trial court in order to protect the remaining assets of appellee, to continue operation of certain remaining business ventures, and to garner and assemble assets of the corporation for the equitable treatment of creditors. "The only reasonable means by which to ensure that all creditors and claimants are protected during the dissolution of East Central," wrote the chancery court, "is ... to appoint a receiver. Therefore, it is this court's opinion that a receiver is necessary and proper...."

Rule 66 of the Arkansas Rules of Civil Procedure provides that: "Courts of equity may appoint receivers for any lawful purpose when such appointment shall be deemed necessary and proper," and under our standard of review we must determine whether the appointment of a receiver was an abuse of discretion. The appointment of receivers rests within the discretion of courts of equity, to be exercised with restraint and caution, and ordinarily in conjunction with a pending proceeding, and rarely as a means in itself, but whenever unusual circumstances warrant. *Chapin v. Stuckey*, 286 Ark. 359, 692 S.W.2d 609 (1985) (*cited in Boeckmann v. Mitchell*, 322 Ark. 198, 909 S.W.2d 308 (1995)). Trial courts are ordinarily permitted to exercise that power with considerable discretion in determining whether, under particular circumstances, a receivership is reasonably required. The power to appoint a receiver

is, of course, a harsh and dangerous one, and should be exercised with great circumspection. *Chapin, supra* (*citing Kory v. Less*, 180 Ark. 342, 22 S.W.2d 25 (1929)). The cases in which receivers ordinarily will be appointed are confined to those in which it can be established to the satisfaction of a court that the appointment of a receiver is necessary to save the property from injury or threatened loss or destruction. *Id.* As we noted in *Boeckmann, supra*, in reviewing such a decision, it is necessary to include a review of the underlying issues which form the basis for the appointment of the receiver. *Id.* Based upon our review of the facts presented to the chancellor, we cannot agree with appellant's contention that the trial court abused its discretion in appointing a receiver to discharge the duties necessary to dissolution of the corporation.

Each side has taken issue with the specific meaning of the chancellor's order with regard to the necessity for a base proceeding, with appellant contending that the chancellor erred in looking to concluded litigation between the parties as a base proceeding, and appellee arguing that the chancellor found a base proceeding in the writ of execution and garnishment filed by appellant against appellee, amounting to an affirmative action by which appellant initiated the base proceeding relevant to this receivership petition. However, based on our prior holding in *Chapin, supra,* and later affirmed in *Boeckmann, supra,* we find it unnecessary to address the question whether there was an ancillary proceeding. Like the case before us, in *Chapin* the appellant contended that the appointment of a receiver was the only relief sought by appellee and was not an appropriate action because it was not ancillary to any other proceeding then pending. *Id.* As we noted in *Chapin,* we take no exception to the basic principle that receivership is not an end unto itself, but is generally ancillary to some proceeding over which the court has jurisdiction. However, this broad statement of the law is "neither categorically nor invariably so," nor is it to be "rigidly applied." *Id.* The appointment of receivers comes within the extraordinary powers of a court of equity, and our only concern should be whether the appointment constituted an abuse of discretion. Here, as in *Chapin,* the trial court determined that under the unusual situation presented in this case, a receiver was needed to manage and protect the assets of an insolvent nonprofit corporation beset by numerous creditors and a judgment-seeking class action. *Id.* We agree with that determination.

We note further that our case law and interpretation of the provisions of Rule 66 is in accord with the most recent expression of legislative intent by our General Assembly. The relatively new enactment of the Arkansas Non-Profit Corporation Act of 1993 specifically provides that a chancery court may dissolve such a corporation in a proceeding by the corporation to have its voluntary dissolution conducted under court supervision. Ark. Code Ann. § 4-33-1430 (Repl. 1996). We conclude that the chancellor's actions not only fall well within this court's own rules and case law, but also reflect the public-policy considerations articulated by later statutory instruction. We therefore hold that the chancellor did not abuse his discretion in determining that the appointment of a receiver was appropriate, and accordingly, we affirm.

Affirmed.

STATE of Arkansas *v.* Antonio SINGLETON

CR 99-1172 13 S.W.3d 584

Supreme Court of Arkansas
Opinion delivered March 30, 2000
[Petition for rehearing denied May 4, 2000.]

[redacted]

Mark Pryor, Att'y Gen., by: *Michael C. Angel*, Ass't Att'y Gen., for appellant.

William R. Simpson, Jr., Public Defender, by: *Ashley Riffel*, Deputy Public Defender; *Kent C. Krause*, Deputy Public Defender; and *Clint Miller*, Deputy Public Defender, for appellee.

LAVENSKI R. SMITH, Justice. The State appeals the trial court's acceptance of a guilty plea by Appellee Antonio Covell Singleton entered over the State's objection. The State objected to entrance of the guilty plea, citing Ark. R. Crim. P. 31.1. The State contends that the trial court could not accept Singleton's guilty plea because the State did not consent. The State asserts that Rule 31.1 requires the State's consent before a defendant can waive a jury trial. The State reads the rule consistent with our recent cases and we must, therefore, reverse.

Facts

On March 9, 1999, the State charged Singleton with two felony counts of possession of a controlled substance, and one felony count of simultaneous possession of drugs and a firearm. In an August 27, 1999, hearing, Singleton tendered a guilty plea to the trial court. The trial court stated its intention to accept Singleton's guilty plea over the objection of the State. The State argued that under Ark. R. Crim. P. 31.1, the trial court could not accept the guilty plea without the prosecution's consent. The trial court

entered the guilty plea and passed sentence. The State timely filed its notice of appeal.

Jurisdiction

The State's ability to appeal criminal cases is limited. The State may file an interlocutory appeal based upon evidentiary rulings that suppress state's evidence or permit evidence of a victim's prior sexual conduct. Also, the State may bring a non-interlocutory appeal where two conditions exist: 1) the Attorney General believes that prejudicial error has occurred, and 2) the uniform administration of the criminal law requires this court's review. Ark. R. App. P.—Crim. 3(b). *State v. Murphy*, 315 Ark. 68, 864 S.W.2d 842 (1993). We have previously held that issues similar to those in the instant case satisfy those criteria. *State v. Vasquez-Aerreola*, 327 Ark. 617, 940 S.W.2d 451 (1997). Hence, jurisdiction of this case is proper.

Guilty Plea Without Consent of the State

On appeal, the State argues that Rule 31.1, as interpreted by this court's prior opinions, requires that the prosecutor consent to a defendant's waiver of a trial by jury. The State is correct. Rule 31.1 provides, "No defendant in any criminal cause may waive a jury trial unless the waiver is assented to by the prosecuting attorney and approved by the court." In *Fretwell v. State*, 289 Ark. 91, 708 S.W.2d 630 (1986), the defendant sought to plead guilty to capital-murder charges on the eve of trial, ostensibly to avoid imposition of the death penalty by the jury. The prosecutor objected and insisted on putting on the State's proof of the defendant's guilt. The court sustained the objection and proceeded to trial. In his appeal, Fretwell contended that the trial court should have had discretion to accept his guilty plea even without the prosecutor's assent. The court stated, "[I]n Arkansas a felony defendant is not entitled to a trial to the court without the assent of the prosecutor." *Fretwell*, 289 Ark. at 93-94. The *Fretwell* decision further stated, "The rule is clear. Criminal cases which require trial by jury must be so tried unless (1) waived by the defendant, (2) assented to by the prosecutor, and (3) approved by the court. The first two are mandatory before the court has any discretion in the matter. Here, the second requirement, assent by the state, was not had and the court was

without discretion to hear the plea." *Id.* The court went on to expressly decline to follow those jurisdictions that give a defendant an absolute right to waive a jury trial.

More recently, in *Vasquez-Aerreola*, we reversed a trial court's decision to accept a defendant's guilty plea, citing *Fretwell*. *Vasquez-Aerreola* reiterated the *Fretwell* holding that a trial court has no discretion to accept a felony defendant's guilty plea over the prosecution's objection. It is apparent from these cases that this court has interpreted Rule 31.1's consent requirements to apply not only to a defendant's election to be tried by the court as opposed to being tried by the jury, but also to the felony defendant's decision to be tried at all. Our cases thus have viewed a guilty plea in the same manner as a request for waiver of a jury trial.

Failure to Cite the Applicable Rule in the Jurisdictional Statement

In response, Singleton makes five arguments opposing the State's appeal. None of appellant's arguments are availing. First, Singleton asserts the State is procedurally barred by its failure to cite the correct basis for appeal on its jurisdictional statement. The State admits the error in its reply brief, and counters that jurisdiction is proper under Ark. R. App. P.—Crim. 3(b) and (c).

Ark. Sup. Ct. R. 1-2(c) and 4-2(a)(2) require an informational and jurisdictional statement. The proper form is set out in the accompanying notes, and is the one used by the State. The State marked 'Interlocutory Appeal,' when they should have marked 'Criminal.' Singleton cites no authority for the proposition that this type of defect requires dismissal of an appeal. We decline to do so now. When an appellant cites no authority or convincing argument in support of his theory, we will not reverse. *McGehee v. State*, 338 Ark. 152, 992 S.W.3d 110 (1999); *Morgan v. State*, 333 Ark. 294, 971 S.W.2d 219 (1998); *Ayers v. State*, 334 Ark. 258, 975 S.W.2d 88 (1998); *Bailey v. State*, 334 Ark. 43, 972 S.W.2d 239 (1998).

Double Jeopardy

Second, Singleton argues that regardless of the court's authority to accept the plea, double jeopardy would attach because the trial court actually did accept his plea. He relies on Ark. Code Ann. § 5-1-112(2), which provides:

> A former prosecution is an affirmative defense to a subsequent prosecution for the same offense under any of the following circumstances:
>
> . . .
>
> (2) The former prosecution resulted in a conviction. There is a conviction if the prosecution resulted in a judgment of conviction which has not been reversed or vacated, a verdict of guilty which has not been set aside and which is capable of supporting a judgment, *or a plea of guilty or nolo contendere accepted by the court.* (Emphasis added.)

We hold Singleton has not been subjected to double jeopardy. The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution protects a defendant from: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. *Tipton v. State*, 331 Ark. 28, 959 S.W.2d 39 (1998). However, once set aside, a defendant's plea of guilty, just as a verdict of guilty, does not constitute a conviction. Thus, in the instant case, where this court reverses the acceptance of a guilty plea, there is no conviction and, therefore, nothing to afford Singleton the protection of double jeopardy. Singleton stands in precisely the same position he occupied the day he tendered a guilty plea. *Ford v. Wilson*, 327 Ark. 243, 939 S.W.2d 258 (1997). Singleton is not being asked to stand trial for a crime for which he was acquitted, but rather for one to which he unsuccessfully tried to plead guilty.

Singleton cites *Penn v. State*, 57 Ark. App. 333, 945 S.W.2d 397 (1997), for the proposition that trial court error will not allow prosecution a second time. However, in *Penn*, the trial court committed an error resulting in entry of an acquittal. For the reasons cited above, this is inapplicable to the present case.

Appeal from a Guilty Plea

Singleton next argues that the State may not appeal a guilty plea, citing *State v. Pylant*, 319 Ark. 34, 881 S.W2d 28 (1994). In *Vasquez-Aerreola*, this court previously discussed the language in *Pylant* relied on by Singleton and resolved the issue against the position asserted by Singleton. In *Pylant*, the trial court entered a guilty plea over the objection of the State, and the State filed an

interlocutory appeal from denial of its motion for a jury trial. This court disposed of the case on grounds of lack of finality because the order on the motion was not a final judgment. We stated, "Aside from issues of finality, the law is well-established that, in general, there is no right to an appeal from a plea of guilty where the appeal constitutes a review of the merits of the plea itself, as in the instant case." *Pylant*, 319 Ark. at 36. This language was cited, and this issue was discussed, in *Vasquez-Aerreola*. This court stated as to the cited language, "The State maintains that this language in *Pylant* is mere dictum. We agree. *Pylant* was decided on finality grounds, thereby making the quoted language *obiter dictum*." *Vasquez-Aerreola*, 327 Ark at 624. This court went on in *Vasquez-Aerreola* to find that the trial court lacked authority to accept a guilty plea over the objections of the State. In *Vasquez-Aerreola*, the guilty pleas were vacated, and the case was remanded.

Appeals Demonstrating Trial Court Error

Singleton next asserts that the State has appealed a mixed issue of law and fact in violation of the principles set out in *State v. Harris*, 315 Ark. 595, 868 S.W.2d 488 (1994). The argument is flawed. The State has not appealed merely a discretionary error in application of law to facts but has appealed a judgment which the trial court lacked the discretion to make at all under current precedents.

The Right to a Jury Trial

Singleton's fifth and final point on appeal is to simply request that this court overrule *Vasquez-Aerreola*, and to amend Rule 31.1 to allow a defendant to plead guilty and limit the prosecution to making recommendations on sentencing. He argues that the State has no right to a jury trial. He is correct. The State has no express constitutional right to a jury trial. However, under our current rules and cases interpreting them, it does have the option to refuse to consent to the defendant's waiver of jury trial. Singleton acknowledges that defendants do not have the right to unilaterally waive a jury trial. *Singer v. United States*, 380 U.S. 24 (1965). A right to plead guilty may be conferred by statute or rule; however, there is no such rule or statute in Arkansas. *Numan v. State*, 291 Ark. 22, 722 S.W.2d 276 (1987).

Singleton asks us to reconsider Rule 31.1 and the *Fretwell/Vasquez-Aerreola* line of cases. This court does not lightly overrule cases and applies a strong presumption in favor of the validity of prior decisions. *Thompson v. Sanford*, 281 Ark. 365, 663 S.W.2d 932 (1984) (citing *Walt Bennett Ford, Inc. v. Pulaski County Special Sch. Dist.*, 274 Ark. 208, 624 S.W.2d 426 (1981)); *Sanders v. County of Sebastian*, 324 Ark. 433, 922 S.W.2d 334 (1996); *McGhee v. State*, 334 Ark. 543, 975 S.W.2d 834 (1998). We decline the invitation in the context of this case, but certainly comments and suggestions can be made to the rules committee at any time.

Reversed and remanded.

Roger Lewis COULTER *v.* STATE of Arkansas

CR 00-281 13 S.W.3d 171

Supreme Court of Arkansas
Opinion delivered March 30, 2000

Alvin Schay, for appellant.

No response.

PER CURIAM. Appellant, Roger Lewis Coulter, seeks a belated appeal and appointment of counsel for purposes of appealing the trial court's denial of relief under Rule 37. Coulter was convicted of capital murder in the Ashley County Circuit Court and sentenced to death. We affirmed the trial court on his direct appeal. *Coulter v. State*, 304 Ark. 527, 804 S.W.2d 348 (1991). On December 31, 1996, Coulter petitioned the circuit court for

relief under Ark. R. Crim. P. 37. The circuit court denied his petition, on October 8, 1999.

Appellant's counsel did not receive notice of the trial court's denial until January 25, 2000. Appellant's counsel promptly thereafter filed a notice of appeal and designation of record on January 27, 2000. Apparently, the notice letter had been sent to counsel's former address at the now-defunct Arkansas Capital Resource Center.

We recently held in a case involving a death-row inmate also formerly represented by the Arkansas Capital Resource Center that lack of notice to the defendant constituted good cause to permit a belated appeal. In *Porter v. State*, 339 Ark. 15 (1999), we did so recognizing the fact that modifications to Rule 37.5 should cure the inadequacies of the notice process.

Appellant's motion for belated appeal is therefore granted, and attorney Alvin Schay is hereby appointed as counsel for appellant for purposes of this appeal.

Lawrence MARTIN *v.* STATE of Arkansas

CR 00-60 13 S.W.3d 576

Supreme Court of Arkansas
Opinion delivered March 30, 2000

Appellant, pro se.

Mark Pryor, Att'y Gen., by: *David R. Raupp*, Senior Ass't Att'y Gen., for appellee.

PER CURIAM. In 1995, Lawrence Martin was found guilty of capital murder and sentenced to life imprisonment without parole. We affirmed. *Martin v. State*, 328 Ark. 420, 944 S.W.2d 512 (1997). The mandate of this court was issued on May 23, 1997. Martin subsequently filed in the trial court a timely petition pursuant to Criminal Procedure Rule 37 seeking to vacate the judgment. The petition was denied in 1998 and an amended order addressing one additional issue was entered in 1999 that also denied relief. The record on appeal from the amended order has been lodged here.

Appellant Martin, who is proceeding *pro se*, now seeks access to a copy of the record to prepare his brief and an extension of time to file it. As the appellant is required to abstract the record in an appeal, the motions are granted. Our clerk is directed to forward a copy of the record to appellant with the provision that the copy of the record be returned to this court after appellant has completed the brief. The appellant's brief will be due forty days from the date of this opinion. Again, the record must be returned when the brief is filed.

Appellant has also filed three additional motions. In the first motion, he asks that this court issue an order compelling the warden at the Maximum Security Unit of the Arkansas Department of Correction where appellant is incarcerated to permit him additional time in the library to prepare the brief. The motion is denied. We decline to dictate the operation of the facility where appellant is imprisoned.

Appellant next asks that we compel the circuit court to provide a videotape of the medical examiner and a part of the jury-selection process so the material can be docketed here, presumably as a supplement to the record in this appeal. (It is not clear whether the request for a part of the jury selection process refers to a written transcript or a videotape.) As appellant does not establish that the material was a part of the record that was before the court when the ruling was made on the Rule 37 petition or otherwise demonstrate that the material is germane to this appeal, the motion is denied.

Finally, appellant requests that counsel be appointed to represent him in this appeal. Postconviction matters are civil in nature, and there is no absolute right to appointment of counsel in civil matters. *See Virgin v. Lockhart*, 288 Ark. 92, 702 S.W.2d 9 (1986). We have held, however, that if an appellant makes a substantial showing that he is entitled to relief in a postconviction appeal and that he cannot proceed without counsel, we will appoint counsel. *See Howard v. Lockhart*, 300 Ark. 144, 777 S.W.2d 223 (1989). Appellant here has not demonstrated that there is merit to the appeal.

Motions for access to record and for extension of time granted; motions to compel additional library time, to supplement record, and for appointment of counsel denied.

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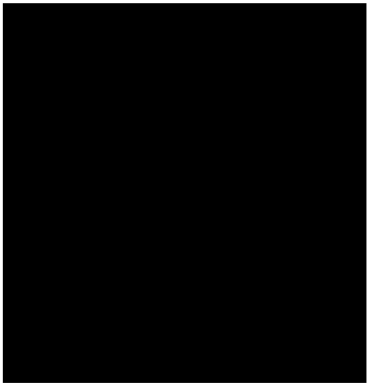

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